DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2022-025

[redacted]
EMC

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 March 16, 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 February 3, 2023, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, a former Chief Electronics Mate (EMC/E-7), who received a General[1] discharge on September 30, 2021, after being denied reenlistment for the illegal use of codeine, asked the Board to correct his record by making the following changes:

- Provide him with a medical retirement or process him through the Physical Disability Evaluation System (PDES);
- Upgrade his characterization of service from General: Under Honorable Conditions, to Honorable;
- Change his reenlistment code from RE-4 to RE-1, or the appropriate code for a medical retirement, which is RE-2 ;
- Remove a negative Administrative Remarks form CG-3307 ("Page 7") dated March 15, 2021, wherein the applicant was counseled for a "drug incident" that had occurred on March 9, 2021; and

[1] There are five types of discharge: three administrative and two punitive. The three administrative discharges are honorable, general—under honorable conditions, and under other than honorable (OTH) conditions. The two punitive discharges may be awarded only as part of the sentence of a conviction by a special or general court-martial.

- Remove another Page 7 dated March 18, 2021, wherein the applicant was informed that he did not meet criteria for reenlistment and was therefore ineligible to reenlist at the end of his current enlistment.

The applicant, through counsel, alleged that the Coast Guard committed an error and injustice when it relied upon a urinalysis from a federal treatment facility to issue him a drug incident and subsequently deny him reenlistment. The applicant further alleged that the Coast Guard circumvented his due process rights by choosing to deny him reenlistment instead of allowing him the opportunity to go before a court-martial or receive Non-Judicial Punishment (NJP). Finally, the applicant alleged that the Coast Guard erroneously and unjustly denied him a medical retirement, or the opportunity to appear before a PDES board.

A more detailed summary of the applicant's allegations is provided below the Summary of the Record.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on August 5, 2003. On August 3, 2013, the applicant temporarily separated from the Coast Guard, returning to active duty on September 1, 2015.

On September 18, 2020, the applicant began his first round of treatment for alcohol abuse at a local rehabilitation center.

According to a Coast Guard Investigative Services (CGIS) report, on November 3, 2020, the applicant was assaulted by his wife, who was later arrested and removed from the home.

On November 5, 2020, the applicant reported to an outpatient alcohol treatment program, where he provided a urine sample upon entering the facility. The sample provided by the applicant tested positive for codeine (1,051 ng/ml), morphine (261 ng/ml), normorphine (64 ng/ml) and norcodeine (81 ng/ml).

On November 9, 2020, a program counselor notified the applicant that he had tested positive for codeine. Initially, the applicant denied any use of drugs, but, after continued conversation with his counselor, he stated that he "did take some of [his] wife's pills that were in an Advil bottle. She uses opiates so I guess that is what I took." The program counselor noted that the applicant did not deny taking the pills, only that he was not aware that the pills he took were opiates.

According to a report of the Coast Guard Investigative Service (CGIS), on February 10, 2021, following the results of the urinalysis, the applicant was interviewed by CGIS investigators. The CGIS notes include the following:

> [The applicant] explained he had a fight with his wife, she contacted USCG Work Life, and ultimately both the police and Child Protective Services arrived at the house. His wife was subsequently arrested for Domestic Violence.

> Special Agent's Note: [The applicant] was referencing an incident that occurred on 11/03/2020 at his residence in [city redacted], which is documented under CGIS case number CS2011001790. He stated that due to the stress of the incident and everything that transpired the evening his wife was arrested, he had a migraine headache. He said he was looking for something to take for the migraine. looked in the cabinet. and his wife had some of her mother's 'Norco' so he took one of those pills.
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> [The applicant] admitted to taking Norco (a prescription combination of acetaminophen and hydrocodone). He explained there was nothing else in the house for him to take to relieve his migraine. He said he was vomiting, could not drive, and did not want to call the hospital to come to the house.
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> [The applicant] said that the next day he drove up for his appointment at the [private] treatment facility [redacted location], which is where he tested positive for the controlled substances. He explained that Norco is a strong pain killer, and his mother-in-law had the prescription due to a medical condition. His wife had them at the house because his mother-in-law stopped taking them due to a doctor's order. His wife takes the Norco on occasion due to neck pain.
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> [The applicant] stated he does not have any prescriptions for pain medication. His last prescription for pain medication was back in 2013 for shoulder surgery.
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> [The applicant] said it was a "stupid decision" to take the Norco. At the time, he had a pounding headache and just wanted it to go away. He explained that when he started his treatment at [the private facility], they gave him a urinalysis, and he tested positive. He realized it was from the Norco he took. He said he told the counselor that he had taken the pain medication, which was documented in a report and provided to [the Coast Guard].
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> [The applicant] stated he knows he was not supposed to take the Norco. This was discussed during his therapy sessions. He was tested weekly for the rest of his treatment at [the facility].
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> [The applicant] said he was aware he is not supposed to take prescription medication without a prescription.

The CGIS report also states that, when confronted with the test result by his counselor at the treatment center on November 9, 2020, the applicant "initially denied any use. After continued discussion with [the counselor], [the applicant] stated that on 11/04/2020 he had an argument with his wife who was arrested, and stated he had a migraine. According to the [counselor's] report, [the applicant] stated "I did take some of my wife's pills that were in Advil bottle. She does use opiates so I guess that is what I took."

On March 15, 2021, the applicant received a negative Page 7, wherein he was counseled for his illegal use of prescription narcotics. The applicant's Commanding Officer (CO) noted that the Report of Investigation showed that, on February 10, 2021, the applicant admitted to having taken Norco, a prescription drug containing acetaminophen and hydrocodone, while knowing that it was a controlled substance and that he did not have a prescription for it.

On March 18, 2021, the applicant underwent a reenlistment interview pursuant to Article 1.B.4.b. of the Military Separations Manual, COMDTINST M1000.4. According to the Page 7 documenting the interview, the applicant's CO had found that the applicant did not meet reenlistment eligibility criteria, as required under Article 1.E.2. of the Coast Guard Enlistments, Evaluations, and Advancements manual, COMDTINST M1000.2. The CO noted that the applicant had failed to receive his recommendation for reenlistment because of a violation of Article 112(a)—Wrongful Use of a Controlled Substance, of the Uniform Code of Military Justice (UCMJ). The CO explained that the applicant had admitted to taking a controlled substance

without a prescription, as documented by the CGIS investigation. The applicant's CO explained to the applicant that, because he had failed to meet the reenlistment eligibility criteria and failed to obtain a positive recommendation for reenlistment, he was not eligible to reenlist and was not entitled to a reenlistment board. Finally, the applicant was informed that his CO would submit a memorandum to the Personnel Service Center Enlisted Personnel Management division (EPM) to discharge the applicant upon the expiration of his enlistment.

On March 18, 2021, the applicant acknowledged receipt of the proposed discharge and his right to consult with an attorney. The applicant objected to his discharge and requested 15 days to prepare a statement on his behalf.

On April 23, 2021, the applicant submitted a memorandum, "Statement on My Behalf Objecting to Discharge…," wherein he provided the following personal statement:

> 1. I respectfully request the reconsideration of my eligibility for reenlistment, notwithstanding the recommendations by the Commanding Officer (CO) of CGC [redacted] ([redacted]), Capt. [redacted]. Currently, [CO] has deemed me ineligible for reenlistment and intends to assign a reentry code of RE-4 based on an alleged drug incident (DI) and not having [CO]'s recommendation for reenlistment. I strongly contest both of these issues based on the information presented below. [The CO]'s conclusions were based on personal bias developed over the short 4-5 months I supported the cutter, a failure to consider all relevant and available information at the time of his determination, and a failure to follow Coast Guard policy. These actions, the behaviors detailed below in paragraph (4), as well as many others have prompted a civil rights complaint regarding violations of policy designed to foster the civil rights goals for military personnel listed in reference (e)[[2]] article 3.B.l.f. I respectfully request your consideration of the attached evidence to support a decision for retention, separate from the determinations of Capt. [redacted].
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> 2. In regard to the accusation of violating UCMJ Article 112a, Capt. [redacted] determined my guilt solely and inaccurately. At roughly 0300 on 04NOV20, I accidentally ingested a substance I believed to be over the counter (OTC) pain reliever. At the time of the alleged DI, I was suffering from the after-effects of family trauma, a debilitating migraine headache, and the negative effects of recently prescribed contraindicated medications from an in-patient treatment facility (enclosure (1, 2, and 3)). The following day, as known and planned, I was administered a urinalysis at my follow-up care treatment center. On 09NOV20, I was told by [redacted] treatment center that opiates were present in the drug test administered on 05NOV20. Confused and frustrated, I was not able to understand what had happened or why I had an indication of a controlled substance in my system and initially denied it. Given the circumstances, I assume I likely accidentally ingested a controlled substance and not OTC medication. I did not know the true contents of the medication taken until I obtained my full medical file from [redacted] on 15APR21. As an accidental and non-intentional ingestion, this should not have been determined a drug incident as per reference (d) articles 5.C.6, 5.E.4, and 7.14.f. Capt. [redacted] wrote that I admitted to knowingly taking a controlled substance in his administrative remarks (enclosure (4)); this, however, is not the case and is a mischaracterization of my statements presented during the CGIS investigation. The statements made were the result of my piecing together the events I was unable to recall with any clarity on the morning of 04NOV20 for days and eventually months later. The finding of this alleged DI happened five (5) months after the incident occurred and the CGIS interview took place four (4) months after the alleged incident. During the time between the urinalysis and the CGIS interview, I sought to figure out what I had accidentally taken on that morning. Due to factors surrounding an argument with my wife on 03NOV20, documented in the CGIS report, it was not until January 2021 that I was able to have conversations with her regarding that day and obtain information about what medications were in the house that related to my limited recall and the images of a white bottle, as I shared [with] CGIS in the interview. The OTC medication I took turned out to be Tylenol with codeine, which I discovered after reviewing the urinalysis report received on 15APR21. This, however, was different from the medication I incorrectly assumed I accidentally took and thus reported to CGIS as hydrocodone acetaminophen (NORCO).

[2] U.S. Coast Guard Civil Rights Manual, COMDTINST M5250.4E.

At the time of the interview, I gave CGIS my best guess, truthfully not having any idea that I had taken a prescription medication at all.

