DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2024-055

[redacted]
BMC (Former)

FINAL DECISION ON RECONSIDERATION

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 September 7, 2022, 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 May 24, 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 is a former Chief Boatswain's Mate (BMC/E-7) who was discharged on August 25, 2022, 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 documented drug incident on January 20, 2022. He asked the Board to correct his military record by providing him with a 90-day extension and retiring him with 20 years of service. The applicant stated that the 90-day extension is all he needs for his benefits to fully vest. The applicant further requested that the Board remove a March 17, 2022, negative CG-3307 ("Page 7") wherein he received a drug incident for disclosures he made during a polygraph examination. The Page 7 states the following:

> On or about 20Jan22, it was determined that you were involved in a drug incident while serving on active duty in the Coast Guard. During an applicant polygraph exam on or about 20Jan22, you admitted to using drugs, including cocaine and marijuana, on multiple occasions between 2002 and 2018. You admitted to

[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."

> using marijuana in 2009 while on leave in [redacted]. You also admitted to using cocaine while on leave in [redacted], at a Mardi Gras celebration in 2018. You used these illicit and controlled substances while you were on active duty and holding a Secret Security Clearance.
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> You were counseled on Chapter 2 of the Military Drug and Alcohol Policy, COMDTINST MJ000.10 (series). The unit Command Drug and Alcohol Representative (COAR) will arrange an appointment with a provider who will determine the nature of your relationship with drugs.

Through counsel, the applicant alleged that the Coast Guard relied on uncorroborated statements made in a national security adjudicative process to find that he had violated the Coast Guard's drug policies and then summarily eliminated his 20-year retirement benefits after he had completed 19.5 years of service. The applicant argued that this denial resulted in the government receiving a multi-million dollar windfall. The applicant claimed that the denial of his retirement benefits after having served for 19-1/2 years was an extreme injustice that shocks the conscience.

The applicant explained that in January 2022, he applied to work for Customs and Border Protection (CBP), a job that was meant to follow his planned retirement later that year. Up to this point, the applicant claimed that his Coast Guard career was relatively unblemished and that he had never failed a drug test while on active duty. The applicant stated that part of CBP's application process included a polygraph examination. According to the applicant, CBP applicants are encouraged to over-disclose and be as transparent as possible. The applicant cited to Appendix A of the National Security Adjudicative Guidelines which states,

> It must be noted that the adjudicative process is predicated upon individuals providing relevant information pertaining to their background and character for use in investigation and adjudicating their national security eligibility. Any incident of intentional materials falsification or purposeful non-cooperation with security processing is of significant concern. Such conduct raises questions about an individual's judgment, reliability, and trustworthiness and may be predictive of their willingness or ability to protect national security.

The applicant alleged that with this guidance in mind, many applicants are properly advised to resolve doubts as to experiences or prior misconduct in favor of disclosure to avoid all possibility of an alleged misrepresentation or false statement. The applicant claimed that under this guidance, if one is unsure of the details surrounding some prior instance of misconduct, it would be far better to fill in the details against their interest in the hopes of avoiding negative conclusions that could arise with an untrue or non-responsive answer. The applicant stated that Appendix E, Personal Conduct, is essentially devoted to encouraging full and frank responses and participation in the adjudicative process. Additionally, in the security context, the applicant claimed that there is a statutory presumption against granting a clearance. Applicants must earn the trust given to them and are essentially encouraged to do this by resolving all doubt or concerns one might have as to their willingness to disclose prior misconduct.

With this guidance in mind, the applicant stated that he recalled two incidents where he was extremely intoxicated and during this time there were others around him doing cocaine, but he has no specific recollection of using cocaine himself. He recalled other instances where his memories were hazy, but believed the polygraph examiner wanted more disclosures to "make it right." The applicant claimed that he did not want to appear dishonest so he disclosed multiple other occasions where he was actually confident that no drug use had occurred at all. The applicant alleged that after this, CBP immediately called Coast Guard Investigative Services (CGIS) and he was removed from his post, transferred to Sector, given a drug incident and declared ineligible to

reenlist. Moreover, the applicant claimed that he was denied any due process because all of this transpired five days before the expiration of his enlistment.

