DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-198

Xxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxx

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the applicant's application form on June 23, 2011, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated March 28, 2012, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

SUMMARY OF THE APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a lieutenant (LT) on active duty, asked the Board to remove from his record a special officer evaluation report (SOER) with low marks[1] covering his service from June 1 to October 13, 2009, when he was serving as Xxxxx xxxxx to a XXXXX; a memorandum documenting substance abuse screening, dated November 6, 2009; and a letter from the XXXXX (the applicant's commanding officer (CO)) documenting counseling about a drug incident, dated October 13, 2009. He also asked the Board to remove from his record his non-selections for promotion to lieutenant commander (LCDR) in 2010 and 2011 so that he will have two more chances to be selected for promotion. In addition, if he is selected for promotion by the first LCDR selection board to review his record after it is corrected by the Board, he asked the Board to backdate his LCDR date of rank to what it would have been had he been selected for promotion in 2010 and to award him corresponding back pay and allowances.

The applicant explained that in 2009, he admitted that he had accidentally ingested marijuana in 2006 when he was introduced to a woman who was smoking a hand-rolled cigarette that smelled like tobacco and picked up a similar one to smoke only to discover that the one he took contained marijuana. A Board of Inquiry (BOI) was held to determine whether he should be retained on active duty. The BOI concluded that he had not intentionally falsified a local records

[1] On an OER form (CG-5310B), Coast Guard officers are rated in eighteen different performance categories, such as "Adaptability," "Professional Competence," "Teamwork," and "Judgment" on a scale of 1 (worst) to 7 (best).

check form in January 2009, that he did not have any intent to obtain or use illegal drugs, and that his actions in failing to report his accidental ingestion of marijuana until 2009 did not support separation from the Service.

The applicant argued that the disputed documents should be removed because his ingestion of marijuana in 2006 was accidental and innocent and so did not meet the definition of a "drug incident," as the BOI concluded. He also argued that because under Article 20.C.3.e. of the Personnel Manual, an Administrative Discharge Board can make a finding of no drug incident, contrary to the finding of an enlisted member's CO, the BOI's findings should be deemed to overrule and negate his own CO's finding that he had been involved in a drug incident. Therefore, the SOER should be expunged because it documents his CO's overruled finding that a drug incident occurred without showing that the BOI found that no drug incident occurred and that he had not previously intentionally lied about his drug use. The applicant argued that without any information about the BOI, the SOER is misleading and unjustly prejudicial to his record when it is reviewed by a selection board.

The applicant noted that Article 20.C.3.d. of the Personnel Manual states that a "commanding officer may delay final determination to pursue any of these options deemed appropriate: 1. Ask the member to consent to a urinalysis test as outlined in Article 20.C.2.a.; 2. Direct the member to participate in a urinalysis evaluation program for a maximum of six months as outlined in Article 20.C.2.a." However, instead of following one of these courses of action, the XXXXX simply relied on the applicant's admission.

The applicant alleged that his due process rights were violated during the preliminary investigation that followed his admission. He alleged that he had been designated a party to the investigation but was not allowed to cross-examine witnesses before the XXXXX determined that a drug incident had occurred, as required by Article 10.A.2.a.5. of the Administrative Investigations Manual (AIM). The applicant alleged that documents showing he was informed of his Article 31(B), Miranda/Tempia rights because he was suspected of having committed offenses under the Uniform Code of Military Justice (UCMJ) prove that he was designated a party to the investigation. However, he was only allowed to cross-examine witnesses during the BOI after the XXXXX had already entered the disputed documents in his record. He argued that this violation of due process justifies expunging the disputed documents because they would never have been entered in his record if he been allowed to cross-examine witnesses during the preliminary investigation.

The applicant argued that the disputed SOER should also be expunged because the XXXXX, who served as both Reporting Officer and Reviewer on his rating chain, should have been disqualified pursuant to Article 10.A.2.g.2.b. of the Personnel Manual. The applicant explained that the XXXXX received the preliminary investigator's report and would have been the convening official for any mast or court-martial that might have been held, although none was. Therefore, the applicant argued, the XXXXX was an interested party to the investigation and should have been disqualified from his rating chain. The applicant also argued that the XXXXX should have been disqualified due to a conflict of interest because the applicant's admission of drug use had the potential to reflect negatively on him, which "created a direct personal conflict."

The applicant alleged that the dates of the SOER are erroneous because the conduct that triggered the SOER occurred in 2006, but the reporting period for the SOER is in 2009. He alleged that because Article 10A.4.f.11. of the Personnel Manual states that an OER may not mention conduct that occurred outside of the reporting period, his rating chain should have documented the alleged drug incident in a separate SOER appropriately backdated and documented his contemporary performance and conduct in 2009 in a regular OER.