3. A drug incident determination must be made by a preponderance of the evidence standard as defined in reference (d) article 5.E.;[3] however, Captain [redacted] had not reviewed all of the available and relevant information at the time of his determination on 09MAR20 nor had he reviewed all applicable Coast Guard policies relating to what constitutes a positive urinalysis as it pertains to CG policy. Capt. [redacted] was not in receipt of medical information provided to the command by way of a CGIS supplementary report via an email from Special Agent In-Charge [redacted] (enclosure (5)). He was, however, in possession of the results of my initial urinalysis conducted at the treatment center. These reports explain the temporary diminished cognitive and physical functions experienced and the reasons for the incomplete recall of the events based on the negative interactions of my then new prescriptions as well as the concentration levels of the substances in the sample. Additionally, during this process, Capt. [redacted] did not ask for, but rather actively refused to accept, any clarification or information from me which would have exposed the factors that contributed to the unknowing ingestion as it related to time of day, presence of physical pain (migraine), documented traumatic stress hours prior, the effects of negative drug interactions and the mistaken identification of what I thought I ingested. Capt. [redacted] also appeared to be unfamiliar with the Coast Guard policies regarding drug tests. The standards used by the United States Coast Guard for determining a positive urinalysis are outlined in reference (f) article. 7.B.l, 7.B.2 and 8.B.2.[4] and reference (g) article 4.9.[5] Following the guidelines referenced above, the determination of a positive urinalysis was not satisfied based on the concentration levels of the controlled substance codeine indicated in the urine. The concentration levels for the initial sample tested on 05NOV20 indicated a codeine concentration of 1051 ng/ml and morphine concentration of 261 ng/ml (enclosure (6)). The cutoff concentrations for a positive test result, or the confirmatory cutoff concentration, for these substances as defined by reference (g) article 4.9 (Table 2), are 2000 ng/ml for codeine and 4000 ng/ml for morphine. The concentration level of codeine measured is over 47% lower than the cut off concentration and the concentration level of morphine was over 93% lower than the cutoff concentration based on guidelines used by the USCG to determine a positive urinalysis result. It is clarified in reference (g) article 4.14.a, that any specimen that fails to meet quantity or quality requirements for determination as positive, for the initial, adjunct, or confirmatory tests, will be reported as negative or invalid. All subsequent tests conducted indicate no presence of controlled, prohibited, or illicit substances. Based on the copy of my urinalysis obtained on 15Apr21, the substance hydrocodone acetaminophen (NORCO) was not detected as present in any urinalysis. I brought this information to the attention of Capt. [redacted] during our meeting on 21APR21 in front of the command chief and a member of the [redacted] staff: offering him a copy of the manual and the associated references for consideration; he refused to accept them and abruptly cut me off indicating it was not something he was willing to consider, incorrectly stating, "this reference had nothing to do with the Coast Guard and we are not part of the DoD." He further indicated that regardless of any information presented, he would not change his determination based on what he alone feels is a preponderance of the evidence was met. He said he relied on my admission that I took a medication that was not prescribed to me. In an attempt to identify the events and factors that lead to the accidental ingestion, I made incorrect statements while being as honest, honorable, and forthcoming as I could; at the time of the CGIS interview, I was still suffering from the negative interaction of prescriptions. The events of that morning are still not complete1y clear six months later; however, what is clear is that Capt. [redacted] was and is not willing to do his due diligence in understanding every aspect of this situation or approach this embarrassing, potentially career ending situation with impartiality. The CO repeatedly acted in contravention to Coast Guard policy in the determination of this alleged drug incident. As stated in reference (d) article 7.A.14.(t) and 5.B.6, if the conduct occurs without the member's knowledge, awareness, or reasonable suspicion, it does not constitute a drug incident; it also states that it is not wrongful when there was an unknowing ingestion, and the CO must make a finding of no drug incident and close the investigation as per reference (d) article 5.E.4. He did not adhere to Coast Guard policy in his determination of this drug incident by way of references (d, f, and g), and abused his discretionary power due to negative personal bias. I do not intentionally take nor have I previously taken a controlled substance improperly and this situation does not qualify as a drug incident based on reference (d) articles 5.C.6, 5.E.4, and 7.14.f. Throughout this process I

[3] Military Drug and Alcohol Policy, COMDTINST M1000.4.
[4] Urinalysis Tactics, Techniques, and Procedures, CGTTP. 1-16, 5.
[5] Technical Procedures for the Military Personnel Drug Abuse Testing Program, DoD Instruction 1010.16.

have been transparent, honest, and forthcoming regarding my understanding with all parties, even when my ultimately incorrect statements were a detriment to myself. I have acted in ways keeping with the Coast Guard Core values.

…

5. Regarding eligibility criteria, listed in reference (c) article 1.E.2,[6] I meet the basic eligibility requirements during this current period of enlistment. My calculated final characteristic averages as defined in reference (a) article 1.B.31.c. is 5.7-5.9[7] (enclosure. (10)); I am physically qualified and have never received an unsatisfactory conduct mark during the current period of enlistment, or career, until this evaluation which is currently being appealed. I have never received any unsatisfactory conduct mark for operating a vehicle under the influence or for perpetrating sexual assault, I have no convictions, have not had my GTCC closed, and have not had more than one weight probationary period in the current enlistment. A review of my enlistment period will show consistent above average and superior marks, multiple accommodations [*sic*], and no incidents of NJP, unsatisfactory conduct, or incidents of misconduct.

6. Even considering the evidence that supposedly implicates me under UCMJ Article 112(a), Capt. [redacted] and command has decided not to allow me any meaningful opportunity to respond, either through the NJP or court-martial process. Simply put, if Capt. [redacted] sincerely believes I have committed an offense that precludes me from future service, I should be given the due process rights to defend myself from these allegations. Strategically, Capt. [redacted] has taken this opportunity from me by relying on regulations that only allow his side of the story and not the full facts and circumstances. Respectfully, I request this situation be looked at thoroughly to allow me the opportunity to respond to these allegations. I have honorably served the United States Coast Guard and faithfully intend to continue serving until I retire. Because of his sole actions, I have been deprived of due process and the ability to defend myself.

7. It is noted in Capt. [redacted] recommendation for discharge request that I be given a reentry code of 4 barring my eligibility to reenlist in any service and forfeiting my chance for my retirement pension after nearly 18 years of honorable service. Given the clear nature of this accidental ingestion and the decisions made with bias by Capt. [redacted] based on the very short time we worked together (2% of my career), if the determination of the drug incident stands, I would ask to have the reentry code be reconsidered and be assigned as a code RE-3.

On September 30, 2021, the applicant was separated from the Coast Guard with a narrative reason of "Completion of Required Service," a characterization of service of "General: Under Honorable Conditions," and a reenlistment code of "RE-4."

On August 22, 2022, a clinical psychologist with the United States Public Health Service (USPHS) submitted a medical advisory opinion addressing the applicant's allegations. The USPHS psychologist's opinion is as follows:

3. Does the Applicant have Post-Traumatic Stress Disorder/Traumatic Brain Injury/Other Mental Health Conditions, or experience a Sexual Assault or Sexual Harassment as documented in their medical/service record? Yes.

a. Was the diagnosis correct? If yes, what conditions/disorders/etc...does the Applicant have?

Yes; Adjustment Disorder with Mixed Anxiety and Depressed Mood; Alcohol Use Disorder, Mild.

4. Did the Applicant have the above conditions/disorders/etc. while in military service (i.e.: during the misconduct or circumstances leading to separation)? Yes.

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[6] Enlistments, Evaluations, and Advancements Manual, COMDTINST M6320.5.
[7] Military Separations Manual, COMDTINST M1000.4.

a. Please describe where in the record evidence of this condition while on active duty can be found (page#, form #, photocopy, or other description of location in files).

Documentation of Adjustment Disorder with Mixed Anxiety and Depressed Mood was reflected on medical officer visits dated 27 February 2017 and 21 March 2017 (location of the medical facility was not indicated). The member was diagnosed with Adjustment Disorder/Family Stress by LT [redacted], [redacted] USCG on 19 June 2018 at Base [redacted] Clinic. The member was diagnosed with Alcohol Use Disorder, Mild by LT [redacted], [redacted] 23 July 2019 at Base [redacted] Clinic. Psychological assessment dated 4 September 2019 at Base [redacted] Clinic by [redacted], PsyD indicates a provisional diagnosis of Adjustment Disorder with Depression/Anxiety (marital conflict). A psychiatric discharge summary from a civilian treatment facility (The [redacted]) dated 26 November 2020 by [redacted], PNHNP-Board Certified identified the member's discharge diagnoses as "Alcohol Abuse, Post-Traumatic Stress Syndrome, and Adjustment Disorder." Of note, post-traumatic stress syndrome is not necessarily the same as post-traumatic stress disorder (PTSD). The use of the former term is uncommon, and may have been an oversight on the part of the provider who intended to render the formal Diagnostic and Statistical Manual of Mental Disorders (DSM-5) diagnosis of PTSD. However, the use of this specific verbiage may also have been intentional, to reflect that the member was demonstrating some symptoms of posttraumatic stress, but at that time did not meet full diagnostic criteria for PTSD. Regardless, the available medical record is clear that the member had a history of clinically significant distress and/or functional impairment in relation to his marital situation.

5. Could the conduct (or circumstances) that led to Applicant's [separation, discipline, discharge, etc.] be symptomatic of, or otherwise related to, their condition(s) identified above?

a. Yes, the circumstances could be related to the condition(s) identified above.

6. In your medical opinion, does the mental health condition or experience of sexual assault or sexual harassment excuse the conduct or poor performance that adversely affected the discharge?

a. The case summary indicates that the member reports accidental consumption of a controlled substance in an attempt to control headache symptoms. It is not within the purview of the undersigned to opine if this consumption was accidental or intentional. However, at the time of the conduct, the member had just completed residential alcohol treatment and was in process of transitioning to a partial hospitalization step-down program. A patient in this transitional period would be considered to be at higher risk than baseline for relapse or difficulty in managing symptoms successfully, as this is a particularly vulnerable place in a patient's course of care. The presence of any significant stressor, such as the one the member experienced on the day of the conduct, could be reasonably expected to overwhelm an individual's fragile coping resources, even in the absence of any other comorbid mental health conditions. Accordingly, it is the opinion of the undersigned that the mental health condition should be regarded as a relevant factor in the conduct that adversely affected the discharge.

APPLICANT'S ALLEGATIONS

The applicant alleged that, on the evening of November 3, 2020, he informed his wife that the second phase of his substance abuse treatment would not be at a local facility and would require the applicant to be away from home. Upon hearing the news, the applicant stated, his wife became upset and there was an altercation, which led to the applicant being assaulted by his wife. After the assault, the applicant's wife was arrested and removed from the premises. The applicant explained that Child Protective Services (CPS) was called and arrived at the house to interview the children. The applicant stated that CPS advised him that it was best if the children were not

removed from the home that evening. As a result, he stayed with his children at his wife's home, which he claimed to be unfamiliar with. The applicant stated that, at some point that evening he took Zoloft, Valerian Root, and Trazodone, which were all prescribed from his treatment facility.[8] The applicant stated that the stress of the day caused him to develop a migraine that, despite rest and sleep, would not resolve. The applicant alleged that, as a result of the pain, he vomited while crawling on his hands and knees to the bathroom to look for some Tylenol or Advil. The applicant further alleged that he remembered seeing a drawer with medication bottles in it and was aware that he should not take any pills from orange bottles. The applicant explained that he found a white bottle that he believed was Tylenol or Advil, and ingested pills that he believed were normal pain relievers. According to the applicant, the pain subsided, and he was able to return to bed, where he fell asleep. The applicant stated that he does not remember when he woke up.

The applicant explained that, the following morning, he drove himself from the cutter to the treatment facility to begin his second phase of alcohol treatment. Upon entering the facility, the applicant stated, he provided a urine sample for a urinalysis, which revealed that the applicant had ingested codeine. After the applicant was informed of the positive urinalysis, he explained to his counselor that he must have accidentally ingested the narcotic while staying at his wife's house. According to the applicant, he was immediately given a second drug test which was negative for all drugs. The applicant stated that the treatment facility told him that his drug screening results were clinical and not forensic, that his urine sample had not been collected for forensic purposes or by using forensic standards, and that federal law prohibited the use of the results for administrative or criminal purposes. In addition to the urinalysis being solely for clinical purposes, the applicant alleged, his results fell far below the Department of Defense's (DoD) cut-off levels for drugs tests used for punitive or adverse action.