The applicant argued that uncorroborated statements have little evidentiary value. According to the applicant, considering the context of the polygraph examination, the statements he did make cannot support a finding of a drug incident by a preponderance of the evidence. The applicant claimed that what he actually did during the polygraph examination "was reasonably resolve his own doubts and reservations" about what had transpired the night he was intoxicated "in favor of full disclosure in order to be as transparent as possible." The applicant explained that he disclosed every instance where he knew substances were present and resolved any uncertainty regarding his own use in favor of disclosure so that he would pass the polygraph exam. According to the applicant, his disclosures were reasonable and appropriate for that context given that he was expected to cooperate. He further claimed that where he had a remote suspicion that he may have been in the presence of someone using illicit substances, he stated that use had occurred, even when he was unsure, all to provide his prospective employer a description of the greatest possible extent of his misconduct.

The applicant explained that throughout his career he was a straight arrow, who worked hard and spent time with family. However, over the years, there were a couple of instances while on leave that he came in contact with illegal substances. He acknowledged that just being in a place where these substances were is admittedly bad judgment on his part, and he always felt bad about even being around it. The applicant alleged that when these encounters occurred he was undeniably inebriated and was never sure if he ingested the substances, but he knew drugs were present and always felt guilty about being there. He further alleged that he had no specific recollection of ingesting any illegal substances, but because he did not want the polygraph to detect that he was hiding something, so he disclosed the two instances as fact, even though he was unsure. The applicant claimed that these admissions were made because he wanted the "machine" to see him as truthful.

The applicant alleged that after he voluntarily disclosed the instances of drug use, the proctor explained that something was not adding up and suggested that there were more instances. The applicant stated that at that point he felt like he was so vested in the process and believed that the examiner was just trying to help him get a favorable outcome on the polygraph that he continued to agree with the examiner's suggestions. The applicant explained that he was feeling extremely distressed and anxious and would have never agreed to any of the examiner's suggestions in his normal state of mind because it simply was not true. The applicant stated that the two occasions that he admitted to have always weighed heavily on his mind. He claimed that at the time he was inebriated, used bad judgment and found himself in a place he should never have been. However, he cannot be sure that any wrongdoing actually took place on his part. The applicant noted that he never failed a drug test or denied taking one while on active duty.

The applicant alleged that the unknown factor is the degree to which his actual misconduct deviated from this possible misconduct which was described for CBP's polygraph examiner. The applicant contended that the Sector Commander assumed, without evidence, that his statements were in fact the actual extent of his misconduct, rather than the possible extent of his misconduct.

This misplaced reliance is in extreme tension with the concern military and civilian courts have had over such reliance on uncorroborated statements. The applicant claimed that no one, not even he could recall precisely what happened on those instances and depriving him of a 20-year retirement based on theoretical possibilities is unjust and unlawful.

The applicant alleged that his Sector Commander determined, by a preponderance of the evidence, that the applicant did what he admitted to doing in order to find that a drug incident had occurred, but the preponderance of the evidence is defined as "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact by but be evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden at most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge might be."[2] The applicant argued that courts also employ a preponderance standard at sentencing. In *United States v. Tessina,* the Court considered the uncorroborated "ballpark" estimate of the weight of drugs sold by the defendant at his sentencing hearing following his conviction for distributing heroin. The Court found that "[s]entencing courts have wide discretion in deciding what to consider, but a sentencing calculation that is based on nothing more than a "ballpark number" when the informer admitted that he could not truthfully recall the number of times he purchased drugs ***does not meet any standard of proof.*** And computing Guidelines based on an uncorroborated statement that admittedly was not much better than a guess might raise due process concerns as well."[3] The applicant argued that it is well-settled in black letter law, military courts, and civilian courts that uncorroborated confessions cannot support a conviction.