The applicant alleged that his Reporting Officer's recommendation in the SOER that he "should be required to show cause for retention in the U.S. Coast Guard" violates Article 10.A.4.f.1. of the Personnel Manual, which prohibits comments that "mention the officer's conduct is the subject of a judicial, administrative, or investigative proceeding." He also argued that references to a completed investigation in the SOER violate this regulation.

The applicant stated that the SOER should be removed in its entirety because his Reporting Officer assigned him three very low marks of 2 and included many negative comments. The fact that his Reporting officer had given him much higher marks on his previous OER proves that the erroneous assumption that he had intentionally used illegal drugs negatively affected his marks in the SOER. He also alleged that the SOER is inconsistent because his Reporting Officer assigned him a mark he received in the third spot on the comparison scale, which means "Fair performer, recommended for increased responsibility," but included a comment that he "is not prepared to assume duties of increased responsibility."

In support of his allegations, the applicant submitted copies of the disputed documents, other OERs, the Article 31(B), Miranda/Tempia Rights forms he signed on September 23 and 24, 2009, before he was interviewed by the preliminary investigator.

SUMMARY OF THE RECORD

The applicant's OER marks as a LT are shown in the chart below. On January 28, 2009, he became the xxxxx xxxxx to a XXXXX. On his first OER in this position (OER5 in the chart), the applicant received all marks of 5 and 6. On his second and last OER in this position (the SOER, which is shaded in the chart), the applicant received slightly higher marks in some categories but three marks of 2 for "Judgment," "Responsibility," and "Health and Well-Being." The XXXXX's Executive Assistant, a commander, served in the role of Supervisor, preparing the first 13 marks (above the bar) in OER5 and the SOER. The XXXXX served as both the Reporting Officer and Reviewer for the applicant and so assigned the last five marks, the comparison scale mark, and the comments supporting those marks.

MARKS IN NINE LT OERs FROM MARCH 2005 THROUGH MAY 2011

PERFORMANCE CATEGORY	OER1	OER2	OER3	OER4	OER5	SOER	OER7	OER8	OER9
Planning and Preparedness	6	6	6	6	5	6	5	6	6
Using Resources	6	5	5	6	6	6	6	6	6
Results/Effectiveness	5	6	6	6	5	5	6	6	7
Adaptability	6	6	6	6	6	6	6	6	6

Professional Competence	7	5	6	6	5	5	6	6	6
Speaking & Listening	7	5	6	6	5	5	6	6	6
Writing	6	6	6	6	5	5	6	6	6
Looking Out for Others	6	6	6	6	5	6	6	6	5
Developing Others	5	6	6	6	5	6	5	6	5
Directing Others	4	5	5	5	6	6	6	6	7
Teamwork	6	6	6	6	6	6	6	6	7
Workplace Climate	6	6	6	6	5	5	6	6	6
Evaluations	4	5	5	5	5	5	5	5	5
Initiative	6	5	5	6	5	5	6	7	6
Judgment	6	5	6	6	5	2	5	6	6
Responsibility	5	6	6	6	6	2	6	6	6
Professional Presence	6	6	6	6	6	4	6	6	6
Health & Well-Being	6	6	6	6	5	2	6	6	5
Average for OER	**5.7**	**5.6**	**5.5**	**5.9**	**5.3**	**4.8**	**5.8**	**6.0**	**5.9**
Comparison Scale‡	**5th**	**5th**	**5th**	**5th**	**5th**	**3rd**	**5th**	**5th**	**5th**

‡ The comparison scale on an OER is not numbered, but as with the performance categories, there are seven possible marks from a low of "Performance unsatisfactory for grade or billet" to a high of "Best officer of this grade." The Reporting Officer assigns the comparison scale mark by comparing the subordinate officer to all of the other officers of the same rank that the Reporting Officer has known throughout his career. A mark in the 5th spot means that the applicant was rated as an "Excellent performer; give toughest, most challenging leadership assignments." A mark in the 3rd spot means "Fair performer; recommended for increased responsibility."

The Reporting Officer wrote a few positive comments but also included the following negative comments in the SOER:

> **REPORTING OFFICER COMMENTS**: … While updating his security clearance, ROO [Reported-on Officer] admitted to using an illegal substance in July 2006. He also admitted this to his supervisor. As a result of an investigation completed during this period, ROO was removed from his duties as xxxxx xxxxx and reassigned. I believe ROO was involved in a drug incident. Though I commend [him] for his candor now, I cannot condone his lapse in judgment or behavior.
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> **COMMENTS**: … On 10 Sep 09, ROO completed a SF-86 (security questionnaire) during which he admitted to smoking marijuana in Jul 2006; also made verbal admission to EA & DOS, & sent e-mail to staff explaining the circumstances. An investigation further revealed that when ROO completed a local records check memo in Jan 2009, he was not truthful when responding to the question, 'Have you ever used a controlled substance?' ROO had not previously reported the drug incident.
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> **POTENTIAL**: [The applicant] improved his preparation and performance during this marking period, anticipated challenges, and instituted measures to mitigate them. He showed great promise and had a bright future ahead. Regretfully, his admission to past drug use led to his relief as my aide. Though his honesty during the security clearance interview is admirable, I am troubled that he not only engaged in illegal activity but did not reveal this information until now. At this time, ROO is not prepared to assume duties of increased responsibility and is not recommended for promotion to Lieutenant Commander. ROO should be required to show cause for retention in the U.S. Coast Guard.