The applicant alleged that under DoDI 1010.16 (2020), only properly collected forensic specimens that equal or exceed DoD cut-offs will be reported as a positive drug test. According to the applicant, his drug screening results were not even close to meeting the required cut-off levels provided by the DoDI. The applicant alleged that, when a military laboratory conducts a drug screening of urine, the lab reports the sample as "negative" when the sample tested yields results that are below the provided cut-off levels. The applicant argued that, because his urine sample yielded results below the prescribed military levels, had his urine sample been forensically tested by a military laboratory, it would have been reported as a "negative" test result and there would have been no drug incident. The applicant further argued that, by any measure, his urine sample was "negative" for prohibited substances for two reasons. First, as already explained, his levels were below DoD's permitted levels of a positive drug test. Second, the applicant argued, his test was not conducted in accordance with Coast Guard testing standards to ensure reliability and the test was designed specifically for a clinical, not forensic, test. Therefore, the applicant alleged, the use of his treatment facility's drug screening results to form the basis of an investigation or for administrative action was improper.

The applicant argued that, despite federal law prohibiting the use of drug screening results from being used to conduct administrative and criminal investigations, the Coast Guard conducted a criminal investigation into the applicant's drug use based on the results of his drug screening at

[8] Zoloft and Trazodone are prescription antidepressants. However, valerian root is an over-the-counter dietary supplement that has not been approved by the FDA as a prescribed medication for any medical use.

his treatment facility. The applicant alleged that, when he spoke to CGIS investigators he relayed the same information as he had previously, but at that point, he had more information regarding the circumstances that led to the positive drug test. According to the applicant, he explained to CGIS investigators that he had discussed with his wife the types of medications in the house at the time and honestly believed he had taken Norco, not Tylenol with codeine. The applicant explained that, at the time of his interview with CGIS investigators, he did not know that Norco could not have caused his urine to screen for codeine. The applicant argued that his statement regarding Norco was incorrectly perceived and recorded by CGIS investigators as an admission of knowing drug use, a violation of Article 112(a) of the UCMJ. For the reasons explained above, the applicant alleged, his characterization of service, separation authority, and reenlistment code were based on the inappropriate consideration of his clinical drug screening, which was clearly protected information.

The applicant stated that he was never afforded the right to due process or to present a defense at NJP or court-martial. The applicant further stated that he was given a General: Under Honorable Condition characterization of service under the misguided determination that he had violated Article 112(a) of the UCMJ.

The applicant alleged that he suffered from PTSD during his active-duty service, which caused his alcohol abuse and subsequent self-referral into a treatment facility, but despite his PTSD diagnosis, the applicant was denied access to a PDES board.

To support his application, the applicant provided the following documents:

- Drug screening results dated November 5, 2020.

- Clinical notes from the treatment facility's Program Counselor, dated November 9, 2020, which documented the applicant's drug use and the applicant's response to the positive drug test. Specifically, the Program Counselor noted that the applicant stated, "I did take some of my wife's pills that were in an Advil bottle. She does use opiates, so I guess that is what I took." The Program Counselor also noted that the applicant did not deny taking the pills, only that he was unaware that he was taking opiates. The notes do not mention the applicant's later claim that he was suffering from a migraine at the time.

- DoDI 1010.16, dated June 15, 2020, section 4.9. Drug Testing, wherein the minimum cut-off levels for positive test results were provided for various controlled substances. Of relevance here, codeine is assigned a 2,000 ng/mL cut-off level.

- A September 19, 2020, psychiatric evaluation wherein the patient was diagnosed with alcohol abuse, PTSD, and adjustment disorder. The applicant was prescribed Zoloft, Valerian Root, and Melatonin.

- A June 28, 2021, response to a document request from the applicant to his treatment facility requesting the facility provide all documentation related to his urine drug screenings. The letter stated the following pertinent information:

> The Addiction Medicine Services program uses urine drug screens solely for clinical purposes. They are not forensic and are not intended to be used for any other purpose.
>
> Additionally, Code of Federal Regulations (CFR), Title 42, part 2, prohibits re-disclosure of confidential patient records. The face cover sheet that accompanied the incident report we sent to your designated contact at the Coast Guard, and with your signed consent, includes the following language: "The federal rules restrict the use of the information to investigate or prosecute with regards to a crime any patient with a substance use disorder, except as provided in §§ 2.12(c)(5) and 2.65."

- A December 14, 2021, Department of Veterans Affairs (DVA) disability rating letter wherein the applicant was given the minimum disability rating of 50% for service-related PTSD.

VIEWS OF THE COAST GUARD

On October 12, 2022, 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.

The JAG argued that the applicant's request for an upgraded discharge should not be granted because he is in ineligible for liberal consideration under 10 U.S.C. § 1552. The JAG explained that, because the applicant was diagnosed with a mental health condition while he was on active duty, the JAG sought a clinical psychologist's opinion in accordance with 10 U.S.C. § 1552(g), who acknowledged the applicant's mental health diagnosis and noted that it should be considered a factor that is relevant to the conduct that the applicant was separated for. However, the JAG argued that both the command that initiated discharge and the separation authority were aware of the mitigating circumstances (PTSD) when deciding the applicant's character of service and reenlistment code. The JAG further argued that the fact that the Coast Guard was aware of the applicant's mental health condition at the time of his separation is at odds with paragraph 7(f) of Principal Deputy General Counsel's, Department of Homeland Security (DHS), June 20, 2018, memorandum wherein he provided additional guidance on the Coast Guard's liberal consideration policy. Specifically, paragraph 7(f) of this memorandum states:

> Service members who are diagnosed with mental health conditions or who report sexual assault or sexual harassment before separation now receive heightened screening to ensure that the possible causal relationship between their symptoms and their conduct or poor performance is fully considered and that the characterization of service is appropriate. Veterans separated under prior procedures and medical standards may have suffered an error or injustice because the separation authority was unaware of their condition or experience or the possible effects of their condition or experience at the time of separation.

The JAG stated that, here, the applicant's separation authority was aware of the applicant's mitigating circumstances and mental health diagnosis prior to making their decision to separate the applicant.

In addition, the JAG argued that, while the applicant may have been experiencing mental health issues related to the domestic incident with his wife, the applicant's decision to take a prescription drug for which he did not have a prescription was not minor misconduct. The JAG argued that use of prescription schedule III narcotics is a violation of Article 112(a) of the UCMJ. According to the JAG, the circumstances surrounding the applicant's drug usage cannot be

reconciled with DHS's liberal consideration policy found in parage 7(d) and 23 of the above-referenced memorandum or its guidance on minor misconduct. Accordingly, the JAG argued that, while the applicant received a diagnosis of PTSD from the DVA, in addition to an active diagnosis of PTSD, these diagnoses should not outweigh the informed decision of the Coast Guard's final characterization of service decision or the reenlistment code. The JAG argued that the applicant failed to prove, by a preponderance of the evidence, that his characterization of service and reenlistment code should be upgraded. In addition, the JAG stated that DHS's liberal consideration policy applies only to discharge upgrades, not to requests to remove a documented drug incident or requests for a medical retirement.

The JAG argued that the applicant failed to prove, by a preponderance of the evidence, that his drug incident was erroneous or unjust. Regarding the applicant's claim that the Coast Guard erred when it utilized information from his alcohol treatment facility to issue a drug incident, in violation of 42 C.F.R. §2.12,[9] the JAG argued that in this particular instance, the scope of the records covered in 42 C.F.R. § 2.12 are specific to the nature of the treatment sought. The JAG claimed that, here, the applicant was admitted to an alcohol treatment program, and while there, tested positive for an unrelated substance, namely codeine. As such, the JAG argued that the records used to issue the applicant's drug incident did not fall within the scope of 42 C.F.R. §2.12.

Regarding the applicant's claim that, even if the Coast Guard was authorized to use the information from his treatment facility, it was insufficient to support a drug incident, the JAG argued that there is no requirement in policy that a drug test be conducted according to Coast Guard policy when that test is not directly administered by the Coast Guard, particularly for a drug incident finding. The JAG explained that the applicant's urine specimen was collected by LabCorp and performed at the MedTox laboratories, and the applicant provided no evidence to show that proper procedures for collection and detection were not followed. Regarding the applicant's allegation that his urinalysis did not meet the cut-off levels as outlined by DoDI 1010.16 (2020), the JAG argued that the applicant's allegations are irrelevant because his Command also had the applicant's admission of taking a schedule III drug without a proper prescription, which admission by itself was sufficient for finding that a drug incident had occurred.[10] The JAG argued that either the positive drug test, or the applicant's admission, standing alone were enough to support a finding that a drug incident had occurred.

In addressing the applicant's claim that upon the finding of a drug incident, his CO was required to initiate separation proceedings when he believed a drug incident occurred, the JAG argued that the policy regarding a misconduct separation for drug use uses discretionary language. Specifically, the JAG explained that Article 5.E.3 of the Military Drug and Alcohol Policy Manual, COMDTINST M1000.10A, as relied upon by the applicant, states "[t]he Command must process the military member for separation by reason of misconduct per Reference (b), Military Separations Manual, COMDTINST M1000.4, as appropriate." According to the JAG, this

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[9] 42 C.F.R. § 2.12 provides the restrictions on the use and disclosure on information when that information is obtained through a federal drug or alcohol treatment program. This regulation is provided in the applicable law and policy section below.

[10] Article 5.E.2. of the Coast Guard Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10A, "[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."

discretionary language rebuts the applicant's argument that there was a firm requirement to process him for a misconduct discharge. The JAG stated that Coast Guard policy allowed for discretion to be used to determine the appropriate discharge, especially considering the proximity to the applicant's end of enlistment and his drug incident. The JAG explained that the applicant's recommended administrative discharge due to ineligibility to reenlist, in lieu of an administrative discharge for misconduct, was reviewed and approved by the separation authority. As such, the JAG argued that the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard committed an error or injustice when it discharged him at the end of his enlistment.

Regarding the applicant's claim that he was erroneously and unjustly denied PDES processing, the JAG argued that the applicant relies heavily on the DVA disability rating letter to argue that he was unfit for duty, but the DVA rating given to the applicant is not determinative of the same issues involved in military disability determinations. The JAG explained that the armed forces determine to what extent a member has been rendered unfit to perform the duties of his office, grade, rank, or rating because of a physical disability.[11] The JAG argued that the procedures, and presumptions applicable to the DVA process are fundamentally different and often more favorable to a veteran than those applied under PDES. The JAG stated that the sole standard for a physical disability determination in the Coast Guard is unfitness to perform one's duties.[12] Furthermore, the JAG stated that a service member's disability must be found to be permanent and stable.[13] In addition, the JAG stated that the service member must also be referred to a Medical Evaluation Board (MEB) by a competent authority. Finally, the JAG stated that under Coast Guard policy, when a service member is being processed for separation for reasons other than a physical disability, and the service member adequately performed their duties, the service member shall be deemed fit for duty even though medical evidence indicated the service member had impairments.[14] The JAG argued that, while the applicant had medical records discussing the applicant's mental health issues, there are no records suggesting that the applicant should have been recommended for indefinite treatment, nor did the applicant receive a recommendation from a competent authority that his fitness be reviewed by an MEB. The JAG argued that, while the applicant had a diagnosis of PTSD from a private, civilian mental health provider, there was no confirmation of the diagnosis or its impact on the applicant's fitness for duty by a Coast Guard or military mental health provider.