The applicant explained that the Military Rules of Evidence (MRE) discuss the value of uncorroborated confessions, stating that "An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been admitted into evidence that would tend to establish the trustworthiness of the admission or confession."[4] Furthermore, the applicant stated, "The corroboration requirement for admission of a confession at court-martial does not necessitate independent evidence of all the elements of an offense or even of the corpus delicti of the offense. Rather, the corroborating evidence must raise only an inference of truth as to the essential facts admitted. Moreover, while the reliability of the essential facts must be established, it need not be done beyond a reasonable doubt or by a preponderance of the evidence."[5] In addition, the applicant stated that "[b]oth [Mil. R. Evid.] 304(c)(l) and *Cottrill* set forth a very low standard,"[6], and "it is settled military law that the quantum of evidence needed to corroborate [a confession] may be very slight."[7] The applicant claimed that generally speaking, the corroboration

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[2] *Black's Law Dictionary,* Ninth ed. 2009
[3] *United States v. Tessina,* 2017 U.S. Dist. LEXIS 204598 at 16-17 (N.Y. West. Dist. Ct. 2017).
[4] Military Rules of Evidence 304(c)(1).
[5] *United States v. Seay,* 60 M.J. 73, 79 (C.A.A.F. 2004) (citing *United States v. Cottrill,* 45 M.J. 485, 489 (C.A.A.F. 1997)).
[6] *Seay,* 60 M.J. at 80.
[7] *United States v. Grant,* 56 M.J. 410,416 (C.A.A.F. 2002) (citing *United States v. Melvin,* 26 M.J. 145, 146 (C.M.A. 1988)).

need only establish the confession is trustworthy.[8] The applicant stated that while this is not a criminal case, and the rules of evidence do not apply, the stakes in this case are high enough to warrant the same level of precision. The finder of fact should be just as concerned with the "trustworthiness" and reliability of his polygraph admissions because he stands to lose a retirement and benefits worth well into the 7 figures.

The applicant claimed that he was denied a four-month enlistment extension to get to a 20-year retirement because of his Sector Commander's overreliance on uncorroborated admissions to find a drug incident. The applicant alleged that the value of his retirement is well over one million dollars, not to mention the independent value of that benefit to his wife as a "20-year spouse," and his children as G.I. Bill recipients, in addition to their collective interest in lifelong medical care. The applicant argued that due to the extremely high value of the benefits at stake, a level of precision commensurate with the care applied in a criminal case is warranted. The value of the M.R.E. 304 considerations, while not binding, are certainly instructive.

To support his application, the applicant submitted an unsworn declaration from another Coast Guard member, who, like the applicant, took part in a CBP polygraph examination prior to the end of his enlistment. This service member, Mr. A, stated that in order to be completely honest with CBP, he admitted to using drugs prior to his time in the service. Mr. A had claimed that he was unaware that he did not disclose his prior drug use on his original SF-86. Mr. A stated that his confidence in his admission was low because he did not have a clear recollection of it, but was trying to be totally compliant and disclose any close calls so the machine would not think he was lying. According to Mr. A, initially he was told that he would receive a drug incident and a general characterization of discharge, but he retained a lawyer, who successfully challenged the adverse personnel actions. Mr. A claimed that he was never given a drug incident and received an Honorable characterization of service upon his discharge from the Coast Guard.

The applicant stated that like Mr. A, his polygraph examination involved admissions of preservice illegal drug use that were not included on his initial SF-86. Also like Mr. A, the applicant explained that he recalled the incidents of alleged drug use vaguely, was uncertain about his culpability, but disclosed his actions as misconduct, nonetheless. However, the applicant alleged that in Mr. A's case, the Coast Guard only threatened Mr. A with a General discharge and drug incident, but ultimately did not follow through because the evidence was insufficient. The applicant claimed that Mr. A was allowed to remain on active duty through the end of his enlistment and provided Mr. A with an Honorable characterization of service. According to the applicant, his case is stronger than Mr. A's. The applicant argued that the Coast Guard needs to provide a rationale for the disparate treatment he received compared to Mr. A's.

