DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2022-094

[redacted]
AVI3/CWO3 (retired)

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 January 4, 2022 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 5, 2024, 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 retired Chief Warrant Officer (AVI3/CWO3), asked the Board to correct his record by removing a drug incident documented via a negative CG-3307 ("Page 7") wherein the applicant was counseled for a drug incident after he tested positive for cocaine.

The applicant argues that he was unjustly issued a drug incident on December 15, 2020, which was based off a positive hair strand test (HST) result for cocaine. The applicant disputes this injustice and claims to have scientific and factual data to support his case. The applicant's reasoning to dismiss and expunge the Page 7 that documents his drug incident from his miliary record includes: numerous scientific issues and concerns with hair strand testing from federal experts; an inadequate investigation; current Coast Guard Drug Policy; the Page 7 that documented his drug incident; the Department of the Navy's recent memo on hair strand testing; and the Department of Homeland Security's Drug-Free Workplace Program. The applicant apologizes for the length of his request and the number and size of enclosures, but, according to the applicant, his situation is very unique and the burden of proof requires the support of these documents. The applicant states that he never knowingly ingested any drug or put himself in a situation to be around drugs throughout his nearly 25-year military career. The applicant thanks the Board for its time and consideration of his request.

According to the applicant, on August 24, 2020, he was told by two Coast Guard Investigative Services (CGIS) agents that he failed a drug test for cocaine. The applicant states he was perplexed and dumbfounded as to how he could have a positive drug test. The applicant claims he was told he could not discuss the investigation with anyone and for two weeks, he thought about how this could have happened. The applicant states that he asked the CGIS agents if he could discuss with his wife, which they permitted. According to the applicant, he spoke to his wife about the positive test result and she broke down into tears and told him of late night activities that occurred on July 17, 2020. The applicant alleges his wife had two friends over and, after a fair amount of alcohol had been consumed, one of the friends brought out some cocaine. According to the applicant, the cocaine was ingested in their dining room by his wife and her two friends, while he was unaware and asleep in their bedroom. The applicant alleges that the ladies were transiting often into the kitchen to get beverages, using numerous communal items, such as cups, ice trays, the refrigerator/freezer handle and touching countertop surfaces. The applicant states that the pandemic has taught us how easy it is to transfer things from our bodies to other items we touch. The applicant argues that the powdered form of an illegal drug was consumed in his house, without his knowledge, in areas that he spent hours every day and it is reasonable to believe that the three ladies who consumed cocaine that night could have easily transferred particles/small amounts onto commonly used surfaces that he would have touched the following days. The applicant states that, by touching these contaminated surfaces, he could have easily gotten particles of cocaine onto food that he ate or transferred it from his hands to hairs onto his arms and legs. The applicant alleges that he never knew of any illegal drug use in his house until he brought up the positive test result with his wife, almost two months later. According to the applicant, on September 13, 2020, after his wife told him about these events, she drafted a letter detailing them, which he provided to his command and the CGIS agents. The applicant states that his wife was very cooperative with the agents, as they conducted a thorough interview with her after receiving her letter. The applicant provided her letter and on September 14, 2020, his wife went to a local lab and had a HST completed.

According to the applicant, the events that led up to his positive HST ware very unfortunate and completely out of his control, and he would like to elaborate on a few issues that help support why he should not have received a drug incident.

In regard to hair strand testing, the applicant argues that this method of drug testing has been around for decades but is still largely considered unreliable in the scientific community. The applicant states that there have been documents involved in two Federal Departments on this subject. According to the applicant, in 2009, the U.S. Department of Justice funded a large study, that resulted in a document titled "Analysis of Cocaine Analytes in Human Hair: Evaluation of Concentration Ratios in Different Hair Types, Cocaine Sources, Drug-User Populations, and Surface Contaminated Specimens," which was authored by Research Triangle, Inc, an independent, nonprofit research institute dedicated to improving the human condition. The applicant included a link to this document. The applicant also included a piece from the Substance Abuse and Mental Health Services Administration (SAMHSA), which published a piece in the Federal Register for proposed rules for the Mandatory Guidelines for Federal Workplace Testing Programs. According to the applicant, both of these documents are in agreement that there are concerning issues with hair strand testing and that more scientific studies are needed for supporting

it as a fair and equitable method of drug testing. The applicant included this quote from the "Analysis in Human Hair" paper:

> After evaluating cocaine (COC) and COC analyte concentrations and ratios in drug-user hair from various populations, dry contaminated hair with various COC sources, and an alternate external application of COC to hair (fortification), the use of cut-off concentrations for any or all of the COC analytes would not be reliable to discriminate a drug-user's hair from dry contaminated hair. Using COC analyte ratios provides more information and some ability to discriminate drug-user specimens from contaminated specimens; however, using cocaethylene (CE) and NCOC concentrations and ratios are not any more efficient in discriminating between the two specimens than is using only BE and COC decision criteria. All three analytes (i.e., CE, NCOC, and BE) can be present at varied concentrations in illicit COC as by-products of the manufacturing process, and as such, will confound the use of ratios to discriminate contamination from use. Contaminating hair with illicit COC materials that contain approximately 1% to 10% of CE, BE, and NCOC resulted in hair specimens that would not be discriminated from drug-user hair by ratios or concentrations. Even after decontaminating the hair, the application of concentration and ratio decision points does not adequately discriminate contamination from drug use.

According to the applicant, the Department of Health and Human Services (HHS), by authority of Section 503 of Public Law 100-71 and Executive Order (EO) 12564, establishes the scientific and technical guidelines for the Federal Workplace Drug-Testing Programs. The applicant includes Executive Order 12564 and quotes "The Secretary of Health and Human Services is authorized to promulgate scientific and technical guidelines for drug testing programs, and agencies shall conduct their drug testing programs in accordance with these guidelines once promulgated." According to the applicant, SAMHSA, only recognizes two methods for drug testing (urine and saliva) in the Mandatory Guidelines for Federal Workplace Drug Testing Programs, which is a proposal to establish the scientific and technical guidelines to include hair specimens in this program. According to the applicant, SAMHSA has been collecting data on hair strand testing for over 20 years and this document in the Federal Register has valuable information throughout it. The applicant states that this document said they were not moving forward with incorporating hair as an authorized specimen, because of "known issues" which include: environmental contamination, decontamination of the specimens and the impact of natural hair color on drug incorporation. The applicant highlights excerpts from this document and provided a copy to his command during the investigation which he states did not go well:

> This two-test approach is intended to protect federal workers from issues that have been identified as limitations of hair testing and related in legal deficiencies identified in Jones v. City of Boston and Thompson v. Civil Service Com'n. Both cases indicate that an employment action taken on the basis of a positive hair test alone, without other corroborating evidence, may be vulnerable to legal challenge.
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> Drugs and drug metabolites may also be incorporated into hair by via secretions of the sweat glands and sebaceous glands, which are in close contact with hair as it develops and emerges from the skin.
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> Of concern are environmental contamination, the impact of natural hair color on drug incorporation and the effects of hygiene and cosmetic treatments. These issues may confound the results and interpretation of hair tests.
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> Decontamination procedures that adequately remove externally deposited drug and drug metabolites prior to confirmation testing are the subject of much scientific inquiry.
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> However, it has been shown that some externally deposited drug may remain, even after extensive washing.
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> There are no published studies that prove external contamination cannot reach the central cortex of the hair.
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> More time and research are needed for the development of performance standards that address this and other issues.
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> In addition, although hydroxylated metabolites of cocaine and benzoylecgonine do not meet the Guidelines definition of a unique metabolite for hair, these analytes have been touted in literature as being diagnostic of cocaine use when ratio criteria are applied to the quantitative results. Hydroxy-metabolites of cocaine were originally thought to be unique metabolites as defined in the HMG (Mandatory Guidelines for Federal Workplace Drug Testing Programs using hair), until these compounds were identified in street cocaine samples and found to be produced during hair treatment experiments. More recently, hydroxy-metabolites of benzoylecgonine were identified in hair and thought to represent a new opportunity to reliably identify cocaine use. However, these analytes also have been detected in a limited study of street cocaine samples and were found to form and increase in concentration over a period of eight weeks after contamination of seven subjects' hair with cocaine.
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> Direct evidence of binding of various drugs with melanin and with human hair has been demonstrated. In one in vitro study, cocaine binding experiments with black, brown and blonde human hair demonstrated up to 34-fold differences in cocaine binding with dark hair as compared to blonde hair. These findings have raised concerns that selective drug binding with the wide variation of color pigments distributed amongst the population may introduce bias in drug testing results.
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> To be clear, the results of a positive hair test cannot be reported to a federal agency without this corroborating evidence to support the positive test result. This hair sampling approach best addresses the current disparate impact and external contamination legal issues discussed in the Jones v. City of Boston and Thompson v. Civil Service Com'n cases.
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> In section 11.14, the Department is proposing that laboratories implement procedures to distinguish external contamination from drug use using a validated and effective decontamination procedure prior to confirmatory testing.