The JAG stated that the applicant was not denied a pre-separation physical, as claimed by the applicant. To the contrary, the JAG noted that the applicant's August 31, 2021, Career Intentions Worksheet, indicates that the applicant acknowledged that a physical examination, dated one year or less from the applicant's upcoming separation date, had been completed.

For the reasons outlined above, the JAG argued that the applicant's request for relief, should be denied.

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[11] *Lord v. United States*, 2 Ct. Cl. 749, 754 (1983).
[12] Article 2.C.2.a. of the Coast Guard Physical Disability Evaluation System Manual, COMDTINST M1850.2D.
[13] *Id*.
[14] *Id*., Article 2.C.2.a.(1).

APPLICANT'S RESPONSE TO VIEWS OF THE COAST GUARD

On October 25, 2022, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. The Chair received the applicant's response on December 26, 2022.

The applicant, through counsel, alleged that he never admitted to taking Norco to CGIS investigators. According to the applicant, he told investigators that he thought he may have ingested Norco by mistake. The applicant claimed that he made that statement only because he knew his mother-in-law's Norco was in the house. The applicant claimed that his statement was only a guess, based on the information he had at the time, but was not a statement of fact. In addition, the applicant claimed that his statement that he had taken Norco was proven false by the results of his urinalysis. The applicant explained that his interview with CGIS investigators took place more than three months after the alleged drug incident, during which time he erroneously believed he had mistakenly taken Norco. In addition, the applicant stated that, at the time of the interview, he was taking two contraindicated medications that caused him to mistake Tylenol with Codeine for regular Tylenol. The applicant alleged that CGIS investigators made no effort to learn and report the differences between Norco and the substances for which the applicant actually tested positive. According to the applicant, CGIS investigators assumed everything made sense and accepted the applicant's admission without any verification.

The applicant again argued that, at the time of his urinalysis, all of the drugs found in his system were below the cutoff levels provided in DoDI 1010.16 (2020). The applicant stated that the JAG brushed off his low levels in its advisory opinion because the applicant allegedly admitted to using drugs, but the applicant alleged there was no admission, because he mistakenly admitted to taking Norco when he in fact took a different narcotic. The applicant alleged that, where there is no admission, the low levels are relevant because DoDI 1010.16 (2020) does not consider the applicant's levels to be a positive drug test. The applicant further alleged that it was improper and unfair of the Coast Guard to consider this a positive drug test when it would not have been reported as a positive test had it been conducted by the Coast Guard.

Regarding his request for PDES processing, the applicant alleged that the Coast Guard's own Clinical Psychologist agreed that the applicant was properly diagnosed with PTSD, while in the service and did in fact suffer from PTSD. The applicant further alleged that the Coast Guard's Clinical Psychologist stated that the alleged misconduct could have been related to the medical diagnosis and that the diagnosis could excuse the misconduct, which the applicant concurred with.

The applicant alleged that the JAG's argument that he was not entitled to PDES processing due to his misconduct was erroneous because he was not separated for misconduct. The applicant also alleged that the JAG's argument regarding the applicant's failure to obtain a diagnosis from a military medical profession is refuted because the Coast Guard's own Clinical Psychologist confirmed the applicant's PTSD diagnosis. The applicant argued that the failure of the Coast Guard to initiate PDES processing with the evidence that existed was inexcusable. Because there was no administrative separation proceeding pending against the applicant, which would have precluded PDES processing, the applicant argued that PDES processing should be initiated now, to afford him proper consideration and medical retirement.

The applicant further alleged that he is entitled to liberal consideration. To support his claim, the applicant explained that at the time of his separation, the Coast Guard did not have the Coast Guard's Clinical Psychologist's opinion, which means it could not have taken into consideration the applicant's full mental health diagnosis. If it had, the applicant alleged, the Coast Guard would have initiated the PDES process or at least required a mental health provider to ensure PDES was not warranted. Because the Coast Guard failed to do so, the applicant alleged, he should be granted liberal consideration.

Once again, the applicant alleged that the Coast Guard erroneously and unjustly relied upon the urinalysis he provided while seeking treatment at a facility protected by 42 C.F.R. §2.12. According to the applicant, the JAG's argument that because he was in an alcohol treatment facility, his drug urinalysis was not protected by 42 C.F.R. §2.12, is contrary to the law. The applicant argued that 42 C.F.R. §2.12 states that alcohol abuse information obtained by a federally assisted alcohol abuse program is protected.

Finally, the applicant alleged that the Coast Guard was required to initiate administrative separation proceedings for misconduct and provide him the opportunity to defend himself before a separation board. The applicant claimed that the Coast Guard's failure to grant him the opportunity to go before a separation board denied him his right to due process. The applicant argued that the JAG misinterpreted COMDTINST M1000.10A in claiming that the language about initiating a discharge for misconduct is discretionary. According to the applicant, the only discretionary language provided in COMDTINST M1000.10A is what subparagraph of misconduct the member will be considered for separation under. The applicant cited Article 1.B.17.b.3.b.4. of the Coast Guard Separations Manual, COMDTINST M1000.4, which according to the applicant states that any member involved in a drug incident "[w]ill be processed for separation." The applicant argued that regulation clearly required his command to initiate an administrative separation for misconduct. As such, the applicant argued that relief is warranted.

To support his reply, the applicant submitted the following document:

- A July 21, 2021, sworn statement from a licensed pharmacist who is also a licensed attorney, herein this witness will be referred to as Dr. R. Dr. R stated that she was asked to evaluate three separate issues: 1. Use of [Applicant's] Protected Health Information appears to contradict and likely violate the language and intent of 42 CFR Part 2 and the Health Insurance Portability and Accountability Act (HIPAA) standards; 2. [Applicant's] urine toxicology result and explain the scientific analysis of the information on the results for the urine sample dated; and 3. Facts suggest that [Applicant] was experiencing the known drug interaction between Zoloft® (sertraline) and Valerian Root, a concurrent use which is contraindicated. The first and second of these issues was already thoroughly addressed by the applicant in his initial application and his response to the advisory opinion. The relevant parts of the pharmacist's opinions on the applicant's prescriptions are summarized below:

  First, a review of the pharmacology of Zoloft® (sertraline) along with its known side effects, warnings, and precautions; and then explain the known drug interaction between Zoloft® (sertraline) and Valerian Root; as well as, how this drug-drug interaction is known to affect an individual's judgment, cognition and behavior.

C. Zoloft® (sertraline), a common prescription antidepressant medication, falls in the group of drugs known as selective serotonin reuptake inhibitors (SSRIs). Zoloft® (sertraline) works by affecting brain chemicals called neurotransmitters, which are unbalanced in individuals with depression, panic, anxiety, or obsessive-compulsive symptoms. While classified as an antidepressant, Zoloft® (sertraline) and prescribed for treatment of depression, Zoloft® (sertraline) is also used to treat other psychiatric conditions, including obsessive-compulsive disorder, panic disorder, anxiety disorders, and
post-traumatic stress disorder (PTSD).

D. The FDA label for Zoloft® (sertraline) highlights a number of warnings which caution against prescribing or use of Zoloft® (sertraline) in a variety of situations, including, but not limited to:

i. Reporting any new or worsening symptoms of depression to the prescribing doctor, and remaining alert to changes in mood or symptoms while under treatment with Zoloft® (sertraline).

ii. As an SSRI (serotonin reuptake inhibitor), Zoloft® (sertraline) can cause serotonin syndrome, a potentially life-threatening condition, and may interact with other medications which increase the risk of serotonin syndrome. Patients treated with Zoloft® (sertraline) are advised to seek medical attention immediately if symptoms of serotonin syndrome appear. Signs and symptoms of serotonin syndrome can include mental status changes (e.g., agitation, hallucinations, delirium, and coma), autonomic instability (e.g., tachycardia, labile blood pressure, dizziness, diaphoresis, flushing, hyperthermia), neuromuscular symptoms (e.g., tremor, rigidity, myoclonus, hyperreflexia, incoordination), seizures, and gastrointestinal symptoms (e.g., nausea, vomiting, diarrhea).

iii. Some medications can also interact with Zoloft® (sertraline) to cause serotonin syndrome, for example these include stimulants, opioids, herbal products, other antidepressants or other psychiatric medication, Parkinson's disease, migraine headaches, serious infections, or medications used to prevent nausea and vomiting. Patients treated with Zoloft® (sertraline) are also cautioned to consult their doctor before making any changes in how or when they take their other medications.

iv. Sertraline (Zoloft®) also carries the FDA Black Box Warning which recommends that all patients treated with antidepressants are monitored and observed closely for worsening of clinical symptoms, suicidality, and/ or unusual changes in behavior, especially during the initial few months of a course of drug therapy, or when making dose adjustments (whether increases or decreases in dose are involved). The FDA continues to advise precautions in patients of all ages who are started on antidepressant therapy, including monitoring closely for worsening, for emergence of symptoms (changes in mood, depression, suicidal thoughts, and behaviors), and advising families and caregivers of the- need to closely observe and communicate with the prescriber. [Applicant] was taking the prescribed Zoloft® (sertraline) and Valerian Root concurrently.

E. When a mandatory mental health evaluation diagnosed [Applicant] with depression, among other medications, the doctor prescribed Zoloft® (sertraline) to treat [applicant's] depression. [Applicant] was also prescribed Valerian Root for his insomnia, to taken concurrently with Zoloft® (sertraline). F. Zoloft® (sertraline) and Valerian Root are known to have a significant drug interaction which can affect individual's judgment, cognition and behavior, and is explained below.

G. In general, drugs can have not only their individual pharmacologic effects; drugs can also interact with each other. Drug interactions are reasonably predictable. However, the extent to which these interactions affect one individual or another is not necessarily quantifiable. A drug interaction by definition is a situation that involves a drug and some other substance, which is often another drug, wherein the substance introduced directly or indirectly affects the activity of the drug when the two are consumed together. The impact of a drug interaction can involve one of three scenarios:

i. The drug interaction can involve the substance enhancing or increasing the drug's actions (synergistic); or
ii. The drug interaction can in affect the drug's actions negatively and decrease the drug's actions (antagonistic); or

iii. The drug interaction can bring about an entirely new effect not produced by either substance alone.

H. Drug interactions are also classified (major, moderate, minor, or unknown) as a guideline based on their clinical significance, or in other words, the significance of the drug interaction's impact or effects on an individual:

i. Major: Highly clinically significant. Avoid combinations; the risk of the interaction outweighs the benefit.
ii. Moderate: Moderately clinically significant. Usually avoid combinations; use it only under special circumstances.
iii. Minor: Minimally clinically significant. Minimize risk; assess risk and consider an alternative drug, take steps to circumvent the interaction risk and/or institute a monitoring plan.
iv. Unknown: No interaction information available.

I. The drug-drug interaction between Zoloft® (sertraline) and Valerian Root is classified as moderately clinically significant, which means the best practice is to usually avoid the combination of Zoloft® (sertraline) and Valerian Root, and to use this combination only under special circumstances. That is because ingestion of Zoloft® (sertraline) concurrently with Valerian Root can increase side effects such as dizziness, drowsiness, confusion, and difficulty concentrating. In some cases, especially in the elderly, an individual can also experience impairment in thinking, judgment, and motor coordination. Alcohol ingestion should be limited or avoided when on when being treated with Zoloft® (sertraline) and Valerian Root at the same time; and individuals prescribed these together are generally advised to avoid activities requiring mental alertness, such as driving or operating hazardous machinery until they are familiar with how the medications affect them.