The applicant stated that if this Board were to deny the applicant's request for relief, a substantive response to this petition is requested pursuant to 5 U.S.C. § 555(e), which was applied to military decision makers in *Roelofs v. Sec'y of Air Force*.[9] The applicant argued that the Court in *Roelofs* found that § 555(e) is not limited to cases where a specific statutory prescription exists but applies "according to the provisions thereof." Section 555(e) applies where "a written

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[8] See *United States v. Rounds,* 30 M.J. 76, 80 (C.M.A. 1990) (citing *Opper v. United States,* 348 U.S. 84, 93, 75 S. Ct. 158, 99 L. Ed. 10 I (1954)).

[9] *Roelofs v. Sec'y of Air Force,* 202 U.S. App. D.C. 307, 628 F.2d 594, 599-600 (1980).

application, petition, or other request ... made in connection with any proceedings" is denied. The applicant claimed that the requirement of "a brief statement of the grounds for denial" remains even though the request pertains to a matter of discretion or grace, not one of entitlement. The applicant also cited to *King v. United States*,[10] wherein the Court in the Seventh Circuit held that an application for parole, which is a matter of discretion rather than one of entitlement was subject to the requirements of § 555(e). The applicant argued that the informal nature of this petition does not negate the applicability of § 555(e) and that the *King* doctrine applies to his case. Accordingly, the requirement of a statement of the basis for denying a request, even though there is no formal proceeding or hearing is binding on the adjudicating official on the PRRB.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on November 18, 2002, and entered into the Boatswain's Mate rating where he continued to advance.

On January 20, 2022, the applicant sat for a polygraph examination as part of the application process for CBP. During this examination, the applicant admitted to using marijuana in 2009 while on leave and to using cocaine while on leave in 2018.

On March 17, 2022, as a result of the applicant's admissions during his polygraph examination, the applicant's Command issued him a drug incident as documented in a Page 7. The applicant was notified that he would be processed for separation in accordance with Article 5 of the Coast Guard's Drug and Alcohol Policy Manual, COMDTINST M1000.10.

On March 17, 2022, a reenlistment interview was conducted and it was determined that the applicant did not meet reenlistment eligibility criteria pursuant to Article 1.E.2. of the Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2. The applicant also failed to receive his commanding officer's recommendation for reenlistment because of the documented drug incident.

On April 5, 2022, the applicant acknowledged that he had been informed that he did not meet reenlistment eligibility criteria and that he had failed to secure a recommendation for reenlistment from his commanding officer. The applicant elected to submit a statement on his own behalf.

On April 12, 2022, the applicant submitted a statement wherein he requested that he be granted a 90-day extension in order to obtain the necessary amount of time to voluntarily retire. He further requested that he be retired at the rate of an E-6 under the Final Pay Rule to account for his misconduct. The applicant also stated:

> 2. I have made some mistakes while on active duty in the Coast Guard and I am ready to be held accountable for those mistakes. I am extremely disappointed in myself for the occasions where I failed to live up to the high standards of Honor, Respect, and Devotion to Duty that characterized much of my service.
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> 3. I had several instances of poor judgment involving substance abuse while on active duty, but my lapses in judgment were more limited than my responses to the polygraph examiner at CPB might suggest, however,

[10] *King v. United States,* 492 F.2d 1337 (1974).

> the number is irrelevant. Even one time would have been a disgrace to my uniform, but these incidents do not characterize me or my service. I know that they are exceptions to who I am. I provided consistently strong performance at five Coast Guard stations and one cutter. I was recommended for advancement on almost all of my evaluations and worked hard to earn a reputation as a hard worker and professional Coxswain. I remained focused on earning my certification as an Officer in Charge and passed my Sector Board at my previous duty station. I was continuing to pursue that goal as the XPO [Executive Petty Officer] at Station [redacted]. I realize that I have thrown all of that hard work and credibility in the garbage with my misconduct. I will have to live with that for the rest of my life.
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> . . .