The applicant alleges he asked his executive officer if Psychemedics used a decontamination process on his HST and he could not provide any information on whether they

did or did not and told the applicant he must contact Pyschemedics for any information on his test results. The applicant states that he attempted numerous times to call and email Pyschemedics, but they never replied to his emails and when he talked to them, they said they would only release information to the "Client," who is the Coast Guard. The applicant argues that he was caught in the middle of both companies telling him he needs to go through the other company to get any information on his test or result, which seems completely unjust and potentially even unlawful.

The applicant wants to reiterate that these documents mention multiple times that recent studies have shown that analytes and metabolites from cocaine have been found in street cocaine. According to the applicant, it was previously thought that these would only show up after the body processes the drug and both documents clearly say that someone does not have to ingest cocaine to have the metabolites show up in a drug test. The applicant quotes the "Analysis in Human Hair" paper:

> All three analytes (CE, NCOC, BE) can be present at varied concentrations in illicit cocaine as by-products of the manufacturing process, and as such, will confound the use or ratios to discriminate contamination from use" and "even after decontaminating the hair, the application of concentration and ratio decision points does not adequately discriminate contamination from drug use.

The applicant argues that people are the best asset the Coast Guard has and, knowing what he now knows about hair strand testing, after all his research, he finds it hard to believe that the Coast Guard made such as drastic change in their process by incorporating hair strand testing, without changing anything else in the policy, such as the investigation process. The applicant states that the consequences of a failed drug test are immense. The applicant questions why would the Coast Guard choose to begin using hair strand testing, when multiple Federal agencies have recently completed large scale studies on it that conclude there are factual problems with it, that could skew the results and provide a false positive. The applicant further argues that the legal cases mentioned throughout the Federal Register (*Thompson v. Civil Service Com'n* and *Jones v. City of Boston*) attest to the fact that there are genuine legal problems with the validity of hair strand testing.

Regarding the CGIS investigation, the applicant states that on August 24, 2020, he was led into a room on [redacted] where two CGIS agents were waiting for him. The applicant alleges he had no warning about this meeting and was absolutely stunned when they proceeded to tell him that he tested positive for cocaine on a random drugs test that was administered on August 13, 2020. The applicant states that he vividly remembers this drug test, as he had to provide a sample via urinalysis and also a sample via hair strand testing. According to the applicant, this was the second time that he had to provide a sample from both his urine and hair, the first was in late 2019 during a unit wide test. The applicant alleges he was fully cooperative with the agents as they interviewed him and his answers remained consistent the entire time, that he has haver taken any illegal drugs or even knowingly been around them. The applicant states that he repeatedly asked the agents if he could see what the results were, but the only information they provided him was that he failed the hair strand test, that was analyzed by Psychemedics. The applicant alleges he was told that he would have to go through his command to view the results. The applicant states that this was the beginning of a nearly four-month investigation, the ultimately concluded with the agents' Report of Investigation.

According to the applicant, immediately following his initial meeting with the CGIS agents, he asked his executive officer if he could view the results of his failed hair strand testing. The applicant states he was allowed to view them in his office but could not have his own copy. The applicant states that his positive test result was 5.8 nanograms (ng)/10 milligrams (mg), which was just above the threshold of the confirmation cutoff. According to the applicant, during this meeting, his executive officer also told him that [redacted] Legal had told him that "a positive drug test alone is enough evidence to meet the preponderance of evidence standard," in regard to receiving a drug incident. The applicant states he was shocked to hear that statement as it does not align with the American criminal justice system legal principle of "innocent until proven guilty." The applicant states that he later researched this and found in Military Drug and Alcohol Policy, COMTDIST M1000.10A, paragraph 5.E.2 that "[a] member's drug use admission or a positive confirmed test result standing along, may be sufficient enough to establish intentional use and thus suffice to meet this burden of proof." The applicant argues that it says "may be sufficient," not that it is sufficient. The applicant further argues that the Coast Guard is completely belittling the investigative process by saying that a positive test alone, may be enough to give someone a drug incident. The applicant questions what would happen to a Coast Guard member who got a date-rape drug or "roofie" unknowingly given to them and they later failed a drug test. The applicant argues that his situation is right along those lines, as he was unknowingly exposed to and/or unknowingly ingested trace amounts of a drug. The applicant states that hearing his executive officer say that [redacted] legal had said that his positive test result alone could be enough evidence did not leave him with a feeling that he would get a thorough and fair investigation, which proved to be true in the end.

The applicant alleges he requested to his executive officer to have another HST completed on him, and the executive officer agreed to his request and he had another one on August 25, 2020.

According to the applicant, on September 13, 2020, he discussed his positive test result with his wife, and she informed him of the events that occurred after he went to bed on July 17, 2020. The applicant states that his wife wrote her letter and gave it to him. The applicant alleges that the following day, he contacted a lawyer at the US Navy Defense Service Office [redacted], as he had numerous questions for him on his entire situation, including presenting his wife's letter to his command and the result of her hair strand test. The applicant states he had conversations and/or emails with this lawyer over the course of that week and ultimately, he did present the letter to the command. The applicant alleges he called the CGIS agents and told them that he obtained some information and wanted to meet with them again.

According to the applicant, on September 29, 2020, he met with the CGIS agents again and present them with a copy of his wife's letter and the results from her hair strand testing. The applicant states that they read the letter out loud and then interviewed him again. The applicant alleges, in both this interview and the first interview, the agents repeatedly told him that they "knew" he ingested cocaine because his test result also showed Benzoylecgonine in it, which is a metabolite from cocaine that they claims was only produced by the body after ingestion. The applicant claims that during this second interview, he brought up the newly published document (with scientific data) in the Federal Register from HHS/SAMHSA, which clearly disputes that you have to ingest cocaine to have that metabolite show up on a HST result. The applicant additionally, states that he would later (after his investigation was over) find the DOJ funded report that also

directly disputes what the agents kept repeating to me. The applicant claims that they never answered his questions and just kept falling back on what Pyschemedics "told" them about the metabolite and cocaine. The applicant alleges that he provided them with the results of his wife's hair strand test, which was taken on September 14, 2020 and were positive for cocaine and came back at 3929 picograms per milligram, which equates to 39.29 ng/10 mg. The applicant states that this shows her results (as a person who ingested cocaine) were nearly 800% higher than his results. According to the applicant, during this interview, he told the agents that his wife and him had sexual intercourse multiple times on July 18, 2020, including in the late-morning hours. The applicant does not know if it was possible to pass any of the recently ingested drug through body fluids and/or sexual activity. The applicant alleges that between the document in the Federal Register on environmental contamination/exposure, his wife's letter and her hair strand results, he felt as though he had provided the CGIS agents with some great information for them to investigate.