J. Valerian is a flowering plant. Valerian Root is the root of that plant, which is dried and used as an herbal remedy. Used in alternative medicine, Valerian Root is believed to be possibly effective as a sleep aid in treating sleep problems (insomnia). Other uses not yet proven with research have included treating anxiety, stress, depression, attention deficit disorder, chronic fatigue syndrome, tremors, epilepsy, menopause symptoms, and other conditions. Valerian may also be used for other purposes.

K. Use of Valerian Root as a medicinal agent, is not approved by the FDA. However, Valerian Root is often sold as an herbal supplement. Herbal supplement do not have regulated manufacturing standards, and some marketed supplements have been identified as contaminated with toxic metals or other drugs. Thus, to minimize the risk of contamination, herbal supplements should be purchased from a reliable source.

L. Valerian Root taken alone may impair an individual's thinking or reactions. Thus, caution is advised if drive or do anything that requires an individual to be alert. Common side effects from Valerian Root can include headache; upset stomach; thinking problems; dry mouth; feeling excited or uneasy; strange dreams; or daytime drowsiness. Though not all side effects for Valerian Root are known, it is believed to be safe when taken for a short period of time (4 to 8 weeks).

M. Other drugs can also affect Valerian Root. For example, taking Valerian Root with other medications that can also cause sleepiness may worsen this effect on an individual. Patients are advised to consult their doctor before taking valerian with a sleeping pill, narcotic pain medicine, muscle relaxer, or medicine for anxiety, depression, or seizures. In addition, FDA cautions advise not to take Valerian Root without medical advice while on a medication to treat any of the following conditions:

i. any type of infection (HIV, malaria, or tuberculosis)
ii. anxiety or depression
iii. asthma or allergies
iv. cancer
v. erectile dysfunction
vi. heartburn or gastroesophageal reflux disease (GERD)
vii. high blood pressure, high cholesterol, or a heart condition

viii. migraine headaches
ix. psoriasis, rheumatoid arthritis, or other autoimmune disorders;
x. a psychiatric disorder
xi. seizure disorder

N. Here, in [Applicant]'s case, four of the risk factors for the adverse drug effects (described above) have been met:

(1) [Applicant] was taking Zoloft® (sertraline) at the same time as Valerian Root; and
(2) [Applicant] was being treated for a psychiatric disorder, namely depression; and
(3) [Applicant] was taking not only Zoloft ® (sertraline), but also Trazodone (both antidepressants) for his depression concurrently with Valerian Root, each of which present an increased risk of the adverse effects/drug interactions noted above; and
(4) [Applicant] suffered from a history of migraine headaches, also increasing the risk and likelihood of the adverse effects/drug interactions noted above.

O. Reviewing the record in this case, [Applicant's] description of symptoms he experienced at least on the occasion described in the record are consistent with the known adverse effect/drug interaction relating to the Zoloft® (sertraline), Valerian Root and his underlying conditions (drug-disease state interaction).

i. November 3rd - 4th, 2020: [Applicant] crawling on his hands and knees trying to find some Advil or Tylenol. After a highly stressful altercation (domestic dispute) with his wife, she was arrested, and [Applicant] dropped the kids off at their grandmother's because he was leaving home the next morning to report to his treatment program. He took the bedtime doses of Zoloft and Valerian, and found he could not fall sleep, though he would usually fall asleep quickly. [Applicant] also found had developed a debilitating migraine headache, with added symptoms of pain, blurred vision, inability to walk, and vomiting, also symptoms [Applicant] had not experienced before.

These facts suggest [Applicant's] stress and anxiety level may have triggered adverse effects likely linked to the combination of Zoloft® (sertraline) and Valerian Root. [Applicant] described stumbling to the bathroom; throwing up in the dark; on his hands and knees because he could not walk. In excruciating pain from the migraine, [Applicant] shuffled through drawers to find something Advil or Tylenol to help his headache. [Applicant] took what he believed to be an Advil around 3:00 am on November 4, 2020. Valerian Root alone may impair an individual's thinking or reactions, and common side effects from Valerian Root can include headache ([Applicant's] migraine); upset stomach (throwing up in the dark); thinking problems (clouded cognition).

However, the drug-drug interaction between Zoloft® (sertraline) and Valerian Root, classified as moderately clinically significant, may have in addition increased the side effects [Applicant] was experiencing, including dizziness ([Applicant] was vomiting), confusion and difficulty concentrating ([Applicant] was stumbling through a migraine to find some Advil or Tylenol). Note that in some cases, an individual on both Zoloft® (sertraline) and Valerian Root can experience impairment in thinking and judgment (just needed to find Advil or Tylenol), and motor coordination ([Applicant] could not walk- he was crawling around in the dark on his hands and knees).

ii. [Applicant]'s CGIS Interview:

Some months following the 11/4/20 incident, CGIS interviewed [Applicant]. In fact, [Applicant] was interviewed more than once in the months following the incident. [Applicant] had still been taking his routine prescribed medications – Zoloft® (sertraline) and Valerian Root, which also becomes significant under elevated stress or anxiety, as on occasions where [Applicant] was interrogated.

CGIS claims [Applicant] waived his right to an attorney in that interview. [Applicant] was asked about the urine toxicology result reporting he ingested opiates. [Applicant] tried to reconstruct the 11/4/20 incident, but all he was able to call was looking around for some Advil or Tylenol to relieve

> a throbbing migraine and the image of a white bottle in his wife's drawer he thought was Advil, which he took for his headache. During the interview, according to CGIS, [Applicant] also admitted he had taken Norco on 11/4/20. [Applicant] completely disputes this. [Applicant] stated he does not remember doing so (admitting to ingesting Norco or waiving the right to an attorney). [Applicant] states that if he had in the course of the interview tried to speculate (in hindsight) what may have possibly contributed to urinalysis results reporting a positive for opiates on 11/5/20, it was just that mere speculation, because he did not know.
>
> Moreover, similar to the 11/4/20 incident, [Applicant's] stress and anxiety level may [have] triggered adverse effects linked to the combination of Zoloft® (sertraline) and Valerian Root. Valerian Root alone can impair an individual's thinking or reactions, and common side effects from Valerian Root can include thinking problems (clouded cognition). [Applicant] maintains he could not have admitted to ingesting Norco, especially because he did not know what was in white bottle on 11/4/20 (impaired judgment and cognition), nor at the time of the CGIS interview 5 months later (impaired judgment and cognition). CGIS claims are not what [Applicant] is able to recall of the interview).
>
> Similar to the 11/3/20 incident with his wife, [Applicant] states the CGIS interview was a highly stressful situation; that he was very anxious may have been confused (impaired judgment and cognition); and [Applicant] could only speak to "images" of a white bottle he believed to be Advil (impaired thinking). Thus, here too, the drug-drug interaction between Zoloft® (sertraline) and Valerian Root, classified as moderately clinically significant, seems likely to have increased the side effects [Applicant] was experiencing including confusion (difficulty concentrating). Note that in some cases, an individual on both Zoloft® (sertraline) and Valerian Root can experience impairment in thinking and judgment. Accordingly, [Applicant]'s states he would not have consciously admitted (as CGIS alleges) that he had taken Norco, nor would [Applicant] have consciously waived the right to an attorney.
>
> iii. Since then, because of the negative physical and cognitive effects [Applicant] reported due to the drug- drug interaction between Zoloft ® (sertraline) and Valerian Root, the Valerian Root was discontinued from [Applicant]'s prescribed medication regimen.

iv. The Zoloft and valerian root interaction more than likely clouded [Applicant]'s judgment and cognition; particularly when experiencing elevated stress, or anxiety, such as on 11/4/20and when he was interrogated. In essence, [Applicant]'s speculative statement about "Norco" was unreliable. In any event the urine toxicology showed it was codeine not Norco—so [Applicant] obviously was speculating and not clearheaded. Moreover, [Applicant] did not in fact know what "he might have ingested" accidentally, because if he did, [Applicant] could simply have said it was something with codeine.

APPLICABLE LAW AND POLICY

Federal Regulations

Title 42 C.F.R. Part 2 provides the necessary guidance on when information collected while receiving treatment at a federal substance abuse treatment facility can be used or disclosed. The following sections are pertinent to the applicant's case:

> § 2.11—Purpose and effect
>
> (a) Purpose. Pursuant to 42 U.S.C. 290dd–2(g), the regulations in this part impose restrictions upon the disclosure and use of substance use disorder patient records which are maintained in connection with the performance of any part 2 program. …
> (b) Effect.

(1) The regulations in this part prohibit the disclosure and use of patient records unless certain circumstances exist. If any circumstance exists under which disclosure is permitted, that circumstance acts to remove the prohibition on disclosure but it does not compel disclosure. Thus, the regulations do not require disclosure under any circumstances.

(2) The regulations in this part are not intended to direct the manner in which substantive functions such as research, treatment, and evaluation are carried out. They are intended to ensure that a patient receiving treatment for a substance use disorder in a part 2 program is not made more vulnerable by reason of the availability of their patient record than an individual with a substance use disorder who does not seek treatment.

(3) Because there is a criminal penalty for violating the regulations, they are to be construed strictly in favor of the potential violator in the same manner as a criminal statute.

§ 2.12(a) General—

(1) –Restrictions on disclosure. The restrictions on disclosure in the regulations in this part apply to any records which:

(i) Would identify a patient as having or having had a substance use disorder either directly, by reference to publicly available information, or through verification of such identification by another person; and

(ii) - Contain drug abuse information obtained by a federally assisted drug abuse program after March 20, 1972 (part 2 program), or contain alcohol abuse information obtained by a federally assisted alcohol abuse program after May 13, 1974 (part 2 program); or if obtained before the pertinent date, is maintained by a part 2 program after that date as part of an ongoing treatment episode which extends past that date; for the purpose of treating a substance use disorder, making a diagnosis for that treatment, or making a referral for that treatment.

(2) –Restriction on use. The restriction on use of information to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient (42 U.S.C. 290dd–2(c)) applies to any information, whether or not recorded, which is drug abuse information obtained by a federally assisted drug abuse program after March 20, 1972 (part 2 program), or is alcohol abuse information obtained by a federally assisted alcohol abuse program after May 13, 1974 (part 2 program); or if obtained before the pertinent date, is maintained by a part 2 program after that date as part of an ongoing treatment episode which extends past that date; for the purpose of treating a substance use disorder, making a diagnosis for the treatment, or making a referral for the treatment.

…

(c) Exceptions—

…

(2) Armed Forces. The regulations in this part apply to any information described in paragraph (a) of this section which was obtained by any component of the Armed Forces during a period when the patient was subject to the Uniform Code of Military Justice except:

(i) Any interchange of that information within the Armed Forces; and

(ii) Any interchange of that information between the Armed Forces and those components of the Department of Veterans Affairs furnishing health care to veterans.

…

(e) Explanation of applicability—

…

(3) Information to which restrictions are applicable. Whether a restriction applies to the use or disclosure of a record affects the type of records which may be disclosed. The restrictions on disclosure apply to any part 2–covered records which would identify a specified patient as having or having had a substance use disorder. The restriction on use of part 2 records to bring criminal charges against a patient for a crime applies to any records obtained by the part 2 program for the purpose of diagnosis, treatment, or referral for treatment of patients with substance use disorders. (Restrictions on use and disclosure apply to recipients of part 2 records under paragraph (d) of this section.)