Because the SOER is derogatory, the applicant was entitled to file an addendum to it. He did so and stated the following:

> I have made a costly mistake. The effects of that mistake have been my relief from my assignment as the [xxxxxxxxxxxx] Xxxxx xxxxx and irreparable damage to both my career and my reputation.
>
> While visiting an ex-girlfriend in July of 2006, we stopped at the apartment of one of her friends to retrieve laundry (my ex-girlfriend did not have a washer/dryer in her apartment). When we arrived, I was introduced to two women, neither of whom I had met before, one of which was smoking a hand-rolled cigarette. I could smell that the cigarette that she was smoking was tobacco. I asked if I could have one and picked up a cigarette that was outside of a cigarette case on the table. I lit it and inhaled and recognized immediately that it was not tobacco. Prior to lighting and inhaling, I had no reason to believe that it was anything other than a hand-rolled cigarette containing tobacco. I asked, and one of the women confirmed that it was marijuana, at which point I handed it to one of the women, and they finished smoking it.
>
> There is no doubt that I should have self-reported my unintentional use of marijuana as soon as it happened. While I understand that my reason for not reporting at that time does not excuse my actions, my explanation is simple—I was scared. I was afraid that were I to report that I had smoked marijuana, even though it was unintentional, that I would not be believed and that I would end up where I am now, facing the possibility that my career will end much earlier than I ever thought it would.
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> In January of 2009, I completed a local records check memorandum with the … Command Security Officer, and for a second time, I neglected to report that I had smoked marijuana in July of 2006. While I did not answer this question truthfully and I accept responsibility for my oversight, I did not answer this question with the intent to deceive. The period during which I filled out the local records check memorandum was one of the busiest and most stressful periods of my life. It was my first day at work after having PCS'ed to … only 14 days after receiving orders. I was attempting to refinance my mortgage and rent out the house that I own in …, attempting to find a place to live here in …, taking three graduate school classes, completing outstanding administrative work from my previous duty location due to the earlier than expected departure, and also attempting to absorb as much information as I possibly could during the 1 – 2 days before the outgoing Xxxxx xxxxx departed for [the Arabian Gulf]. My mind was in a million places and I simply did not remember the unintentional use that happened three years earlier when I was speeding through the paperwork.
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> The difference between the period when I was filling out that local records check memorandum and when I filled out my SF-86 Security Questionnaire are tremendous. My housing situation, both in … and in … had stabilized, and I had completed my Master's program. Most importantly, I had gained a level of understanding and comfort with the pace of life involved with being a Xxxxx xxxxx. As I went through the pages of the SF-86 Security Questionnaire, I remembered that night in 2006, and I listed it in my paperwork. I believe that my admission via the SF-86 is proof that I did not intentionally falsify the local records check paperwork that I submitted to the … Command Security Officer.
>
> The 'Comments' block in Section 8 of my OER states that "On 10 Sep 09, ROO completed a SF-86 (security questionnaire) during which he admitted to smoking marijuana in July 2006; also made verbal admission to EA & DOS, & sent e-mail to staff explaining the circumstances." That statement is true, but because it is open to misinterpretation I would like to provide clarification.
>
> I definitely admitted both in writing (via my SF-86) and verbally (to both the [XXXXX's] Executive Assistant and Deputy of Staff) that I had 'smoked' marijuana. In my view, having

> inhaled from the cigarette meets the definition of the word 'smoked,' regardless of the fact that I did not know that it was marijuana when I inhaled, hence the use of that verbiage. During those conversations, I also stated that I was out with an ex-girlfriend the night that it happened and that I fully expected that once investigated, the situation would be resolved favorably and my access to classified material (which was temporarily revoked pending an investigation) would be reinstated. No further details regarding what happened that night were discussed. My email to the staff was an explanation of why I was relieved of my duties as Xxxxx xxxxx, including an apology for leaving them shorthanded and thanking them for the part they played in my personal and professional growth, but it did not address the details of what happened in 2006.
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> Given the details above, I believe being assigned a mark of 2 in Sections 8.c. and 8.e. (Personal and Professional Qualities – Responsibility and Health/Well-being) is disproportionately harsh.
>
> With respect to Section 8.c. (Responsibility), with the exception of my oversight in completing the local records check memorandum, I believe that I would have met the criteria for a 5 or 6 in the category. I self-reported an issue that would have remained unknown were it not for my own admission, displaying both the integrity and ethics that the Coast Guard desires of its personnel. I held myself to the highest standards of accountability under the most difficult of circumstances. Lastly, my performance throughout the period would have warranted higher than average marks.
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> Regarding Section 8.e. (Health and Well-being), my failure to meet the Coast Guard's standards of sobriety were beyond my control. While I admit that I smoked marijuana, it was unintentional.
>
> Finally, regarding Section 8.b. (Judgment), while I did self-report, I did so three years later than I should have, and I accept full responsibility for the gap in reporting and my lapse in Judgment. I both deserve and acknowledge a mark of 2 in that category.