According to the applicant, Psychemedics is a civilian company that the Coast Guard pays to complete drug testing via hair strand testing. The applicant states that they are a for profit corporation that are publicly traded on the NASDAQ Exchange and regard themselves as the best in the business. The applicant argues that though Psychemedics claim that their method of testing is error proof, they have faced legal challenges in multiply cases that were tried in courts of law (*see Jones v. City of Boston* and *Thompson v. Civil Service Com'n*), which are the same cases referenced in the HHS document in the Federal Register.

The applicant states that only one of the items he brought to the CGIS agents was included in the ROI and the only person that the report mentions the agents contacting is a chemist from Psychemedics. The applicant claims that the lone item discussed with the chemist was the possibility of someone testing positive after sexual intercourse with someone who recently ingested cocaine, to which she said she couldn't recall a publish medical study on that. The applicant questions how much does a chemist know about how drugs can be passed from person to person. The applicant finds it ironic that a chemist at Psychemedics brings up published studies when discussing hair strand testing. The applicant claims that HHS is not moving forward with the inclusion of hair strand testing as an authorized drug testing specimen because of multiple problems and issues discovered in numerous published studies on hair strand testing. The applicant quotes the CGIS report, "[m]oreover, the hair analysis test is based off of the metabolites produced in the body after the consumption or ingestion and not from exposure or contamination of a controlled substance," which the applicant argues is a complete contradiction of the SAMSHA and DOJ paper, which are based off documented, scientific studies. The applicant remains extremely disappointed that the CGIS agents did not go to an innocent third party to seek scientific analysis or gather information about the issues he brought up during his investigation, which was based off HHS's document in the Federal Register. The applicant notes that they go to the company who was paid to administer the tests and consider their operations error-proof. The applicant thinks it's fairly obvious that they would stand by their procedures and the results of his failed test.

The applicant would like to briefly expand on the topic of potentially testing positive after sex with a person who recently ingested cocaine. According to the applicant, the chemist said that she "didn't recall of any published medical studies" on that topic. The applicant, after doing a

small bit of research, claims to have found a very similar scenario to his, which he included. According to the applicant, in 2016, there was an Olympic pole vaulter named Shawnacy (Shawn) Barber, from Canada who was drug tested after qualifying for the 2016 Olympics and he failed this drug test for cocaine. The applicant states that it turns out that a short time before his competition, he solicited for a "causal encounter" on Craigslist and a woman replied to his request and they ended up in a hotel room, where they had an approximate 30-minute sexual encounter that mainly involved kissing. According to the applicant, the woman in this situation had done cocaine prior to meeting Barber in his hotel room and took the drug again in the bathroom of his hotel room, all of which was unknown to the Olympic athlete. The applicant states that Barber appealed the suspension he received and the case went before the Sport Dispute Resolution Centre of Canada and won his appeal and his suspension eliminated. The applicant claims that this case also referenced another case (Court of Arbitration for Sport, CAS 20009/A/1926 ITF v. Richard Gasquet) that had very similar circumstances. The applicant argued that though this is not a published "medical study," it is a judicial decision from an official and highly reputable source in Canada, which deals with drug and doping cases involving Olympic athletes. According to the applicant, there seemed to be enough scientific evidence in this case to prove cocaine can be passed through saliva and sexual encounters. The applicant quotes the decision in the Barber case:

> The evidence showed that Mr. Barber did not know or suspect, and could not have a reasonably known or suspected, even with the exercise of utmost caution, that he was at risk of ingesting a prohibited substance by kissing [the woman]. He had no way or knowing, and had no reason to suspect, that the woman had ingested cocaine before their sexual encounter, nor that she could possibly contaminate him with a prohibited substance.

The applicant argues that this situation and result seem to completely dispute what the chemist from Psychemedics said.

In regards to the Coast Guard Drug Policy, the applicant states that just prior to submitting his HST sample that day, he also provided a urinalysis sample, which tested negative. The applicant included the Coast Guard drug policy and claims it does not mention hair or hair strand test. The applicant quotes from the policy that one or the objectives is to "[e]stablish reliable means to inspect Coast Guard military members, detect drug abuse, and separate drug abusers in order to maintain unit readiness for full mission capability." The applicant states that the chapter requires that commands must use the Urinalysis Tactics, Techniques and Procedures (TTP) CG-TTP 1-16.5, which is an additional 89-page document that thoroughly covers urinalysis testing. According to the applicant, the TTP states that the samples will be sent to Tripler Army medical Center, Forensic Toxicology Drug Testing Laboratory. The applicant claims that the Coast Guard Drug and Alcohol Abuse Program (COMDTINST M1000.10 (series)), states that testing must be done at a Department of Defense lab, which Tripler is, or a certified SAMHSA lab. The applicant argues that urinalysis is a tried and true, reliable method of drug testing. According to the applicant, the Federal Register document and CG-TTP 1-16.5 provide a great foundation on all aspects of testing and specifically what labs the samples can get tested at. The applicant believes that the Coast Guard succeeded with their objective to establish a reliable means of drug testing, via the urinalysis method.

According to the applicant, on July 30, 2020, District [redacted] released Note [redacted] which had a subject line of Hair Strand Testing Implementation. The applicant quotes its purpose

was to "provide supplemental guidance to the Military Drug and Alcohol Policy, COMDTINST M1000.10 (series) and implement Hair Strand Testing (HST) in conjunction with the urinalysis program." The applicant claims it elaborates on how the UCMJ and the Military Justice Manual provide the administrative rights for units to conduct inspections/drug screening. The applicant quotes the note: "HST may be used in lieu of, or in conjunction with, urinalysis during such an administrative inspection." The applicant claims the manual goes on to mention that there are two enclosures for people who will be filling certain positions in the HST process at each unit and then goes into details of how and where the specimens are collected. According to the applicant, nowhere in the Note does it say what type of lab the samples have to go to, or if the lab as to have any certifications. The applicant claims the enclosures are templates for the certification and designation of each collection coordinator and collection specialist. The applicant states that each of these templates, in memo format, have the same sole reference, which is: Psychemedics Corporations Hair Sample Collection guide. The applicant notes that there is no direction in this Note on what lab to sent the HST samples to for analysis, but the certification memos specifically states that these members have "received training and guidance" from Psychemedics Corporations Collection Guide. According to the applicant, this Note does provide supplemental guidance on how to obtain a HST sample, but it completely lacks any information on what type of lab or required certifications the lab needs. The applicant argues that since this note is to provide "supplemental guidance" and fails to mention any specific lab, then he would think the guidance in the Federal Register is still applicable for HST. The applicant states that he makes this statement as he had three HST's taken in D14 and all went to Pyschemedics to get analyzed. The applicant claims that the Note uses Pyschemedics in the verbiage, as to endorse or support that specific company. The applicant argues that by sending the drug testing samples to Psychmedics, the Coast Guard is not following its own policy on what type of lab to send drug samples to. The applicant claims that Psychemedics is neither a DOD or SAMHSA approved lab. The applicant argues that, with the contradiction of sending HST samples to a lab that fails to meet the current policy requirements, the Coast Guard has failed in executing its drug policy objective, when using HST. The applicant questions, if a member wanted a urinalysis sample analyzed by a non-DOD or non-SAMHSA lab, would the Coast Guard approve? The applicant questions, if the answer is no (which the policy clearly states), then why does the Coast Guard get to do that with HST?