On May 2, 2022, the applicant's Sector Commander recommended that the applicant be discharged due to the applicant's admission of using illegal substances. That same day the applicant signed a First Endorsement, wherein he objected to his discharge and elected to submit a personal statement.

On August 25, 2022, the applicant was discharged from the Coast Guard with a General—Under Honorable Conditions characterization of service.

On May 3, 2024, in its decision for BCMR Docket No. 2022-078, the Board denied the applicant's request to be granting him a 90-day service extension and allowing him to retire with 20 years of service. However, the Board issued its final decision without having recorded the applicant's reply to the Coast Guard's Advisory Opinion.[11] Upon being notified of the Board's error, a new case was opened to fully address the applicant's allegations and arguments.

VIEWS OF THE COAST GUARD

On March 9, 2023, 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 Personnel Service Center (PSC).

PSC recommended that the Board deny relief in this case based on a lack of evidence that the Coast Guard committed an error or injustice. PSC stated that the applicant admitted to the use of two controlled substances on more than one occasion while on active duty. PSC explained that the Coast Guard has a zero tolerance drug policy and in accordance with this policy the applicant was discharged. Finally, PSC noted that members with documented drug incidents are not ineligible to reenlist.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 17, 2023, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. The Chair received the applicant's response on August 16, 2023, but did not become aware of it until May 21, 2024.

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[11] The applicant's attorney sent the applicant's response to the Advisory Opinion to the individual email account of the Board's paralegal instead of to the BCMR's general email address. This resulted in the applicant's response being overlooked

Through counsel, the applicant argued that the Coast Guard's advisory opinion was non-responsive and failed to address the evidentiary sufficiency of the Commanding Officer's preponderance finding. The applicant explained that in his petition, he provided authority to show that the weight of uncorroborated admissions or confessions, especially when based on incomplete or vague memory of the accused, is insufficient to meet any standard of proof. The applicant contended that the Coast Guard provided no countervailing authority to support the reliance they have placed on the evidence in question.

The applicant claimed that he never failed to pass any drug test given to him nor did he ever seek to avoid any drug test. He further claimed that he served faithfully and honorably for almost 20 years and his family built their future on his career and his service. The applicant explained that when he applied to the Customs and Border Patrol (CBP), he was trying to continue his service to his country, but had no idea of the "snake pit" he was walking in to. The applicant alleged that the CPB polygraph contractor is renowned for its aggressive and unethical practices and has a reputation for exploiting the good faith and honesty of applicants. According to the applicant, CBP and congressional leadership are now questioning this approach, as some of the extreme approaches and shameful behavior were revealed earlier this year.

The applicant accused the CBP polygraph examiners of using psychological torture when vetting applicants, and argued that their approach should not cost him his retirement. The applicant argued that relying on the CBP polygraph as "evidence" to support a drug incident should not be upheld by this Board. The applicant further argued that the Coast Guard seriously misconstrued the meaning of their own "zero tolerance" policy, because before you can have "zero tolerance" toward misconduct, you must first critically evaluate the evidence, apart from your emotional reaction to the allegations. The applicant claimed that here, the Coast Guard treated the allegation as evidence, reacted emotionally, and refused to grant a 90-day extension to allow for his retirement to "vest." The applicant argued that this result is shocking and unjust and the American taxpayer would agree.