The applicant's SOER addendum was forwarded through his rating chain. The Supervisor stated that he believed that "this was an isolated incident and not a deeper character flaw" but recommended that the applicant be required to show cause for retention because of Coast Guard drug policy. The XXXXX forwarded the addendum without comment.

On October 13, 2009, the XXXXX entered in the applicant's record a memorandum with the subject line "Letter of Counseling – Documented Drug Incident." The XXXXX wrote that he had "considered your statement with regard to the circumstances surrounding the use and the possible defense of innocent ingestion. However, considering all of the evidence, I have determined that the use was a drug incident as defined by [the Personnel Manual]." The XXXXX noted that he had relieved the applicant of his duties, opted not to take disciplinary action against him, and initiated procedures for an involuntary discharge.

On November 6, 2009, a memorandum with the subject line "Substance Abuse Screening Results," noting that the applicant did not meet the criteria for drug abuse or dependence was entered in his record.

Although the applicant received high marks and was recommended for promotion in OER7, he was not selected for promotion in 2010. Likewise, even though he received high marks and very strong recommendations for promotion in OER8 and OER9, he was not selected for promotion in 2011.

On October 21, 2010, the BOI convened requiring the applicant to "show cause" for retention on active duty. The BOI was composed of three voting commanders, a legal advisor,

and a recorder. The applicant submitted his own sworn testimony, "witness testimony," and various character references. The BOI concluded that he had "not intentionally falsif[ied] the local records check memorandum in an attempt to deceive" in January 2009 and that the applicant had "not demonstrate[d] intent to obtain or use illegal drugs." The BOI acknowledged that the CO had found that a drug incident occurred but stated that it had reviewed the applicant's statements, "witness testimony," and "various character references," which "placed the case in a broader context." The BOI concluded that he should be retained on active duty because the applicant's conduct "was not indicative of [his] character" and because of his performance record. The BOI's recommendation was approved on May 4, 2011, by Commander, Personnel Service Center.

VIEWS OF THE COAST GUARD

On October 28, 201, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the requested relief. In so doing, he adopted the findings and analysis provided in a memorandum on the case submitted by Commander, Personnel Service Center (PSC).

Memorandum of Commander, PSC

In response to the applicant's allegation that the XXXXX should have been disqualified from serving on his rating chain, PSC stated that the fact that the XXXXX reviewed the investigation into the applicant's admission of drug ingestion did not render the XXXXX an "interested party" to the investigation or otherwise adversely affect his ability to fairly evaluate the applicant's performance. PSC explained that an "interested party" to an investigation is someone who is also subject to the investigation.

In response to the applicant's allegation that the SOER should not have mentioned the investigation, PSC pointed out that the sentence prohibiting such comments in Article 10.A.4.f.1. of the Personnel Manual ends with the phrase "except as provided in Article 10.A.3.c." Article 10.A.3.c. is the article governing SOERs. PSC stated that the applicant's SOER was authorized under Article 10.A.3.c.1.a., which requires an SOER when an officer is relieved of his primary duties. PSC alleged that the prohibitions listed in Article 10.A.4.f.1. do not apply to SOERs and so "comments relating to the investigative and administrative proceedings in the disputed OER are not restricted in this case."

In response to the applicant's allegation that the BOI overturned the XXXXX's finding that a drug incident occurred, PSC noted that a BOI does not have the authority to overturn a CO's determination of a drug incident and that the BOI did not actually issue a finding of no drug incident. Instead, the BOI acknowledged the CO's authority to make the determination and did not agree or disagree with that determination, but explained its recommendation for retention by expressing the opinion that the applicant had "not demonstrate[d] intent to obtain or use illegal drugs."

PSC concluded that the applicant's rating chain properly carried out its responsibilities in preparing the disputed OER. In support of these allegations, PSC submitted sworn declarations

from the rating chain members. The Supervisor for the SOER, who was the XXXXX's Executive Assistant, noted that his portion of the SOER (the first 13 marks) is not in dispute and stated that he "stand[s] by my comments as written and marks as signed." The Reporting Officer and Reviewer for the SOER, who is now XXXXXXX, noted that the BOI made no finding of whether a drug incident occurred and stated that after reviewing the applicant's submissions to the BCMR, he "stand[s] by the comments and marks" he assigned in the SOER, as well as the other documents related to the incident.