In regards to the CG-3307, dated December 15, 2020, documenting the drug incident, the applicant disputes the last sentence in the first paragraph, which states "[a]n additional HST was performed on 25 AUG 2020 which also produced a positive confirmed result for cocaine." The applicant argues that while he did indeed provide another sample via HST on August 25, 2020, which was at his requests, he does not agree with calling it a "positive" confirmed result for cocaine. According to the applicant, they changed the criteria from the initial and conformation cutoff levels which were on his first test at 5 ng/10 mg and instead lowered the limit of detection to .25 ng/10mg, which is a 95% decrease. The applicant states that his results came back at 4.04 ng/10 mg, which should have passed (not been deemed a positive test). The applicant questions why did the test criteria drop at all, why did it drop so significantly, and why did they call it a "re-test"? The applicant argues that a re-test is when they would test his original specimen again, to validate their original findings. The applicant claims his second HST (August 25) was another test (as stated on the CG-3307, with the word "additional), it was not a hair strand re-test, and it should have been analyzed against the 5.0 ng/10 mg standard and been declared a negative test. The applicant argues that he was could not find anything in the Coast Guard Drug and Alcohol Abuse

Program (COMDTINST M1000.10 (series)), [redacted] Note [redacted] or anywhere in Coast Guard policy about dropping the confirmation criteria or limits of detection for a second drug test. According to the applicant, he knows that some will speculate that his second HST results are lower, only because they were taken longer from when he was unknowingly exposed, but he does not agree with that. The applicant argues that, if it were closer to the 90-day window that HST offers, then he would say that theory could be reasonable, but his second HST was taken 38 days after July 17 and only 12 days after my first test. The applicant claims what is questionable concerning the two tests is the difference in the results. The applicant states that there is a 30% reduction in the amount detected, over a 12-day period. The applicant argues that, with the dates mentioned above, a 30% difference in tests taken only 12 days apart makes him question the variability and accuracy of HST. The applicant states that he does not understand how two HSTs, taken only 12 days apart and well within the 90-day window that HST offers, have results that are 30% different in detected levels of cocaine. The applicant argues that this does not add up and something is clearly wrong with these results.

The applicant states that cocaethylene is a compound that is formed by the coadministration of cocaine and alcohol and both of his HSTs were tested for cocaethylene, but neither registered for it. According to the applicant, on the night of July 17, 2020, he had two alcoholic drinks, specifically Jameson Irish Whiskey and ginger ale, before going to bed. The applicant claims this information was divulged to the CGIS agents in his second interview and was corroborated by his wife and another witness [redacted] in their interviews. The applicant argues that, if he had ingested cocaine on the night of July 17, it would have mixed with the alcohol he consumed and registered as cocaetheylene on the HSTs, but this did not happen because he did not ingest any cocaine on the night of July 17. The applicant claims that when he was unknowingly exposed to residual cocaine the following day in his kitchen and/or dining room and/or when he had sexual activity with his wife, he had zero alcohol in his system, which is why neither of his HST results showed any cocaethylene in his results. The applicants states that his wife consumed alcohol on July 17 and her HST results documented a quantitative level of 886 pg/mg of cocaethylene. The applicant argues that this is more scientific data that supports the fact that he did not knowingly ingest cocaine on the night of July 17, 2020.

According to the applicant, he posed many of these exact questions to his executive officer, who could not answer any of them. The applicant states he signed the CG-3307 as it stated that he acknowledged the information, although he did not and still does not agree with it. The applicant states that this is yet another example of how disappointed he is in the Coast Guard, throughout his entire HST process. The applicant notes that the official documentation of his drug incident states that he failed two separate drug tests. According to the applicant, he had very reasonable questions on the results of his second test and he still does not have answers. The applicant argues that with the consequences so high when dealing with a failed drug test, there should rarely be any unanswered questions. The applicant claims he was honest and open for hours of questioning from the CGIS agents, yet they never answered his questions to them and now his executive officer did not answer his questions regarding the verbiage on the official documentation of his drug incident. The applicant states that he dedicated nearly 25 years of his life to the United States Coast Guard. The applicant states that he moved where they told him to move, he deployed when they told him to deploy, and he worked extended hours when they needed him to. The applicant claims he excelled at the challenges that senior leadership comes with and

strived to make every unit he was at, the best in the Coast Guard. The applicant argues that when he innocently faced the most damning single piece of paper through his nearly 25-year career, his executive officer could not even answer his questions.

In regards to the Department of Navy (DON) stance on HST, the applicant states that the DON granted a waiver to use hair testing to increase deterrence and detection of drug abuse. According to the applicant, they cancelled that waiver in early August 2021 and were very specific as to why in the third paragraph:

> existing hair drug testing technology cannot reliably identify if a Service member used drugs and cannot eliminate the potential of environmental drug exposure. Furthermore, hair color and cosmetic treatments can affect the drug binding affinity, while differences in hair texture and length can yield widely varying results, leading to discrepancies in testing outcomes based on race, gender and subjective grooming preferences, even when exposed to the same drug under the same circumstances. Accordingly, in its current state, hair drug testing does not meet the scientific and legal standards that are required by the DON Drug Demand Reduction Program. DON commands do not have the authority to use drug hair testing as a method of deterrence or as a supplement to urinalysis.
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> Drug testing programs must be accurate, reliable and based on valid scientific methodologies. The Department of Defense (DOD) and DON have determined that urine drug testing meets these standards and is the only authorized drug testing program of Service members specimens.

The applicant argues the reasoning that the DON provided as to why they are not authorizing HST sounds very familiar to information presented in other references that he has cited, some of which was the exact information he provided the CGIS agents and his command during his investigation, in September 2020. The applicant claims neither of which even acknowledged that information. The applicant states he is glad to see that the Office of the Assistant Secretary of the Navy not only recognized that HST is unreliable and doesn't meet their scientific and legal standards, but that they also took action to clearly say it is not authorized.

The applicant argues that he realizes that this Navy memo has no authority in the Coast Guard, but it does pertain to the Coast Guard, as they rely on the DOD labs to conduct the majority of its drug testing. The applicant claims that they have forensic toxicologists on staff at their labs and know much more than anyone in Coast Guard about drug testing. The applicant argues it would be foolish of the Coast Guard to not acknowledge that the DOD did a pilot program on HST and ultimately did not approve it.

Regarding the DHS Drug-Free Workplace Program, the applicant states that, on January 2, 2018, DHS published a Privacy Impact Statement for the Drug-Free Workplace Program (DFW), under DHS/ALL/PIA-063. The applicant states this is the most up to date document he could locate on the DFW for DHS. The applicant quotes the document:

> The Federal Drug-Free Workplace Program was established by Executive Order (EO) 12,564 on September 15, 1986, to address illegal drug use by federal employees. The DHS Office of the Chief Human Capital Officer (OCHCO) oversees the departmental DFW program, and developed and implemented a comprehensive DFW program that includes the Components developing their own DFW plans that conform to DHS policies.

The applicant states there are a few pieces of information published in the document that he would like to address.

According to the applicant, as required by EO 12564, the DHS departmental DFW plan must be certified by HHS and, additionally, under the DHS DFW, each component hast has its own DFW plan that conforms to the overarching DHS plan. The applicant states that the second paragraph of the overview of the DHS DFW PIA lists the components with OCHCO-approved DFW plans and the Coast Guard is not listed. The applicant states that the DHS DFW states that the specimens are sent to "an HHS-certified laboratory for analysis," and that, under "What specific legal authorities and/or agreements permit and define the collection of information by the project in question," it references the HHS Mandatory Guidelines for Federal Drug Testing Programs. The applicant argues that the HHS and the Mandatory Guidelines for the Federal Workplace Drug Testing Program do not support HST as an authorized collection specimen on its own. The applicant questions, even if the Coast Guard had an OCHCO approved DFW plan on file, wouldn't they still fall under the DHS DFW plan and if the Coast Guard did submit a component DFW plan that entailed how they are currently operating, in regards to calling a failed HST on its own as a verified positive test result, would it get certified by the HHS. The applicant argues that he does not this so, as the HHS have made it crystal clear that they do not support of recognize HST as a viable drug testing method on its own, there would have to be another authorized method (urine or saliva) that also tested positive. The applicant stats that his HST sample was not sent to an HHS certified lab, which does not align with eh DHS DFW plan.