(4) How type of diagnosis affects coverage. These regulations cover any record reflecting a diagnosis identifying a patient as having or having had a substance use disorder which is initially prepared by a part 2 provider in connection with the treatment or referral for treatment of a patient with a substance use disorder. A diagnosis prepared by a part 2 provider for the purpose of treatment or referral for treatment, but which is not so used, is covered by the regulations in this part. The following are not covered by the regulations in this part:

…

(ii) A diagnosis of drug overdose or alcohol intoxication which clearly shows that the individual involved does not have a substance use disorder (e.g., involuntary ingestion of alcohol or drugs or reaction to a prescribed dosage of one or more drugs).

Coast Guard Manuals & Instructions

Article 1 of the Military Separations Manual, COMDTINST Ml000.4 (August 2018), provides the necessary guidance on discharging a service member with eight or more years of active service. In relevant part:

1.B.2.f.2. Standards of Discharge. General Discharge. The member's commanding officer or higher authority may effect a separation with a general discharge if the member is subject to discharge and a general discharge is warranted under the standards prescribed in this paragraph. When a general discharge is issued for one of the reasons listed in Article 1.B.2.f. (1)(a) of this Manual, the specific reason shall be stated in an entry on an Administrative Remarks, Form CG-3307, entry in the member's PDR. A general discharge applies in these situations:

a. The member either:

1. Has been identified as a user, possessor, or distributor of illegal drugs or paraphernalia;
1.B.5.a. Scope. If at the time of the initial pre-discharge interview conducted under Article 1.B.4.b. of this Manual or any time after a commanding officer determines an enlisted member is not eligible to reenlist, this Article's procedures apply.

…

1.B.5.c. More than Eight Years' Service. Members who have eight or more years of total active duty and/or reserve military service that meet the reenlistment eligibility criteria in reference (l), Enlisted Accessions, Evaluations and Advancements, COMDTINST M1000.2 (series), but are not recommended for reenlistment by their commanding officer, are entitled to a reenlistment board. However, members who do not meet the eligibility criteria are not entitled to a reenlistment board, even if they have eight or more years of total active and/or reserve military service. If a member is entitled to a reenlistment board, the commanding officer shall

follow the procedures in Reference (q), Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1 (series).

…

The Coast Guard Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10A, provides the relevant guidance on the preponderance of the evidence standard used when determining if a drug incident has occurred and the illegal use of prescription drugs. The relevant sections are as follows:

3.B.2. Preponderance of the Evidence. The findings of a drug incident shall be determined by the commanding officer and an Administrative Discharge Board, if the member is entitled to one, using the preponderance of evidence standard. That is, when all evidence is fairly considered, including its reliability and credibility, it is more likely than not the member intentionally ingested drugs. A preponderance of the evidence refers to its quality and persuasiveness, not the number of witnesses or documentation. A member's admission of drug use or a positive confirmed test result, standing alone, may be sufficient to establish intentional use and thus suffice to meet this burden of proof.

…

5.A.3. Prescription Drugs.

…

b. Unauthorized Use. No current prescription (within six months) or verified medical explanation for a drug) that would account for the positive urinalysis result. Unauthorized use results in a drug incident finding.

…

5.E. Determining a Drug Incident.

1. 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. The CO/OIC may delay final determination to pursue any of the following options.

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.

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.

Article 1 of the Coast Guard Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2A, provides the necessary guidance on reenlistment eligibility. In relevant part:

> **1.A.5. 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.A.5.a. of this Manual, and meet the eligibility criteria listed in Article 1.A.5.b. of this Manual. In addition, SELRES members, and IRR members on active duty, or approved to drill for points, must also meet the eligibility criteria listed in Article 1.A.5.c. of this Manual. Members who have eight or more years of total active duty and/or reserve military service that meet the eligibility criteria, but are not recommended for reenlistment by their commanding officer, are entitled to a reenlistment board, as outlined in reference (c), Military Separations, COMDTINST M1000.4 (series). However, members who do not meet the eligibility criteria are not entitled to a reenlistment board, even if they have eight or more years of total active and/or reserve military service. The procedures in Article 1.A.5.d of this Manual shall be followed for members who do not meet the eligibility criteria.
>
> …
>
> **l.A.5.b. 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):
>
> 5. 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.
>
> (a) 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.
>
> (b) 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.
>
> …
>
> **1.A.5.d.(2) Members Not Eligible to Reenlistment.** Commands ***shall*** also submit a memorandum to Commander, (CG PSC-EPM-1) or (CG PSC-RPM-1) to discharge members who do not meet the eligibility criteria and are not recommended for reenlistment/extension by their commanding officer. The memorandum (with enclosures as required) shall contain sufficient facts to establish, by a preponderance of the evidence, that the member does not meet the eligibility criteria. The member shall be afforded the opportunity to submit a written statement for consideration by Commander (CG PSC-EPM-1) or Commander (CG PSC-RPM-1). (Emphasis added.)

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.

Chapter 5.B.11.b. of the Medical Manual in effect in 2020 states the following about anxiety disorders, including PTSD:

> These disorders are disqualifying for appointment, enlistment, or induction under Chapter 3-D of this Manual or if identified on active duty shall be processed in accordance with Physical Disability Evaluation System, COMDTINST M1850.2 (series), except as noted on (5) below. These disorders may be disqualifying for retention under Chapter 3-F of this Manual.

Chapter 3.F. of the Medical Manual lists the medical conditions that are disqualifying for retention on active duty. Chapter 3.F.1.c. of the Medical Manual states the following about fitness for duty and referring members to the PDES:

> Fitness for Duty. Members are ordinarily considered fit for duty unless they have a physical impairment (or impairments) that interferes with the performance of the duties of their grade or rating. A determination of fitness or unfitness depends upon the individual's ability to reasonably perform those duties. Active duty or selected reserves on extended active duty considered permanently unfit for duty shall be referred to an Initial Medical Board for appropriate disposition [through the PDES].

Chapter 3.F.16. lists the psychiatric conditions that may be disqualifying for retention on active duty and result in a referral to the PDES. Paragraph (b) states that, to be disqualifying, anxiety disorders and PTSD must show "[p]ersistence or recurrence of symptoms sufficient to require treatment (medication, counseling, psychological or psychiatric therapy) for greater than twelve (12) months."

The Physical Disability Evaluation System (PDES) Manual, COMDTINST M1850.2D, Article 2.A.38. defines "physical disability" as "[a]ny manifest or latent physical impairment or impairments due to disease, injury, or aggravation by service of an existing condition, regardless of the degree, that separately makes or in combination make a member unfit for continued duty." Article 2.C.2. states the following:

> **Fit for Duty/Unfit for Continued Duty. The following policies relate to fitness for duty:**
>
> a. The sole standard in making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank or rating because of disease or injury incurred or aggravated through military service. Each case is to be considered by relating the nature and degree of

physical disability of the evaluee concerned to the requirements and duties that a member may reasonably be expected to perform in his or her office, grade, rank or rating. In addition, before separation or permanent retirement may be ordered:

(1) There must be findings that the disability:
(a) is of a permanent nature and stable, and
(b) was not the result of intentional misconduct or willful neglect and was not incurred during a period of unauthorized absence.

…

b. The law that provides for disability retirement or separation (10 U.S.C. 61) is designed to compensate a member whose military service is terminated due to a physical disability that has rendered him or her unfit for continued duty. That law and this disability evaluation system are not to be misused to bestow compensation benefits on those who are voluntarily or mandatorily retiring or separating and have theretofore drawn pay and allowances, received promotions, and continued on unlimited active-duty status while tolerating physical impairments that have not actually precluded Coast Guard service. The following policies apply:

(1) Continued performance of duty until a member is scheduled for separation or retirement for reasons other than physical disability creates a presumption of fitness for duty. This presumption may be overcome if it is established by a preponderance of the evidence that:

(a) the member, because of disability, was physically unable to perform adequately in his or her assigned duties; or

(b) acute, grave illness or injury, or other significant deterioration of the member's physical condition occurred immediately prior to or coincident with processing for separation or retirement for reasons other than physical disability which rendered him or her unfit for further duty.

(2) A member being processed for separation or retirement for reasons other than physical disability shall not be referred for disability evaluation unless the conditions in articles 2.C.2.b.(1)(a) or (b) are met.

(3) The determination of a grave or serious condition or significant deterioration must be made by a competent Coast Guard medical officer. Such medical authority will consult with the CGPC senior medical officer, as necessary, to ensure proper execution of this policy in light of the member's condition. The member's command may concurrently submit comment to the CGPC senior medical officer.

c. If a member being processed for separation or retirement for reasons other than physical disability adequately performed the duties of his or her office, grade, rank or rating, the member is deemed fit for duty even though medical evidence indicates he or she has impairments.

…

i. The existence of a physical defect or condition that is ratable under the standard schedule for rating disabilities in use by the Department of Veterans Affairs (DVA) does not of itself provide justification for, or entitlement to, separation or retirement from military service because of physical disability. Although a member may have physical impairments ratable in accordance with the VASRD, such impairments do not necessarily render him or her unfit for military duty. A member may have physical impairments that are not unfitting at the time of separation, but which could affect potential civilian employment. The effect on some civilian pursuits may be significant. Such a member should apply to the DVA for disability compensation after release from active duty.

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 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.[15]

3. The application is 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).

4. The applicant made the following allegations: (a) In issuing him a drug incident, his CO erroneously and unjustly concluded that he had admitted to knowingly using an opiate and relied upon the result of a drug urinalysis performed as part of his alcohol treatment at a federal treatment facility in violation of HIPAA under 42 C.F.R. §2.12; (b) The Coast Guard erroneously found that he did not meet reenlistment eligibility criteria due to an alleged drug incident; (c) The Coast Guard denied him his right to due process when it denied him the right to appear before an Administrative Separation Board (ASB), court-martial, or NJP, which would have afforded him the opportunity to defend himself and present evidence; and (d) The Coast Guard erroneously and unjustly denied him a medical retirement for his PTSD or at a minimum the opportunity to appear before an MEB. 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.[16] 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."[17]

5. **Alleged HIPAA Violation**: The applicant alleged that the Coast Guard violated HIPAA regulations at 42 C.F.R. § 2.12 when it used protected information to initiate an investigation into his alleged drug use because the drug urinalysis was conducted pursuant to his alcohol abuse treatment program. Title 42 C.F.R. § 2.12(a) states the following about restrictions on disclosure:

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[15] *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).
[16] 33 C.F.R. § 52.24(b).
[17] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

> (1) Restrictions on disclosure. The restrictions on disclosure in the regulations in this part apply to any records which:
>
> > (i) Would identify a patient as having or having had a substance use disorder either directly, by reference to publicly available information, or through verification of such identification by another person; and
> >
> > (ii) –Contain drug abuse information obtained by a federally assisted drug abuse program after March 20, 1972 (part 2 program), or contain alcohol abuse information obtained by a federally assisted alcohol abuse program after May 13, 1974 (part 2 program); … for the purpose of treating a substance use disorder, making a diagnosis for that treatment, or making a referral for that treatment.
>
> (2) –Restriction on use. The restriction on use of information to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient (42 U.S.C. 290dd–2(c)) applies to any information, whether or not recorded, which is drug abuse information obtained by a federally assisted drug abuse program after March 20, 1972 (part 2 program), or is alcohol abuse information obtained by a federally assisted alcohol abuse program after May 13, 1974 (part 2 program); … for the purpose of treating a substance use disorder, making a diagnosis for the treatment, or making a referral for the treatment.