Memorandum of the JAG

The JAG alleged that the applicant's rating chain properly prepared the SOER upon the applicant's relief from his primary duties in accordance with the Personnel Manual. The JAG alleged that the applicant "has not provided any creditable evidence to suggest his rating chain violated its duties with regard to the SOER." He argued that the applicant has submitted insufficient evidence to rebut the presumption of regularity accorded his rating chain and the disputed documents.

The JAG noted that the PSC is correct in finding that the applicant is "uninformed as to the meaning of 'interested party" since in this context, an "interested party" must be either the subject of or a person named witness in an investigation and is not the person who initiated the investigation.

The JAG concurred in the PSC's claim that a BOI has no authority to make findings about whether or not a drug incident occurred. Moreover, contrary to the applicant's allegation, an Administrative Separation Board cannot overturn a CO's determination that an enlisted member was involved in a drug incident even though it can make a different, conflicting determination. The JAG stated that the BOI is authorized only to make a recommendation for or against retention of an officer and may offer comments supporting the recommendation. Therefore, the JAG argued, the BOI's findings and opinions "are irrelevant as to all matters challenged by the applicant and non-dispositive as it applies to [the PSC's and the JAG's findings and analysis."

The JAG alleged that the applicant has not proved that the SOER contains any factual error or that it was prepared in violation of a regulation. The JAG argued that because the applicant has not proved that the SOER is erroneous or unjust, there is no basis for removing his non-selections for promotion from his record. Therefore, the JAG recommended that the Board deny the applicant's requests for relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

The applicant was granted an extension of the time to respond to the Coast Guard's advisory opinion and submitted his response on December 7, 2012.

The applicant noted that the Coast Guard's advisory opinion did not address his claim that his due process rights were violated because he was not allowed to "question the individual(s) listed as witnesses" or his complaint about the disputed OER containing comments about events that occurred outside of the reporting period. The applicant argued that the Coast Guard's

failure to address these claims is sufficient for the Board "to infer that my assertions are based on irrefutable facts and proper interpretation of policy," to find that his rating chain violated provisions of the Personnel Manual, and to grant his requests for relief.

The applicant repeated his claim that he was designated a party to the investigation and that he was erroneously denied the right of cross-examining the witnesses against him. He noted that Article 1.D.8. of the AIM defines a party to an investigation as a "person who is required to be accorded specific rights in connection with a Formal Investigation or Court of Inquiry. A Party is usually designated because their conduct is subject to investigation. A Party must be accorded the opportunity to participate in the investigation as described in Chapter 10 of this manual." The applicant argued that the XXXXX's decision not to impose non-judicial punishment (NJP) at mast unjustly deprived him of the right to question the witnesses against him. The applicant again argued that the fact that he was notified of his Miranda/Tempia rights proves that he was designated a party to the investigation and thus proves that it was a formal investigation, giving him the right to question witnesses.

The applicant alleged that because he was not allowed to question the witnesses, he was unable "to clarify perceived inconsistencies between my statements to the investigating officer and statements of individuals listed as witnesses."

The applicant repeated his allegation that it was erroneous for the SOER to address conduct that occurred outside of the reporting period from June 1 to October 13, 2009. He noted that both the date of the alleged drug incident in the summer of 2006 and the date he signed the local records check form in January 2009 fell outside of the reporting period for the SOER. He alleged that the Personnel Manual required his rating chain to prepare, instead, both an SOER covering only the period of the alleged misconduct and addressing only that misconduct and a regular OER.

The applicant alleged that the counseling letter in his record documenting the drug incident is actually a Letter of Censure, instead, and as such could only be issued pursuant to NJP. He argued that because the XXXXX did not take him to mast or award him NJP, the letter must be considered an Administrative Letter of Censure, instead of a punitive one, and so should not have been entered in his record.

The applicant argued that because his XXXXX did not award NJP, he was deprived of the right to appeal the determination that he had incurred a drug incident. He argued that the provision in Article 20.C.4. of the Personnel Manual allowing both COs and Administrative Separation Boards to make drug incident determinations shows that "the intent of Coast guard policy was that a Commanding Officer's determination should be reviewed by an Administrative Discharge Board (which for officers is referred to as a Board of Inquiry)." The applicant alleged that the term "Administrative Discharge Board" as used in Article 20.C.3.d. is simply a generic term that encompasses officers' Boards of Inquiry.

The applicant alleged that although Article 20.C.3.d. of the Personnel Manual requires a CO to make a determination about a drug incident after considering all the evidence, the XXXXX failed to do so. He explained that because he was not allowed to question the

witnesses, he was prevented from clarifying the witnesses' statements, and so the XXXXX did not consider the evidence that would have been produced had he been allowed to question the witnesses.