Regarding the Civilian Employee Drug-Free Workplace Program, COMDTINST M12792.4, the applicant claims that it applies to all Coast Guard appropriated fund Federal civilian employees and applicants for those positions. The applicant states that he fully understands that this manual is not directly applicable to his situation, as he was on active duty, but he wants to highlight a few items, as it is a COMDTINST and relates to drug testing in the Coast Guard. The applicant quotes:

> Mandatory Guidelines for Federal Workplace Drug Testing Programs. The Coast Guard will adhere to Reference (t) promulgated by the Department of Health and Human Services consistent with the authority granted by Reference (a) and to the requirements of Section 503 of Public Law 100-71. The Coast Guard will contract for collection services with trained collection professionals who meet high standards of quality assurance in urinalysis procedures and observe strict confidentiality standards.

The applicant states that, for all civilian employees, the Coast Guard strictly follows HHS guidance under the Mandatory Guidelines for Federal Workplace Drug Testing Program and the only collection method they reference is urine. The applicant argues that this manual does not contain the word hair, hair strand test, or HST and this is valuable information, as it demonstrates that the Coast Guard does recognize, value and enforce the HHS's Mandatory Guidelines for the Federal Workplace Drug Testing Programs, but only for the civilian Workforce. The applicant questions why do they have one program for civilians and another for active duty.

The applicant concludes his arguments rehashing the arguments already set forth. The applicant disagrees with the drug incident finding against him. The applicant argues that his wife made a terrible mistake on July 17, 2020 and has regretted it every day since. The applicant claims that the isolation from COVID-19 restrictions, coupled with unemployment from the pandemic

and her increasing depression, were factors in her poor decision. The applicant states that illegal drugs destroy people's lives and he does not condone her actions that night. The applicant claims that she had a crucial one-time lapse in judgment, which resulted in him being un-knowingly exposed to and/or un-knowingly ingesting a trace amount of cocaine, from public spaces and common times in his house. According to the applicant, he was further exposed and potentially contaminated from having sex with his wife, which included kissing, in a relatively short amount of time after she ingested the cocaine, which he knew nothing about or ever suspected. The applicant claims that he wishes that there was something he could have done to change things, but there is not, as he played no role in the activities that night and knew nothing about it until months later, during his investigation. The applicant argues that Section 5.C of the Coast Guard Drug and Alcohol Abuse Program (COMDTINST M1000.10 (series)) clearly states when a drug incident should be issued and paragraph 5.C.6 states, "[h]owever, if the conduct occurs without the member's knowledge, awareness, or reasonable suspicion or is medically authorized, it does not constitute a drug incident." The applicant states, for all of the reasons, evidence and supporting documentation he has included, he believes that he should not have received a drug incident. The applicant argues that, if for some reason, someone disputes or doesn't believe his statements, in this petition, please consider a sentence out of Coast Guard Drug and Alcohol Abuse Program (COMDTINST M1000.10 (series)) in paragraph 5.E.1, "evidence relating to the military member's performance of duty, conduct, and attitude should be considered only to measure the creditability of a member's statement." The applicant asks the Board to review his entire military record and it will see extensive amounts of superior performance, conduct and attitude. The applicant claims his credibility should be superior.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on September 30, 1996, where he eventually rose to Chief Warrant Officer.

Decision Memorandum on Hair Strand Test Administrative Separations

On August 13, 2019, the Coast Guard issued a memorandum stating, "[c]onfirmed HST results at or above the confirmation cutoff (the level at which the HST laboratory can certify the member ingested the drug, as verified by the servicing legal office) are sufficient, in and of themselves to justify administrative separation."

[Redacted] District Notice

On July 30, 2020, [redacted] District issued a notice implementing HST testing in conjunction with the urinalysis program. The notice states at Section 4.f that, "HST may be used in lieu of, or in conjunction with, urinalysis during such an administrative inspection. All those subject to an administrative inspection can be ordered to provide only hair, only urine, or both hair and urine."

First Hair Analysis Drug Test Results

Psychemedics tested a hair sample collected on August 13, 2020. The sample tested positive for cocaine at 5.80 ng/10 mg and positive for Benzoylecgonine at 0.59 ng/10 mg. The confirmation cutoff listed is 5 ng/10 mg for cocaine and 0.5 ng/10 mg for Benzoylecgonine.

CGIS Report

On August 19, 2020, CGIS agents opened a report regarding the HST of the applicant indicating positive for cocaine and benzoylecgonine. The report indicates that the agents initially interviewed the applicant on August 24, 2020, where he denied cocaine use by himself or his spouse and volunteered to take another test.

On September 1, 2020, the report states that the agents received the results of the re-test of the applicant. The second test showed a 4.04 ng/10 mg of cocaine and 0.40 ng/10 mg of benzoylecgonine with a detection cutoff of 0.5 ng/10 mg. The applicant was subsequently notified.

On September 23, 2020, the report indicates that the agent spoke with a chemist, with forty years of experience, at Psychemedics Corporation. The chemist told the agent she could not recall a published medical study in which an individual tested positive for cocaine after sexual intercourse or cunnilingus and that the hair analysis test is based off of the metabolites produced in the body after consumption and not from exposure or contamination.

On September 24, 2020, the agents were provided the letter from the applicant's wife, reproduced in part below.

> I was just informed as of Sunday September 13, 2020 that my husband recently tested positive for cocaine. I was sick to my stomach with this news. I know that my husband does NOT do drugs. He has dedicated over 24 years to the Coast Guard and would never do anything to jeopardize that. I immediately knew that I had to come clear and confess to something that I had recently done that I was NOT proud of. I broke down in tears and proceeded to tell [the applicant] everything. The look he gave me was one that I will never forget. He looked betrayed. Again, I am not proud of what I have done but hopefully by sharing the information with you I may help clear [the applicant's] name.
>
> On Friday July 17th, 2020 I had a couple ladies over to our house to celebrate my friends [sic] 69th birthday. The ladies and I planned on getting pretty drunk that night so [the applicant] decided to go to bed early. He went to bed and shut the door to the bedroom so that we would not disturb him. My friends and I continued to drink in quite excess which is around the time that a bag of cocaine was brought into the mix unbeknownst to my husband who was still sleeping. I was extremely intoxicated at this point and figured "what the hell…[the applicant is] in bed with the door shut… what he doesn't know won't hurt him." Words I now find myself choking on. [The applicant] never saw or knew that any of this was going on in the house. He remained sleeping behind closed doors in the bedroom until Saturday July 18th when he woke to go on a hike. The ladies and I continued drinking and playing games until all the cocaine was gone. I'm not sure what time it was when [the applicant] woke up in the morning on Saturday July 18th, 2020. I knew the sun had come up and it was morning. The ladies and I were still up and drinking in our dining room. [The applicant] immediately left the house to go hike […]. I thought he was mad at me so the ladies packed up their stuff and left. [The applicant] was gone for a couple of hours on his hike so I attempted to tidy up the house.
>
> Never in a million years did I think that my moment of weakness and poor judgment would have such an impact on someone else.

> All I can think is that this is all my fault. Either in my drunken attempt at clearing the house I missed some cocaine either on a plate or the table and [the applicant] came in contact with it unknowingly. Even worse, I may have contaminated him physically due to the fact that we had sexual contact on Saturday July 18th. I read online that there have been some cases where a person tested positive for cocaine after just kissing someone who had ingested the drug. Evidently if someone has ingested cocaine if can be transmitted to someone else through saliva, sweat or other bodily fluids without them being aware. This too makes me sick to my stomach.
>
> [The applicant] should not be punished for my wrong doing. [sic]

On September 29, 2020, the agents interviewed the applicant a second time. The applicant gave the agents the letter from the applicant's wife and told them he never saw any evidence of cocaine use.