The applicant claimed that in any other branch of service, he could not have been separated without retirement after having served for 19 years, 9 months with zero due process of law. The applicant contended that the safe harbor statute provided for members of the other branches of service require those services to provide a board and some due process prior to separation. Had that happened here, the Coast Guard would have had a board of officers review the evidence and make a recommendation to the Personnel Service Center as to his retention and/or retirement. The applicant claimed that the disparity in his treatment when compared to other service members serving under other military branches implicates the Equal Protection and Due Process Clauses of the U.S. Constitution. "The equal protection clause of the fourteenth amendment guarantees that "no State shall…deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV § 1. The applicant argued that the Equal Protection clause is applicable to the federal government through the Due Process clause of the Fifth Amendment. *United States v. Iron Shell*, 633 F.2d 77, 89 n. 17 (8th Cir. 1980) (citing *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954)). He further argued that statutes drawing a classification are generally held to be valid if the classification is rationally related to a legitimate government interest. *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). Strict scrutiny is invoked by statutes that classify based on exercise of a fundamental right.

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-13, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976) ("Equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class."). *Loomis v. United States*, 68 Fed. Cl. 503, 521 (2005).

The applicant stated that he is in a class of enlisted service men and women of paygrade E-7 who serve their country on periods of enlistments. According to the applicant, all military branches have uniformly recognized that reliance upon the prospective benefits of military service increases with length of service. For example, the applicant explained that within the Department of Defense (DoD), members get additional due process to defend themselves against involuntary separation at 6 years, but in the Coast Guard the same rights accrue at 8 years. The applicant stated that in addition, Congress recognized that, after 18 years of service, reliance has increased even more, and additional protection is warranted. In accordance with this belief, Congress acted to protect that interest with 10 U.S. Code § 1176,[12] which prevents the separation of an enlisted member of DoD who has attained at least 18 years of service. The applicant claimed that he is a member of the "suspect class" but is unreasonably denied the protection of the statute because a parallel statute was not included in Title 14. The applicant argued that there is no basis or unique reason to justify the Coast Guard's deprivation of its E-7 members the protection extended by Congress to their counterparts serving with the DoD. The applicant claimed that no other similarly situated E-7 in any other military branch could be summarily discharged with only a few weeks' notice after 20 years with no benefits, on the basis of one person's preponderance of the evidence finding.

The applicant contended that this Board should find that the evidence relied upon by the Commanding Officer was insufficient to warrant denial of enlistment and direct the application of a correction to his DD-214 to reflect 20 years of service to his country. The applicant stated that while the equal protection issue is compelling in demonstrating the incongruent injustice of the Coast Guard's practice, the far more compelling basis for relief in this case is the insufficiency of the evidence considered by a single officer. The applicant claimed that this one individual only considered statements made by him in an inappropriately coercive environment wherein he was extremely vulnerable. The applicant argued that statements in this context simply cannot form the basis for a finding by any standard of proof. The consequence of this finding is aggravating, as is the equal protection violation. This correction would be consistent with the Board's mandate to prevent and correct manifest injustice.

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[12] Title 10 U.S.C. § 1176 states, "**(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.

Title 10 U.S.C. § 7314 states, "Under regulations to be prescribed by the Secretary of the Army, an enlisted member of the Army who has at least 20, but less than 30, years of service computed under section 7325 of this title may, upon his request, be retired;" and

Title 10 U.S.C. § 9314 states, "Under regulations to be prescribed by the Secretary of the Air Force, an enlisted member of the Air Force or the Space Force who has at least 20, but less than 30, years of service computed under section 9325 of this title may, upon his request, be retired."

To support his response, the applicant submitted news articles wherein other CBP applicants claimed that aggressive, humiliating polygraph examination tactics blocked them from joining CBP despite the fact that the agency is short staffed.[13]

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.

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.
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> (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
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> (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).

[13] These articles do not prove error or injustice on the part of the Coast Guard, nor do they prove that the answers provided by the applicant during the polygraph examination were not true. Accordingly, these articles will not be summarized here.