In this case, the applicant was attending a federally assisted[18] alcohol abuse program, but it was the results of a drug urinalysis that were provided to the Coast Guard, not the results of an alcohol test or "alcohol abuse information," as the regulation specifies. The regulation is very specific in this regard as 42 C.F.R. § 2.12(a)(1)(ii) could have referred more generically to substance abuse information obtained by a federally assisted substance abuse program, as stated in § 2.12(e)(3), or to both alcohol and drug abuse information obtained by a federally assisted alcohol or drug abuse program. Instead, both § 2.12(a)(1)(ii) and § 2.12(a)(2) carefully distinguish the two and appear to restrict the disclosure and use of only "alcohol abuse information" by a "federally assisted alcohol abuse program" and to not restrict the disclosure and use of "drug abuse information" by a "federally assisted alcohol abuse program."

The restrictions on "disclosure" in 42 C.F.R. § 2.12(a) and "use" in 42 U.S.C. § 2.12(a)(2) are distinguished in § 2.12(e)(3), which states, "Whether a restriction applies to the use or disclosure of a record affects the type of records which may be disclosed. The restrictions on disclosure apply to any part 2–covered records which would identify a specified patient as having or having had a substance use disorder. The restriction on use of part 2 records to bring criminal charges against a patient for a crime applies to any records obtained by the part 2 program for the purpose of diagnosis, treatment, or referral for treatment of patients with substance use disorders." Although § 2.12(e)(3) does refer to all "substance use disorders" to explain the difference in

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[18] 42 C.F.R. § 2.12(b) defines "federally assisted" as meaning that the facility—

> (3) … is supported by funds provided by any department or agency of the United States by being:
>
> (i) A recipient of federal financial assistance in any form, including financial assistance which does not directly pay for the substance use disorder diagnosis, treatment, or referral for treatment; or
>
> (ii) Conducted by a state or local government unit which, through general or special revenue sharing or other forms of assistance, receives federal funds which could be (but are not necessarily) spent for the substance use disorder program; or
>
> (4) It is assisted by the Internal Revenue Service of the Department of the Treasury through the allowance of income tax deductions for contributions to the program or through the granting of tax exempt status to the program.

restrictions on disclosure and use, the express restrictions in 42 C.F.R. §§ 2.12(a) and 2.12(a)(2) are more specific and § 2.11(b)(3) states that "[b]ecause there is a criminal penalty for violating the regulations, they are to be construed strictly in favor of the potential violator in the same manner as a criminal statute." Therefore, the Board agrees with the JAG and finds that the applicant has not proven, by a preponderance of the evidence, that the Coast Guard's use of the drug urinalysis results received from his alcohol abuse treatment program in its investigation violated 42 C.F.R. § 2.12. Nor does the regulation prohibit the sharing of drug abuse information to the armed forces.[19]

6. **Drug Cut-Off in DoDI 1010.16**. The applicant alleged that even if his urinalysis result was not prohibited from being used by the Coast Guard, the levels found in his system were below the limits enumerated by DoDI 1010.16 (2020). This instruction provides that, in order for a member's urinalysis result to be "positive" for codeine, that member's codeine level must be at or above 2,000 ng/ml. However, as the Page 7s dated March 15 and 18, 2020, show, the applicant's CO did not base his finding that the applicant had incurred a drug incident on the urinalysis result but on the applicant's admission in the CGIS report that he had used a prescription drug for which he had no prescription. The urinalysis result did cause the CO to initiate the investigation but, by itself, the urinalysis result would not have justified a drug incident. An admission, however, is sufficient by itself to support a finding of a drug incident.[20] Therefore, the fact that the level of codeine in the applicant's urine did not rise above the cut-off level in DoDI 1010.16 does not show that the CO's finding that the applicant had incurred a drug incident was erroneous or unjust. The Board finds that the applicant has failed to prove, by a preponderance of the evidence, that his CO erred by finding that the applicant had incurred a drug incident based on his admission, even though the level of codeine in his urine did not exceed the minimum cut-off for a positive result pursuant to DoDI 1010.16.

7. **Admission of Knowing Drug Use**. The applicant alleged that his CO erred in finding that he had admitted to knowingly ingesting codeine. He claimed that he was simply guessing about what might have happened when confronted by the CGIS agents. He claimed that he had ingested the codeine unknowingly when he was looking for Advil because he was suffering from a migraine and adverse prescribed/over-the-counter drug interactions after his fight with his wife and her arrest. The record shows that, in the early morning hours of November 4, 2020, the applicant ingested a schedule III narcotic, presumably Tylenol with codeine, without a proper prescription. The record further shows that, upon learning of his positive drug test on November 9, 2020, the applicant initially denied any drug usage, but then told his treatment counselor that "I did take some of my wife's pills that were in Advil bottle. She does use opiates so I guess that is what I took." While being interviewed by CGIS investigators on February 10, 2021, the applicant told CGIS the following:

> [The applicant] said he was looking for something to take for the migraine. looked in the cabinet. and his wife had some of her mother's 'Norco' so he took one of those pills.

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[19] 42 C.F.R. § 2.12(c)(2)(i) states that the restrictions do not apply to "Any interchange of that information within the Armed Forces."

[20] COMDTINST M1000.10A, Chap. 5.E.2.

> [The applicant] admitted to taking Norco (a prescription combination of acetaminophen and hydrocodone). He explained there was nothing else in the house for him to take to relieve his migraine. He said he was vomiting, could not drive, and did not want to call the hospital to come to the house.
>
> … He explained that Norco is a strong pain killer, and his mother-in-law had the prescription due to a medical condition. His wife had them at the house because his mother-in-law stopped taking them due to a doctor's order. His wife lakes the Norco on occasion due to neck pain.
>
> [The applicant] stated he does not have any prescriptions for pain medication. His last prescription for pain medication was back in 2013 for shoulder surgery.
>
> [The applicant] said it was a "stupid decision" to take the Norco. At the time, he had a pounding headache and just wanted it to go away. …
>
> [The applicant] stated he knows he was not supposed to take the Norco. …

Then, after being told that Norco would not have caused the urinalysis result he received, in his April 23, 2020, personal statement, the applicant wrote, "At the time of the interview, I gave CGIS my best guess, truthfully not having any idea that I had taken a prescription medication at all."

To further support his claims—that he was unaware of his actions the night of the alleged drug use—the applicant submitted a sworn statement from a licensed pharmacist who is also a licensed attorney. According to the pharmacist, the symptoms described by the applicant the night of the alleged drug incident are consistent with known adverse drug interactions related to Zoloft, Valerian Root, and his underlying "drug-disease state interaction." On the night of the drug incident, the applicant alleged that he suffered from a debilitating migraine, pain, blurred vision, inability to walk, and vomiting, all of which he had never experienced before, and according to the pharmacist, "***may***" have been triggered by the adverse side effects of Zoloft and Valerian Root being taken together. The pharmacist stated that Valerian Root, an over-the-counter dietary supplement, alone may impair an individual's thinking or reactions, and common side effects include headaches, upset stomach, and problems with cognition, side effects which could be heightened when combined with Zoloft.

However, the Board finds the pharmacist's analysis to be unpersuasive and unsupported by the evidence in this case. First, the applicant had apparently been taking this medication and the dietary supplement Valerian Root for approximately two months prior to his November 4, 2020, drug incident. Although the applicant alleged he suffered from adverse side effects that led him to being unable to see, walk, or think, apart from his claims, there is no evidence that the applicant experienced the alleged symptoms before, during, or after the night he swallowed the drugs. Nor does the record before the Board contain medical records dated before November 4, 2020, showing that the applicant suffered from debilitating migraine headaches.

Finally, the applicant argued that, because he admitted to CGIS investigators that he had taken Norco, not Tylenol with Codeine—the drug actually found in his system—there was technically no admission and therefore no drug incident. The pharmacist takes the same position. However, the applicant's claim is without merit. The applicant has not provided any policy, and the Board has found none, that states that a member must accurately identify what type or brand name of drug he used for it to be considered an admission. The fact that the applicant misidentified

which opiate he took does not render his admission erroneous, invalid, or inadmissible as grounds for a drug incident finding.

The Board finds that the preponderance of the evidence supports his CO's finding that the applicant admitted to knowingly taking a controlled substance for which he had no prescription, which constitutes a drug incident under Article 5.A.3. of COMDTINST M1000.10A and a criminal offense under Article 112a of the UCMJ. As a result, the preponderance of the evidence shows that the applicant's CO properly issued the applicant a negative Page 7 to document the applicant's drug incident. Article 5.E.2. of the Coast Guard Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10A, states, "A member's admission of drug use or a positive confirmed test result, standing alone, may be sufficient to establish intentional use and thus suffice to meet this burden of proof."

8. **Ineligibility to Reenlist:** Under Article 1.A.5.b. of the Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2A, to be eligible to reenlist, 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 of the UCMJ—Wrongful Use, Possession of a Controlled Substance—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 the circumstances that makes a member ineligible to reenlist under Article 1.A.5.b. of COMDTINST M1000.2A. The applicant had a Page 7 dated March 15, 2021, documenting illegal drug use in violation of Article 112a of the UCMJ in his record, and he has not shown that it was erroneous or unjust. Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard erred when it concluded that the applicant failed to meet reenlistment eligibility criteria due to a documented drug incident.

9. **Lack of Hearing**: The applicant alleged that when the Coast Guard discharged him without an opportunity to appear before a court-martial, NJP, or ASB, it violated his due process rights. For the following reasons, the Board disagrees:

a. The record shows that in November 2020, the applicant incurred a drug incident by intentionally using a Schedule III narcotic, for which he did not have a prescription.[21] This drug incident rendered the applicant ineligible to reenlist under Article 1.A.5.b. of the Coast Guard Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2A. In accordance with Article 1.B.5.a. of the Military Separations Manual, COMDTINST M1000.4, "If at the time of the initial pre-discharge interview conducted under Article 1.B.4.b. of this Manual ***or any time after a commanding officer determines an enlisted member is not eligible to reenlist***, this Article's procedures apply." (Emphasis added.) Article 1.A.5.d.(2) of the same instruction required the applicant's command to submit a memorandum to Commander, PSC to discharge the applicant because he did not meet the eligibility criteria and was not recommended for reenlistment by his CO. The record shows these procedures were properly followed. Upon finding him ineligible to

[21] A requirement for "wrongful use" udner Article 112a of the UCMJ.

reenlist, policy required that he be processed for separation at the end of his enlistment contract.

b. The applicant contended that, regardless of his drug incident and expiring enlistment, he had a right to a hearing. He argued that a hearing is provided to enlisted members with more than eight years of service because the Coast Guard believes that:

> [s]ound personnel management and ***ordinary concepts of fairness demand that a decision to separate, deny reenlistment***, or reduce in rate a member must be carefully considered, and ***that a member entitled to a hearing*** must be provided an opportunity to be heard, to present evidence, and to challenge evidence that will be included in the record. The requirements in this Manual, Coast Guard policy, and U.S. law pertaining to board proceedings shall be administered equitably and in good conscience by all participants of a board hearing (Reference (c)). (Emphasis added.)[22]

The applicant ignores the key words in this policy— "entitled to." The following Coast Guard policy is instructive:

Article 1.B.5.c. of the Military Separations Manual, COMDTINST M1000.4 states,

> Members who have eight or more years of total active duty and/or reserve military ***service that meet the reenlistment eligibility criteria*** in reference (l), Enlisted Accessions, Evaluations and Advancements, COMDTINST M1000.2 (series), but are not recommended for reenlistment by their commanding officer, are entitled to a reenlistment board. However, ***members who do not meet the eligibility criteria are not entitled to a reenlistment board, even if they have eight or more years of total active and/or reserve military service.*** If a member is entitled to a reenlistment board, the commanding officer shall follow the procedures in Reference (q), Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1. (series) (Emphasis added.)