On September 30, 2020, the agents interviewed the applicant's wife. The applicant's wife recounted the events in her letter in more detail. Additionally, she provided results from a HST she took on September 14, 2020, which indicated positive for Cocaine, Benzoylecgonine, and Cocaethylene.

On December 9, 2020, the agents interviewed one of the friends present the evening of July 17, 2020. The friend recounted the events of the wife's letter.

Page 7

On December 15, 2020, the applicant was issued a Page 7 documenting a drug incident. The Page 7 stated, "it was determined that [the applicant was] involved in a drug incident through a positive confirmed drug Hair Strand Test (HST) result for cocaine. An additional HST was performed on 25 AUG 2020 which also produced a positive confirmed result for cocaine." The Page 7 notified the applicant that he would be processed for separation.

VIEWS OF THE COAST GUARD

On April 3, 2023, a Judge Advocate (JAG) for the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

The JAG argued that the applicant fails to carry his required burden to prove that the issuance of the drug incident and Page 7 was erroneous or unjust. In response to the applicant's challenging the use of hair strand testing as not authorized, the JAG argues that the applicant fails to prove that hair strand testing is prohibited by any Coast Guard policy. The JAG notes that none of the documents cited by the applicant prohibit the use of hair strand testing by the Coast Guard. Further, the JAG points to policies for the Coast Guard at large and specifically, Coast District [], expressly authorizes the use of hair strand testing for administrative purposes. The JAG notes that the Coast Guard District [] authorization of the use of hair strand testing quotes the Military Rules of Evidence 313(b), which states "[i]nspections may utilize *any reasonable* natural or *technological aid* and may be conducted with or without notices to those inspected." (emphasis added). The JAG concludes that, despite the volume of documents produced by the applicant, he fails to disprove the validity of hair strand testing as an authorized means of drug testing.

In response to the applicant's arguments that he did not knowingly ingest cocaine, the JAG argues that there is no indication that the command failed to consider all available evidence. The JAG notes that the command was free to assess the credibility of all evidence and assign differing weight to any evidence before it. The JAG argues that the command had two positive drug tests which, per policy, were sufficient in and of themselves for a drug incident finding. The JAG concedes that the applicant proposed alternative theories, but notes that the command had evidence from a scientist, with over 40 years of experience, refuting the applicant's alternative theory that the cocaine entered his system through sexual contact. The JAG concludes that it was not erroneous or unjust for the command to determine there was sufficient evidence to conclude by a preponderance that the applicant intentionally ingested drugs. Therefore, the JAG argues that the applicant fails to overcome the presumption of regularity regarding the issuance of the drug incident and associated Page 7 and fails to prove error or injustice.

APPLICANT'S RESPONSE TO VIEWS OF THE COAST GUARD

On May 1, 2023, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. The applicant responded on May 16, 2023.

In response to the JAG's note that there was no record that the applicant exhausted his administrative remedies, the applicant states that, in late fall of 2020, he was not selected for promotion to W-4, but was selected to continue as a W-3. The applicant claims he did not find this out until early in 2022 and only through a Freedom of Information Act (FOIA) request. The applicant states that, on December 15, 2020, he was presented with a CG-3307 that documented a drug incident, and this piece of paper ended his 25-year Coast Guard career and occurred just prior to his unit stating a modified schedule for Holiday Routine. The applicant claims he was never told that he was on the approved continuation list or why he was removed from the list. The applicant states that, even today, he still does not know, after exhausting multiple avenues with new FOIA requests. The applicant argues that the Coast Guard was and remains very secretive as to what ended his career. The applicant states that his world was turned upside down after receiving the unjust drug incident. According to the applicant, it was not until January of 2021 that he was informed he would have to retire by June 30, 2021 and this gave him a short amount of time (less than 6 months) to start his retirement administrative work, including a retirement physical, working with VA on a disability claim, deciding where to move after retiring from the Coast Guard, and trying to buy a house in that location. The applicant states that this all occurred right in the middle of the COVID-19 pandemic, and in Hawaii, a very isolated location that had numerous statewide restrictions which made routine items, such as getting household goods packed very difficult. The applicant argues that, if he had submitted a request to the PRRB, he finds it extremely unlikely to think it would have been received, docketed, and completed within 6 months, as the PRRB only deals with active-duty personnel.

The applicant responded to the JAG's characterization of the events. In response to the JAG characterization of the applicant as having tested positive for cocaine metabolites, the applicant states that, during the investigation, the CGIS agents told him multiple times that because the result showed a metabolite, specifically benzoylecgonine, was proof that he ingested the drug and ruled out environmental contamination. The applicant argues that this has been proven to be

scientifically untrue and he references specific parts from the Federal Register (Vol. 85 No. 176, Thursday 16 Sep 2020), which he submitted, states:

> More recently, hydroxy-metabolites of benzoylecgonine were identified in hair and through to represent a new opportunity to reliably identify cocaine use…However, these analytes also have been detected in a limited study of street cocaine samples and were found to form and increase in concentration over a period of eight weeks after contamination of seven subjects' hair with cocaine.

In response to the JAG's characterization of the applicant has having two separate tests, the applicant states that this agrees with his statement that he did indeed have two separate HST tests, both analyzed by Psychemedics. The applicant argues that the results of the second test indicate that the reason for the test was re-test, which is incorrect. The applicant argues that a retest is a second test on the original or the same sample provided of an HST. The applicant claims that, on August 25, 2020, he provided a new HST sample for another (second) test, not a retest. The applicant argues that the advisory opinion later confuses this terminology, when it states "provided another sample for a re-test." According to the applicant, the Military Drug and Alcohol Policy, CMDTINST M1000.10A (MDAP) clearly differentiates this by stating in paragraph E.1.d, "Retest Sample. Request the laboratory retest the original specimen." The applicant notes that this is referring to urine, as the MDAP does not include anything about hair, but the definition of retest should not change, regarding what method is used. The applicant argues that, since he has clearly articulated why his second test was a new test, not a retest, then the cutoff levels should have remained the same for his second test, at 5 ng/10 mg, which would have resulted in a negative second test, changing everything about his case. The applicant states that he asked his executive officer and the CGIS agents why this was called a retest and why the cutoff levels were 95% loser, as the cutoff level for his second test was lowered to .25ng/10mg. The applicant claims no one could provide me with an answer for this throughout his investigation and he still does not have one today. The applicant states that he also attempted to ask Psychemedics why the limit was lowered, but they would not discuss his results with him and said he needed to go through the Coast Guard, so the drug testing lab told him to go through the Coast Guard and the Coast Guard could not and would not answer simple questions of his.

In response to the JAG's statement that he "claims the use of HST was against policy," the applicant states that his claim is the Coast Guard is breaking their own policy by having a civilian lab analyze drug tests, which is not a DoD lab or a SAMHSA approved or a DoD lab. The applicant argues that it is not logical of the Coast Guard to start utilizing a new drug testing method, which is widely regarded as unreliable, and lower the criteria for which type of lab can process the HST.

In response to the JAG's characterization the applicant claims the cocaine was from either sexual contact or food consumption, the applicant argues that both of those are true, but his claim is broader and covers environmental exposure. The applicant claims the ladies that admitted to consuming in his house, while he was asleep and unaware in his bedroom, were in the dining room, kitchen, and bathroom. The applicant argues that it is logical to think that they would have transported trace/tiny amounts of the drug around my house in public and often used or touched spaces resulting in his exposure to it in the days after.