The applicant argued that it is unfair to allow a BOI to make recommendations about retention but not to make decisions about other matters, such as drug incident determinations. He argued that if, as stated in Article 12.A.15.h.1. of the Personnel Manual, officers are allowed to "refute matters of record against them" at a BOI, the BOI should be able to address those matters that have been refuted. He argued that a BOI serves no purpose if an officer can successfully refute an allegation of misconduct and yet not receive full relief. He stated that if Coast Guard policy actually deprives an officer of appealing a CO's determination of a drug incident, then the BCMR should recommend changes to that policy. The applicant also disputed the Coast Guard's claim that the BOI's decision was not a determination that the finding of a drug incident was incorrect.

The applicant argued that he has clearly shown that the SOER contains misstatements of fact, since the BOI overruled the XXXXX's finding of a drug incident, and violates the regulations for preparing OERs in many ways. Therefore, the SOER is erroneous and unjust and should be expunged from his record. Furthermore, he argued that because the SOER obviously prejudiced his record before the LCDR selection boards, his non-selections for promotion should be removed and he should receive the full relief he requested in his application.

APPLICABLE LAW

Drug Abuse Regulations

Article 20.A.2.k.1. of the Personnel Manual in effect in 2009 states that the intentional use of drugs constitutes a "drug incident as determined by the commanding officer." Article 20.A.2.k.2. states that a "member need not be found guilty at court-martial, in a civilian court, or be awarded NJP for the conduct to be considered a drug incident."

Article 20.C.3.a. provides that "[c]ommanding officers shall initiate an investigation into a possible drug incident, as defined in Article 20.A.2, following receipt of a positive confirmed urinalysis result or any other evidence of drug abuse. The absence of a positive confirmed urinalysis result does not preclude taking action based on other evidence." Article 20.C.3.c. states that "[b]efore being questioned in relation to a drug incident, members are entitled to be advised of their rights under Article 31, UCMJ. This applies whether or not disciplinary action under the UCMJ is contemplated."

Article 20.C.3.d. states that "[i]n determining whether a drug incident occurred, a commanding officer should consider all the available evidence, including positive confirmed urinalysis test results, … Evidence relating to the member's performance of duty, conduct, and attitude should be considered only in measuring the credibility of a member's statement(s)."

Article 20.C.3.e. states that "[t]he 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. … 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."

Article 20.C.4. states that "[i]f after completing the investigation described in Article 20.C.3, the commanding officer determines that a drug incident did occur, he or she will take these actions:"

> 1. Administrative Action. Commands will process the member for separation by reason of misconduct under Articles 12.A.11., 12.A.15., 12.A.21., or 12.B.18., as appropriate. …
> 2. Disciplinary Action. Members who commit drug offenses are subject to disciplinary action under the UCMJ in addition to any required administrative discharge action.

OER Regulations

Article 10.A.1.b.1. of the Personnel Manual in effect in 2009 states that COs "must ensure accurate, fair, and objective evaluations are provided to all officers under their command." Article 10.A.4.c.4. provides the following instructions for Supervisors completing the first 13 marks on an OER (similar instructions are provided for Reporting Officers for completing the last 5 marks in Article 10.A.4.c.7.):

> b. For each evaluation area, the Supervisor shall review the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor shall carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards. The Supervisor shall take care to compare the officer's performance and qualities against the standards—not to other officers and not to the same officer in a previous reporting period. After determining which block best describes the Reported-on Officer's performance and qualities during the marking period, the Supervisor fills in the appropriate circle on the form in ink.
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> d. In the "comments" block following each evaluation area, the Supervisor shall include comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a four. The Supervisor shall draw on his or her observations, those of any secondary Supervisors, and other information accumulated during the reporting period.
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> e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. …
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> g. A mark of four represents the expected standard of performance. Additional specific performance observations must be included when an officer has been assigned a mark of five or six to show how they exceeded this high level of performance. …

Article 10.A.4.c.8.a. states that on the comparison scale in an OER, a Reporting Officer "shall fill in the circle that most closely reflects the Reporting Officer's ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known."

Article 10.A.2.g.2. of the Personnel Manual states that a rating chain member may be disqualified from evaluating a subordinate if the rating chain member has been "relie[ved] for cause due to misconduct or unsatisfactory performance, [is] an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the

Supervisor, Reporting Officer, or Reviewer raises a substantial question as to whether the Reported-on Officer will receive a fair, accurate evaluation. … If not already determined by the commanding officer, it is incumbent on the Reported-on Officer to identify to the next senior officer in the chain-of-command that an exception to the designated rating chain may exist. This issue should be raised by the Reported-on Officer during the reporting period or within 30 days after the end of the reporting period."