Here, because the preponderance of the evidence shows that the applicant was correctly deemed ineligible to reenlist, he was not entitled to a hearing before the reenlistment board even though he had eight or more years of total active service.

c. Regarding the applicant's allegations that the Coast Guard violated his due process rights when they denied him the opportunity to appear before the ASB, the Board finds his arguments unpersuasive. Although policy requires a member's CO to initiate a discharge for misconduct after finding that a member has incurred a drug incident, policy does not require the actual separation authority, Commander, PSC, to reenlist the member—despite his ineligibility to reenlist—to provide time to follow the multiple lengthy procedures, including a hearing before an ASB, so that the member can be discharged for "Misconduct" due to drug abuse, with an HKK separation code, instead of being discharged for "Completion of Required Service" at the end of his enlistment. Nothing in the Military Separations Manual requires Commander, PSC, to reenlist and follow separation procedures for a member under one chapter of the Military Separations Manual when the member is already ineligible to reenlist and thus eligible for discharge under another chapter of that manual.

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[22] Article 1.E.1.c. of the Coast Guard Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1.

The applicant's ineligibility afforded him the opportunity to provide a statement on his behalf to PSC, which the record shows he did. The applicant is under the impression that the outcome of ASB proceedings could have rendered a different, more beneficial outcome than the one his CO and PSC provided, but the Board finds that his belief is misplaced. Article 1.J.1. of the Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1, states:

> ***[A] board's report***, including its findings of fact, opinions, and recommendations, ***is advisory only***; it will be thoroughly and carefully reviewed and considered, but it is not binding on CG PSC. ***CG PSC is responsible for enforcing policy that is in the best interests of the entire Coast Guard and for ensuring the consistent application of military personnel policy across the Coast Guard***.

The record shows that the applicant submitted a personal statement to Commander, PSC. The applicant was thus afforded the opportunity to present his case to Commander, PSC, who is the separation authority for both misconduct discharges and discharges due to ineligibility to reenlist. In light of the applicant's drug incident and military record, PSC found the applicant's request to be unpersuasive and found that the applicant's separation at the end of his enlistment was in the best interest of the Coast Guard. The Board finds that the Coast Guard followed appropriate policy and afforded the applicant with all rights to which he was entitled in policy.

Even if the applicant had appeared before an ASB and the ASB recommended that the applicant be retained, the record indicates that PSC would have separated the applicant at its earliest convenience. As stated in the above-referenced policy, PSC is responsible for enforcing policy that is in the best interests of the entire Coast Guard and for ensuring application of military personnel policy across the Coast Guard. The Coast Guard has long maintained a strict no-tolerance policy for drug use, and PSC is bound to enforce that policy uniformly throughout the Coast Guard, as it did here. Under Article 1.B.17. of the Military Separations Manual, a member who incurs a drug incident by illegally using drugs must be discharged with no higher than a General discharge.

d. The applicant also contended that he had a right to court-martial or NJP in order to defend himself and present evidence. He argued that the Coast Guard circumvented his due process right when it denied him the right to defend himself before a court-martial or NJP. Rule 306(a) of the Rules for Courts-Martial (R.C.M.), states, "Each commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense." The applicant's CO was not required to dispose of the applicant's case through court-martial or NJP. Article 1(d)(2) of Part V of the R.C.M. states, "A commander who is considering a case for disposition under Article 15 will exercise personal discretion in evaluating each case, both as to whether nonjudicial punishment is appropriate, and, if so, as to the nature and amount of punishment appropriate." Again, policy grants the CO discretion when choosing the appropriate disposition for a member.

> Here, as outlined in the above-referenced policy, and despite the applicant's contentions to the contrary, he was not entitled to a court-martial or NJP under Rule 306 of the R.C.M. or Article 1(d)(2) of Part V of the R.C.M. Coast Guard policy gives discretion to COs on how to dispose of offenses within their command, but does not require any specific action be taken. Here, the record shows that the applicant's CO decided that court-martial and NJP proceedings were not appropriate in the applicant's case and decided that other administrative measures would be more appropriate. The applicant has not proven by a preponderance of the evidence that his CO's failure to convene a court-martial or mast for NJP was erroneous or unjust.

9. **Request for Medical Retirement or PDES Processing.** The applicant alleged that he should have been granted a medical discharge for his documented PTSD which, according to the applicant, was further supported by the Coast Guard Clinical Psychologist's opinion.[23] The Physical Disability Evaluation System (PDES) Manual, COMDTINST M1850.2D, Article 2.C.2.a. states, "The sole standard in making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank or rating because of disease or injury incurred or aggravated through military service." Chapter 3.F.1.c. of the Medical Manual, COMDTINST M6000.1F, states, "Members are ordinarily considered fit for duty unless they have a physical impairment (or impairments) that interferes with the performance of the duties of their grade or rating. A determination of fitness or unfitness depends upon the individual's ability to reasonably perform those duties."

The record shows that, on April 23, 2021, the applicant submitted a personal statement wherein he contested his separation and requested the separation authority reconsider his separation. The Board found the following excerpt from the applicant's personal statement instructive:

> I meet the basic eligibility requirements during this current period of enlistment. My calculated final characteristic averages as defined in reference (a) article 1.B.31.c. is 5.7-5.9[24] (enclosure. (10); ***I am physically qualified and have never received an unsatisfactory conduct mark during the current period of enlistment, or career, until this evaluation which is currently being appealed.*** I have never received any unsatisfactory conduct mark for operating a vehicle under the influence or for perpetrating sexual assault, I have no convictions, have not had my GTCC closed, and have not had more than one weight probationary period in the current enlistment. ***A review of my enlistment period will show consistent above average and superior marks, multiple accommodations, and no incidents of NJP, unsatisfactory conduct, or incidents of misconduct.*** (Emphasis added)

This excerpt refutes the applicant's claim that he was unfit for duty at the time of his separation due to PTSD or any other medical condition, thus, he was not entitled to PDES

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[23] The Coast Guard Clinical Psychologist noted that the applicant's civilian counselor did not state that the applicant had PTSD, but Post-Traumatic Stress Syndrome. The Coast Guard Psychologist explained that PTSD and PTSS are different. According to the Coast Guard psychologist, it cannot be discerned whether the civilian health provider intentionally used the word "syndrome" to indicate that the applicant was experiencing some symptoms of post-traumatic stress, but at the time did not meet all of the full diagnostic criteria for PTSD, or if the usage of the word was in error.

[24] Military Separations Manual, COMDTINST M1000.4.

processing. The applicant himself argued that he was physically qualified to remain in the Coast Guard. In his April 23, 2021, personal statement, the applicant highlighted his evaluation marks as evidence of his fitness to remain in the Coast Guard. Article 2.C.2.c., COMDTINST M1850.2D, states, "If a member being processed for separation or retirement for reasons other than physical disability adequately performed the duties of his or her office, grade, rank or rating, the member is deemed fit for duty even though medical evidence indicates he or she has impairments."

The applicant now contends that he was in fact unfit for duty because he was suffering from PTSD and should have been granted a medical evaluation board. To support his claim, the applicant submitted a letter from the DVA wherein he was given a disability rating of 50%. Article 2.C.2.c.i., COMDTINST M1850.2D, provides the following:

> The existence of a physical defect or condition that is ratable under the standard schedule for rating disabilities in use by the Department of Veterans Affairs (DVA) does not of itself provide justification for, or entitlement to, separation or retirement from military service because of physical disability. Although a member may have physical impairments ratable in accordance with the VASRD, such impairments do not necessarily render him or her unfit for military duty. A member may have physical impairments that are not unfitting at the time of separation, but which could affect potential civilian employment. The effect on some civilian pursuits may be significant. Such a member should apply to the DVA for disability compensation after release from active duty.

The PDES manual makes it clear that a VA disability rating does not by itself create entitlement to PDES processing and retirement from military service. Moreover, PTSD is not *per se* a disqualifying condition that triggers PDES processing. According to Chapter 3.F.16. of the Medical Manual, a member's PTSD is not considered disqualifying unless it persists for at least 12 months despite treatment. In the applicant's case, although the record shows that he had been diagnosed with mental health conditions, the preponderance of the evidence shows that those diagnoses did not render the applicant unfit for duty, as indicated by his own words and enlisted evaluations. Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that he was unfit for duty at the time of his separation or that he was entitled to a hearing before a medical evaluation board. His request for relief should therefore be denied.

10. Finally, the applicant alleged that he is entitled to liberal consideration because he was suffering from a mental health condition at the time of his separation. Nothing in the record shows that his PTSD was related to combat or a military sexual trauma, as required by 10 U.S.C. § 1552, and DHS's liberal consideration policy does not apply to requests for removal of drug incidents or for medical boards or disability ratings. In addition, the record shows that the Coast Guard was aware of the applicant's PTSD diagnosis at the time of his separation, and based on all the evidence before it, found that the applicant's conduct warranted separation because of his ineligibility to reenlist.

11. **Character of Service/Discharge**: Liberal consideration does apply, however, to an applicant's request for an upgraded character of discharge when a mental health condition may

have caused or contributed to the character of discharge.[25] Although the Board finds that the applicant has failed to prove, by a preponderance of the evidence that his drug use was accidental and that the Coast Guard erred when it denied him reenlistment due to a documented drug incident, the Board is not precluded from granting some relief in this case.[26] Here, the Board is persuaded that there were extenuating circumstances that led to the applicant's drug usage, namely, being physically assaulted by his wife in front of his children and, according to him, stress that caused the applicant to suffer from a severe headache. Other than the applicant's November 4, 2021, drug incident, there is no documentation of counseling for misconduct in his record. Given the extenuating circumstances and the length of the applicant's honorable service—approximately 16 years—the Board finds that upgrading the applicant's character of service from General, Under Honorable Conditions, to Honorable would be in the interest of justice.

12. 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.[27] He has not proven, by a preponderance of the evidence, that the Coast Guard erroneously denied him due process or reenlistment into the Coast Guard. Accordingly, the applicant's request should be denied, but alternate relief should be granted by upgrading his character of service on his DD-214.

(ORDER AND SIGNATURES ON NEXT PAGE)

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[25] DHS Office of the General Counsel, "Guidance to the Board for Correction of Military Records of the Coast Guard Regarding Requests by Veterans for Modification of their Discharges Based on Claims of Post-Traumatic Stress Disorder, Traumatic Brain Injury, Other Mental Health Conditions, Sexual Assault, or Sexual Harassment" (signed by the Principal Deputy General Counsel as the delegate of the Secretary, June 20, 2018).

[26] 41 Op. Att'y Gen. 94 (1952), 1952 WL 2907 (finding that "[t]he words 'error' and 'injustice' as used in this section do not have a limited or technical meaning and, to be made the basis for remedial action, the 'error' or 'injustice' need not have been caused by the service involved.").

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

ORDER

The application of former EMC [redacted] USCG, for correction of his military record is denied, but alternate relief is granted. The Coast Guard shall issue him a new DD-214 to reflect an Honorable discharge.

February 3, 2023

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