The applicant responded to the JAG's inclusion of the applicable policy which states that "if the conduct occurs without the member's knowledge, awareness, or reasonable suspicion or is

medically authorized, it does not constitute a drug incident." The applicant argues that he agrees with this, and that he had zero knowledge, awareness, or suspicion to ever imagine drugs had been consumed in his house, resulting in his exposure to them. The applicant states that these words are included in the MDAP to prevent innocent people, like him, from receiving a drug incident for a situation that was completely out of their knowledge and control.

The applicant responded to the JAG's emphasis on the applicant policy which states that Coast Guard members "are expected…as law enforcement agency members, to maintain a lifestyle that neither condones substance abuse by others nor exposes the Service member to accidental intake of illegal drugs." The applicant states that he fully agrees with this statement and that he was in the Coast Guard for nearly 25 years and participated in dozens of drug tests. The applicant claims his wife was suffering from mental health issues, which stemmed from the COVID-19 pandemic and made a terrible decision in July of 2020 that he did not condone when he ultimately found out about it during his investigation (and still does not). The applicant argues that, if you do not know about a choice or situation that someone else makes, you cannot change anything about that situation. The applicant states that he had no idea in July of 2020 that his wife would make this terrible decision, which also means he had no way to prevent it.

The applicant responded to the JAG's inclusion of the language "a member's drug use admission or a positive confirmed test result, standing along may be sufficient to establish…" by arguing that it does not say "will" or "shall', instead it uses the word "may," which means that a positive drug test alone does not establish intentional use and does not meet the burden of proof.

The applicant responded to the JAG's inclusion of the MRE which states, "inspections may utilize any reasonable natural or technological aid." The applicant notes that the JAG opinion underlined the word reasonable. The applicant questions if the DoD did not allow something, should the Coast Guard consider it reasonable and if HHS does not allow something, should the Coast Guard consider it reasonable. The applicant quotes from a memo from the US Navy:

> Unlike urinalysis, existing hair drug testing technology cannot reliably identify if a Service member used drugs and cannot eliminate the potential of environmental drug exposure… Accordingly, in its current state, hair drug testing does not meet the scientific and legal standards that are required by the Department of the Navy (DON) Drug Demand Reduction Program. DON commands do not have the authority to use hair drug testing as a method of deterrence or as a supplement to urinalysis.

The applicant quoted from the Federal Register (Vol. 85. No. 176, Thursday 16 Sep 2020), "[t]here can be opportunities for hair to be contaminated from drugs in the environment."

The applicant argues that, if the JAG is trying to convey that HST is a "reasonable" natural or technological aid, he completely disagrees. According to the applicant, all the other Armed Services have made it extremely clear that HST is not authorized for the testing of drugs, because it is unreliable. The applicant argues that, with something as important as drug testing, there should be unification amongst all the Armed Services, but, sadly, this is not the case. The applicant states that it seems illogical that the Coast Guard things HST is "reasonable" when the DoD and the Federal experts think it is unreliable.

The applicant responded to the JAG's statement that the CGIS agents spoke with a "scientist" at Psychemedics and she said she could not recall any studies where an individual tested positive for cocaine after sexual activity. The applicant argues that this is full of misinformation. The applicant argues that this individual is a "chemist" at Psychemedics and the CGIS ROI correctly called her a chemist. The applicant notes that the ROI also states that she had 40 years of experience as a chemist, not necessarily at a drug testing lab, which the advisory opinion seems to hint at. The applicant states that Psychemedics is the for-profit company that the Coast Guard employed to analyze many HSTs and his unit alone sent in over 500 samples within 18 months. The applicant argues that Psychemedics must be profiting a considerable sum of money from testing Coast Guard HST samples and they have a vested and monetary interest in keeping the Coast Guard as customer, so he feels they will tell the Coast Guard what they want to hear.

Further, the applicant questions why you ask a "chemist" if drugs can be transferred from person to person via sexual activity. The applicant claims he reached out to Psychemedics about the job description of a chemist but they did not respond to him. The applicant argues that a forensic toxicologist would provide more information on how drugs can or got into a person and a chemist could tell you more about the specifics of evaluating the samples. The applicant states that this is one single person that could not "recall" any studies on this topic and that it is incredibly sad to think that his investigators only reached out to one person (who works for the company that processed the samples) regarding the questions that he brought up in his investigation. The applicant also notes that he mentioned a case regarding a Canadian Olympian named Shawn Barber, who went through the Sport Dispute Resolution Centre of Canada, regarding a failed drug test for cocaine. The applicant states that the arbitrator found him not guilty, and he was allowed to compete in the Olympics. The applicant quoted the decision:

> The evidence showed that Mr. Barber did not know or suspect, and could not have reasonably known or suspected, even with the exercise of utmost caution, that he was at risk of ingesting a prohibited substance by kissing [the woman]. He had no way of knowing, and had no reason to suspect that [the woman] had ingested cocaine before their sexual encounter, nor that she could possibly contaminate him with a prohibited substance.

The applicant states that the chemist at Psychemedics said two things to the CGIS agents: she could not recall anything about drugs getting passed from sexual activity and that metabolites prove drug ingestion. The applicant argues that the report on Shawn Barber directly disputes her claim and that the information in the Federal Register directly disputes her claim that metabolites prove ingestion. According to the applicant, this means that the sole individual that the CGIS agents went to for information on questions he asked them, misinformed them. The applicant argues that calling that an investigation regarding a matter that would terminate a Coast Guard officer's 25-year career is insulting and embarrassing.

The applicant states that the analysis section mentions multiple areas that he challenges. The applicant notes they have all been mentioned throughout the advisory opinion and he has discussed each of them in his reply already. The applicant states that he just wanted to note that this section too, is filled with misinformation.

The applicant states that he believes that he has thoroughly covered the details that the advisory opinion discusses. The applicant argues that the information he brings up to dispute their

claim is actual, fact-based evidence from entities including: Federal experts on drug testing (HHS), the Coast Guard's fellow Armed Services, and the Coast Guard's own policy and procedures. According to the applicant, when you stand back and look at all aspects of his case and fully digest the information he has provided, you will see there is not a preponderance of evidence that shows he knowingly ingested cocaine. The applicant argues that you will see one failed drug test that was .08 ng/10 mg over the 5.0 ng cutoff level, a terrible decision by his wife (completely unknown to him, but which severely impacted him), an inadequate CGIS investigation, false information from the sole civilian source that CGIS contacted and multiple reports, a US Navy memo, and a piece in the Federal Register that all align and support his side in this matter.

Finally, the applicant states in his petition he brought up information on the DHS Drug-Free Workplace program and it was not addressed at all in the advisory opinion. The applicant states that the advisory opinion did provide a memo, internal to the Coast Guard, about authorizing administrative separations from the results of the HST, but it fails to mention anything about DHS. The applicant argues that the Coast Guard is part of DHS, and their drug policy should align with DHS policy. According to the applicant, from documents he has reviewed, DHS drug testing method/policy must be approved by HHS. The applicant argues that the piece in the Federal Register extensively details why HHS is not currently moving forward with HST, on its own, and the issues that are preventing that. The applicant questions, if this is indeed true, why does the Coast Guard not have to follow the overarching DHS policy and has DHS or anyone else in DHS authorized HST. The applicant states that his petition covers this very thoroughly, explaining how drug testing began with EO 12564, which states the methods must be approved by the Secretary of HHS.