Article 10.A.4.f. states that in an OER a member of an officer's rating chain shall not:

> 1. Mention the officer's conduct is the subject of a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings under the Uniform Code of Military Justice, civilian criminal proceedings, PRRB, CGBCMR, or any other investigation (including discrimination investigations) except as provided in Article 10.A.3.c. Referring to the fact conduct was the subject of a proceeding of a type described above is also permissible when necessary to respond to issues regarding the proceeding first raised by an officer in a reply under Article 10.A.4.g. These restrictions do not preclude comments on the conduct that is the subject of the proceeding. The only prohibit reference to the proceeding itself.
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> 11. Discuss Reported-on Officer's performance or conduct which occurred outside the reporting period.

Article 10.A.3.c.1. states the following about SOERs:

> a. A special OER may be completed to document performance notably different from the previous reporting period if deferring the report of performance until the next regular report would preclude documentation to support adequate personnel management decisions, such as selection or reassignment. This report should not normally reflect performance reportable under Article 10.A.3.c.1.b. [which requires preparation of an SOER follow NJP or a criminal conviction]. Notably changed performance is that which results in marks and comments substantially different from the previous reporting period and results in a change in the comparison or rating scale. If an individual has been removed from primary duties (other than relief for cause as prescribed by Article 4.F.6) and early transfer from unit is required, a special OER is required before the Reported-on Officer receives consideration for reassignment. An OER documenting removal from primary duties is derogatory and must be submitted in accordance with Article 10.A.4 h. In both cases, the OER counts for continuity.
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> d. Special OERs may be submitted to document significant historical performance or behavior of substance and consequence which was unknown when the regular OER was prepared and submitted. This report should not normally reflect performance reportable under Article 10.A.3.c.1.b. The OER should address only the performance dimensions relevant to the special OER since all other performance dimensions will have been addressed in the regular OER. The special OER should be initiated by the original rating chain unless they are unavailable or disqualified. Article 10.A.2.g. applies. The Reviewer must be a flag officer. This OER does not count for continuity.

Board of Inquiry Regulations

Article 12.A.15.h.1 of the Personnel Manual states that the purpose of a BOI is to "afford[] officers a fair, impartial hearing at which they have an opportunity to establish their retention in the Coast Guard is warranted. The officers concerned may present evidence to refute matters of record offered against them or otherwise establish they should be retained. The board of inquiry will consider all relevant evidence presented at the hearing and make findings and a recommendation based on a preponderance of evidence.

Article 12.A.15.h.4. of the Personnel Manual states that if an officer is required to show cause for retention on active duty before a BOI, the officer may be represented by counsel, present witnesses, question witnesses, and must have

> full access to and furnishes copies of records relevant to the case at all stages of the proceedings, except a board shall withhold any records the Commandant determines should be withheld in the interests of national security. If any records are withheld under this clause, the officer whose case is under consideration shall, to the extent national security permits, be given the actual records or copies of them with the classified portions deleted.

Article 12.A.15.h.6.b.(4) states that when deciding whether to recommend retaining an officer, the BOI "must consider an officer's record as a whole and make its recommendation based on a preponderance of evidence. Refuting any single reason for removal does not necessarily refute other documented reasons the board considers."

Article 12.A.15.h.8. provides that the BOI's report with a recommendation to retain or separate an officer is forwarded to Commander, PSC who informs the applicant of his final decision.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's submissions, the Coast Guard's submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

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.

3. The applicant asked the Board to remove from his record the SOER covering his service from June 1 to October 13, 2009, as well as a letter documenting a drug incident and another documenting the results of substance abuse screening. The Board begins its analysis by presuming that the disputed records in an applicant's military record are correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that they are erroneous

or unjust.[2] Absent specific evidence to the contrary, the Board presumes that the members of an applicant's rating chain have acted "correctly, lawfully, and in good faith" in preparing their evaluations and other documents.[3] To be entitled to removal of an OER, an applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.[4]

Findings about the SOER

4. Applicant's Argument about the BOI's Report. The applicant alleged that the SOER should be removed because it was tainted by his CO's erroneous belief that he had been involved in a drug incident, as shown by the comments supporting the low marks the CO assigned. The applicant alleged that the BOI's finding that he "did not demonstrate intent to obtain or use illegal drugs" proves that the CO's determination that a drug incident occurred was overturned or at least erroneous. The applicant alleged that the provision in Article 20.C.3.d. of the Personnel Manual allowing Administrative Discharge Boards (ADBs) to make drug incident determinations also applies to BOIs. The Board disagrees with these arguments for several reasons. First, an ADB is not a generic term; it is a specific term for the forum in which an enlisted member must show cause for retention and the regulations for an ADB are in Article 12.B. of the Personnel Manual, which applies only to enlisted members. A BOI, as prescribed in Article 12.A., governing officer separations, has no authority to make any findings about whether a drug incident occurred; its authority is limited to recommending whether an officer should be retained after reviewing the officer's entire record and any evidence and character references the officer presents.[5]