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.
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> (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.
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> (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.[14]

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. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving, by a preponderance of the evidence, that the disputed information is erroneous or unjust.[15] Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."[16]

5. The applicant alleged that it was erroneous and unjust for the Coast Guard to deny him a 90-day extension in order for him to obtain his retirement. The Board's review of the record shows that in January 2022, the applicant's Command learned that the applicant had admitted to using illegal drugs while on active duty on two separate occasions. Specifically, the applicant admitted to using marijuana in 2009 while on leave and then using cocaine in 2018 while on leave. On both occasions the applicant was still on active duty. As a result of these admissions, the applicant received a documented drug incident and his Command initiated separation proceedings against the applicant as required by Article 1.B.17.b.4 of the Military Separations Manual, COMDTINST M1000.4. Despite the fact that the applicant used these drugs in 2009 and 2018, the Coast Guard, and in particular the applicant's Command, remained unaware of his drug use until January 2022.

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[14] *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).
[15] 33 C.F.R. § 52.24(b).
[16] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

6. 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. Moreover, Article 1.B.17.b.4. of COMDTINST M1000.4 states that any member involved in a drug incident will be processed for separation with no higher than a General—Under Honorable Conditions characterization of service.

7. The applicant alleged that it was erroneous and unjust for his Commanding Officer to rely on uncorroborated statements made during a polygraph examination to issue the drug incident. According to the applicant, "Uncorroborated statements have little evidentiary value and considering the context in which Chief [Applicant] made his statements, those statements cannot support a finding of a drug incident by a preponderance of the evidence**."** However, not only are the applicant's arguments misplaced, but they are unsupported by Coast Guard policy. Article 5.E.2. of the Coast Guard Military Drug and Alcohol Policy, COMDTINST M1000.10A (June 2018), states, "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." Here, not only did the applicant admit to using these drugs during a polygraph examination, but he also admitted to using the drugs in a contemporaneous personal statement he made to the Coast Guard on April 12, 2022, in objection to his separation. Specifically, the applicant stated,

> I have made some mistakes while on active duty in the Coast Guard and I am ready to be held accountable for those mistakes. I am extremely disappointed in myself for the occasions where I failed to live up to the high standards of Honor, Respect, and Devotion to Duty that characterized much of my service.
>
> I had several instances of poor judgment involving substance abuse while on active duty, but my lapses in judgment were more limited than my responses to the polygraph examiner at CPB might suggest, however, the number is irrelevant. Even one time would have been a disgrace to my uniform, but these incidents do not characterize me or my service. I know that they are exceptions to who I am.

The Board finds the statements made by the applicant during the polygraph examination to be persuasive and sufficient for his commanding officer to determine that the applicant used illegal drugs while on active duty by a preponderance of the evidence. The applicant's response to the advisory opinion accuses the examiner of psychological torture, but he did not submit any evidence showing that the statements he provided during the examination were falsified or unreliable. The fact that the applicant had never failed a drug test is also not persuasive because he submitted no evidence to show that he underwent drug tests during these periods of admitted use. In addition, at no point in his personal statement does the applicant make the claims that he now makes to this Board, namely that he was only trying to resolve any discrepancies in his conscience to ensure the "machine" did not think he was lying and that he did not in fact ingest illegal substances.

Finally, as argued by PSC, the Coast Guard, as a law enforcement agency with drug interdiction as a major mission, has a zero tolerance policy on drug use, and the applicant was

discharged in accordance with its policies. The applicant hid his drug usage from the Coast Guard and received the benefit of this deception by remaining employed with the Coast Guard for another 12 years when policy dictated that he be discharged with no higher than a General discharge in 2009, which was the earliest admitted drug use. The applicant has failed to point to one Coast Guard policy, and the Board could find none, that required the Coast Guard to grant him the 90-day extension in order to obtain his retirement benefits. The applicant's response to the advisory opinion does not dissuade the Board nor does it provide any evidence of error or injustice. Despite the applicant's contentions in his response to the advisory opinion that it was the CBP examiner's conduct that cost him his retirement, it was not the examiner's conduct but his own misconduct—the use of illegal substances—that resulted in his separation and made him ineligible to remain in the Coast Guard. The record shows that had he admitted his drug use earlier, the applicant would have ceased being eligible for retirement in 2009 when he unlawfully ingested marijuana while still on active duty and while holding a security clearance and again in 2018 when he ingested cocaine. Therefore, the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard committed an error or injustice when it separated him for failing to meet reenlistment eligibility criteria.