The applicant states that illegal drugs are terrible and have no place in the Coast Guard or any Armed Service. The applicant argues that he fully supports random drug testing to weed out drug users and remove them from the service, but the Coast Guard does not have any drug experts in their organizations, and they need to make sure the testing methods they utilize are reliable and should align with the rest of the Armed Services. The applicant claims that the extended window that HST provides is the sole advantage. The applicant argues that HST is more invasive than other methods (regarding collecting a sample), much more expensive and cannot differentiate between ingestion and environmental contamination. The applicant argues that drugs are terrible, but something that is worse to falsely accuse an innocent individual of using drugs. The applicant states that his drug incident was unjust, and he hopes that the board has the wisdom and courage to reverse this terrible wrong that has been done to him by the Coast Guard. The applicant thanks the Board for its time and consideration in both his petition and this reply.

APPLICABLE LAW AND POLICY

Article 5 of the Military Drug and Alcohol Policy Manual, COMDTINST M1000.10A (June 2018), discusses the circumstances that warrant a drug incident.

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

1. Enforce the prohibition of illicit and controlled substances, and substances prohibited by lawful order. Controlled substances are scheduled in 21 U.S.C. § 812 and are referenced by the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a, Article 112a.

. . .

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

1. Intentional use of drugs for non-medical purposes;

...

6. However, if the conduct occurs without the member's knowledge, awareness, or reasonable suspicion or is medically authorized, it does not constitute a drug incident.

. . .

5.D. **Drug Incident Investigations.**

1. Summary. The Coast Guard does not tolerate the intentional use of illegal drugs, illicit chemical analogues, or prescription drug misuse. This includes ingestion of hemp oil or products made with hemp seed oil; however, does not include food items regulated and approved by the Federal Drug Administration (FDA) that contain hemp ingredients. ***Coast Guard members are expected to comply with the law and not use illegal drugs***; additionally, ***as law enforcement agency members, to maintain a life-style that neither condones substance abuse by others nor exposes the Service member to accidental intake of illegal drugs.*** Impairment puts members, crews, and missions at risk and is not a behavior consistent with the Coast Guard culture and Core Values. (Emphasis added.)

. . .

2. Initiating an Investigation. 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. In the vast majority of incidents, COs/OICs will be able to resolve the matter without further CGIS involvement beyond initial consultation. However, in some cases, additional CGIS investigative efforts may be needed to protect broader government criminal enforcement interests. This includes, but is not limited to, identifying and dismantling controlled substance distribution networks, potential misuse of Coast Guard authorities to obtain controlled substances, or government property theft, including seized contraband. (Emphasis added.)

. . .

b. The absence of a positive, confirmed urinalysis or blood test result, which could include refusal to consent, does not preclude taking action based on other evidence.

. . .

E. **Determining a Drug Incident.**

2. Evidence Collection. In determining whether a drug incident occurred, a CO/OIC must consider all the available evidence, including: positive confirmed urinalysis/blood test results; any prescription documentation; medical and dental records; service record (PDR); and chain of command recommendations. Evidence relating to the military member's performance of duty,

> conduct, and attitude should be considered only to measure the credibility of a member's statement(s). If the possible drug incident evidence includes a positive urinalysis result, the command must also verify that the urinalysis was conducted in accordance with policy, including properly followed collection and chain of custody procedures.
>
> 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.*** (Emphasis added.)
>
> 3. Drug Incident Finding. If after the investigation is complete, as described in Paragraph 5.C. of this Manual, the CO/OIC determines that a drug incident occurred, the following actions must be taken.
>
> > a. Administrative Action. The command must process the military member for separation by reason of misconduct per Reference (b), Military Separations, COMDTINST M1000.4 (series), as appropriate. Cases requiring Administrative Discharge Boards because of the character of discharge contemplated or because the member has served eight or more total years, must also be processed per Military Separations, COMDTINST M1000.4 (series), as appropriate.
> >
> > b. Disciplinary Action. Military members who commit drug offenses are subject to disciplinary action under the UCMJ in addition to any required administrative discharge action.
> >
> > c. Medical Treatment Eligibility. Military members who are identified as drug-dependent or diagnosed with a "drug use disorder-severe," must be offered treatment prior to discharge. Reference (a), Coast Guard Substance Abuse Prevention and Treatment Manual, COMDTINST M6320.5 (series), outlines substance abuse medical referrals, screenings, and action policy. If it is determined that treatment is needed and accepted, the member must be discharged from the Service upon completion. Members who are diagnosed as drug/chemical dependent but refuse treatment are required to sign an Administrative Remarks, Form CG-3307, entry acknowledging that they may waive the right to benefits for chemical dependency treatment under the Department of Veterans Affairs.

Military Rules of Evidence 313 of the Manual for Courts-Martial provides the following guidance on lawful inspections:

> b. **Lawful Inspections**. An 'inspection' is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle. Inspections must be conducted in a reasonable fashion and, if applicable, must comply with Mil. R. Evid. 312. ***Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected.*** (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 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 alleged that the drug incident issued on December 15, 2020, was erroneous and unjust because the Coast Guard used HST which is not a supported testing procedure under federal guidelines and because he did not ingest cocaine and was exposed to it though his wife's drug use. 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.[1] 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."[2]

4. The applicant alleged that the drug incident issued on December 15, 2020 was erroneous and unjust because the Coast Guard used HST which is not a supported testing procedure under federal guidelines and because he did not ingest cocaine and was exposed to it though his wife's drug use. For the reasons outlined below, the Board disagrees:

a. HST. The record shows that the applicant was subject to random drug testing on August 13, 2020 using HST. However, the applicant alleged that the HST that was used to support his CO's finding of a drug incident and ultimately led to his removal from primary duties was erroneous and unjust because Coast Guard policy does not provide procedures for hair follicle testing. However, the applicant has failed to point to one Coast Guard policy, and the Board could find none, that specifically prohibits the use of hair follicle testing for determining illicit drug usage within a given unit or individual.

   The applicant pointed to federal regulations and policies, many of which do not apply to members of the Coast Guard and failed to establish that the Coast Guard was specifically prohibited from using any other technologically accepted means of testing. In addition, Rule 313 of the Military Rule of Evidence in the Manual for Courts-Martial (MCM) states "***[i]nspections may utilize any reasonable natural or technological aid*** and may be conducted with or without notice to those inspected" (emphasis added). The record also shows that the Coast Guard at large and the District where the applicant was stationed approved of the use of HST.

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[1] 33 C.F.R. § 52.24(b).
[2] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

Given 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. Nor has the applicant shown that it was contrary to law or policy.

b. The applicant alleged that the Coast Guard erred in issuing him a drug incident because he did not ingest cocaine and was exposed to it though his wife's drug use. The applicant claims his wife and her friends used cocaine in their home unbeknownst to him and he was exposed through contact with surfaces or sexual contact with his wife. The record shows that the applicant provided this explanation to the CGIS agents and his executive officer, and that the agents interviewed his wife and one of the friend's present that night. However, the applicant has not shown that his command failed to consider this evidence. Further, the command also had evidence from a scientist, with over 40 years of experience, refuting the applicant's alternative theory that the cocaine entered his system through sexual contact.

   Per Article 5.E.2. of the Military Drug and Alcohol Policy Manual, COMDTINST M1000.10A (June 2018), in determining a drug incident, the command uses a preponderance of the evidence standard meaning, "when all evidence is fairly considered, including its reliability and credibility, it is more likely than not the military member intentionally ingested drugs" and "a positive confirmed test result, standing alone, may be sufficient to establish intentional use and thus suffice to meet this burden of proof." After the initial test as well as a second positive test, the Coast Guard had sufficient evident to meet this standard. The applicant provided the command alternative theories, but this does not mean that the command has to accept the alternative theories. The applicant has not demonstrated that it was either erroneous or unjust in the command's conclusion that a preponderance of evidence supported that he intentionally ingested the drugs.

5. 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.[3] He has not proven, by a preponderance of the evidence, that either his documented drug incident was erroneous or unjust. Accordingly, the applicant's requests for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

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

ORDER

The application of retired CWO3 [redacted] USCG, for correction of his military record is denied.

September 5, 2024

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