8. Equal Protection. In his response to the advisory opinion, the applicant claimed that the Coast Guard violated the Equal Protection and Due Process Clauses of the United States Constitution. According to the applicant, he was denied equal protection under the law because similarly situated enlisted members, serving in the Army, Navy, Air Force, and Marine Corps would not have been separated so close to retirement without additional due process. The applicant argued that he is a part of a "suspect class" because he was unreasonably denied the protection under 10 U.S.C. § 1176 because a parallel statute was not included in Title 14. However, the applicant's former status as a Coast Guard E-7 does not constitute a suspect class. "A suspect class either 'possesses an immutable characteristic determined solely by the accident of birth,' or is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'"[17] Because the applicant's former status as a Coast Guard E-7 is not a suspect class he has failed to prove that 10 U.S.C. § 1176 (or the lack of such a statute in Title 14) should be subject to strict scrutiny because it denies Coast Guard members similar protections under the law. As stated in previous findings, the record shows that the Coast Guard followed applicable laws and policies in discharging the applicant for his admitted drug use on multiple occasions. And the applicant has failed to prove, by a preponderance of the evidence, that the applicable laws and policies violated his constitutionally protected rights.

9. To support his application, the applicant submitted an unsworn declaration from another service member who, like the applicant, had disclosed prior drug use during a polygraph examination with CBP, but unlike the applicant, Mr. A was not discharged and was given an Honorable characterization of service after separating from the Coast Guard. However, the Board finds the applicant's reliance on Mr. A's somewhat similar circumstances misguided and

[17] *Segovia v. United States*, 880 F.3d 384, 390 (7th Cir. 2018) (quoting *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 638 (7th Cir. 2007) (citing *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), and *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973)).

unpersuasive. To begin, Mr. A's situation is distinguishable from the applicant's because Mr. A's admission involved drug use that had occurred prior to his entry into the Coast Guard, not drug use that had occurred while on active duty, like the applicant's. Second, Mr. A's claims that he was allowed to remain in the service is not evidence of an error or injustice in the applicant's case. As stated previously in this decision, Coast Guard policy mandates that a service member with a documented drug incident be separated from the service with no higher than a General discharge. Here, the applicant admitted to using controlled substances while still on active duty which was a violation of Coast Guard policy and was separated in accordance with policy.

10. The applicant made numerous arguments about the Military Rules of Evidence and case law to support his arguments, however, as acknowledged by the applicant, the Military Rules of Evidence do not apply to his case. Likewise, the case law relied upon by the applicant is also inapplicable to his case. First, in *United States v. Tessina*, the "ballpark" estimates to which the court is referring does not apply here. The applicant did not give "ballpark" estimates of when he may or may not have used drugs, but cited specific occurrences and locations. Finally, *United States v. Seay*, is also inapplicable because the applicant was not subjected to a Court Marial where the rules of evidence are at play and Coast Guard policy does not require corroborating evidence to support a finding of a drug incident. All that is required for a drug incident is that it be proven by a preponderance of the evidence, that it is more likely than not that the service member engaged in the illegal drug use. Considering that most service members do not go around falsely claiming to have used illegal drugs, it is not unreasonable for the Coast Guard to find a service member's admission to using illegal drugs credible knowing that such an admission is so detrimental to one's career.

11. 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.[18] He has not proven, by a preponderance of the evidence, that the Coast Guard committed an error or injustice when it failed to grant him a 90-day extension and separated him for failing to meet reenlistment eligibility criteria after it was found that he had violated the Coast Guard's drug policy. Accordingly, the applicant's request for relief should be denied.

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

ORDER

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

May 24, 2024

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