In addition, the BOI's statement that the applicant "did not demonstrate intent to obtain or use illegal drugs" is insufficiently specific as to time and place to show that the BOI actually thought no drug incident occurred. The BOI did not state that in 2006 the applicant did not knowingly or intentionally smoke marijuana. The BOI's statement could mean that the BOI believed that the applicant had shown he had no intent to obtain or use drugs in the present or future. Moreover, the BOI's decision to recommend retention was based on the applicant's entire record, not on whether or not a drug incident occurred.[6] The BOI's recommendation for retention does not show that the BOI thought no drug incident had occurred. Therefore, this Board finds that the applicant has not proved by a preponderance of the evidence that his CO erred in finding that a drug incident had occurred. In this regard, the Board notes that the applicant failed to submit a copy of the investigation or the transcript of the BOI to support his allegations.

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[2] 33 C.F.R. § 52.24(b).

[3] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

[4] *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), *cited in Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

[5] Personnel Manual, Article 10.A.15.h.

[6] Personnel Manual, Article 12.A.15 h.6.b.(4).

5. Applicant's Argument about Other Possible Courses of Action. The applicant argued that before determining that he had been involved in a drug incident, his CO should have delayed and had him undergo urinalysis pursuant to Article 20.C.3.d. of the Personnel Manual. However, that article states that a CO *may* pursue such options. Such actions are not required, and there is no reason to think that the CO suspected the applicant of being a regular drug user since the applicant had only admitted to past drug use on the security form.

6. Applicant's Argument about Due Process. The applicant argued that the CO violated his due process rights by designating him a party but not allowing him to question the witnesses against him. However, there is no evidence in the record that the applicant was designated a party to the investigation. The fact that he was advised of his Article 31(b), Miranda/ Tempia rights does not make him a party to an investigation. Under the AIM, parties to an investigation are only designated for a formal investigation or court of inquiry,[7] which are both extremely rare. Although the applicant did not submit a copy of the investigation, he referred to the investigator as a preliminary investigator, and in the Board's experience, most drug incidents receive only a preliminary investigation. Parties are not designated pursuant to informal, preliminary drug incident investigations. Therefore, the Board finds that the CO did not violate the applicant's rights by not providing him a forum for cross-examining witnesses before determining that he had been involved in a drug incident. In this regard, the Board notes that COs are allowed to make drug incident determinations without taking any disciplinary action through NJP or court-martial.[8]

7. Applicant's Argument about Disqualification. The applicant alleged that his CO should have been disqualified from his rating chain under Article 10.A.2.g.2.b. because the CO was an "interested party" to the investigation, since he convened it and reviewed the report, and had a conflict of interest since the applicant's conduct was potentially embarrassing. Pursuant to this argument, all COs who ever had to convene an investigation of a subordinate's conduct would be disqualified from serving on their rating chains since COs normally review the reports of investigations they have convened and could, at least theoretically, be embarrassed by misconduct committed under their command. The Board agrees with PSC and the JAG that the applicant has misconstrued the meaning of the term "interested party." A person is only an "interested party" to an investigation if the outcome of the investigation could somehow affect them either by implicating them or exonerating them. The CO, a XXXXX, could not have been implicated or exonerated in any way by the investigation of the applicant's past drug use and so was not an interested party to the investigation. The Board also disagrees that a theoretical potential for embarrassment on the part of a CO constitutes a conflict of interest and finds that it is very unlikely that a XXXXX would feel embarrassed by misconduct the applicant committed long before he became the CO's Xxxxx xxxxx. Therefore, the Board finds that the CO was not disqualified from serving on the applicant's rating chain because he was not an interested party to the investigation and did not have a conflict of interest. There is no evidence that the applicant's rating chain had any reason not to prepare a fair and accurate SOER.

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[7] AIM, Chapter 1.D.1.b.

[8] Personnel Manual, Article 20.A.2.k.2.

8. Applicant's Argument about SOER Inconsistency. The applicant complained that the SOER is inconsistent because his CO included a comment that he was not ready for increased responsibilities but also assigned him a mark in the third spot on the comparison scale, which denotes a "fair performer; recommended for increased responsibility." Comments in an OER are supposed to be consistent with the numerical marks.[9] However, the options on a comparison scale are quite limited. The CO had to choose a mark denoting the applicant as (1) an unsatisfactory performer, (2) a marginal performer with limited potential, (3) a fair performer recommended for increased responsibility, (4) a good performer ready for tough, challenging assignments, (5) an excellent performer ready for the most challenging assignments, (6) an officer strongly recommended for accelerated promotion, or (7) the best officer of this grade that the CO had ever known. The CO's choice and comment together show that the CO, in comparing the applicant to the other lieutenants he had known, found the applicant to be a fair performer—rather than a marginal performer or an good performer who should be given a challenging assignment during his next tour of duty—but could not recommend that the applicant be given increased responsibility. In light of both the applicant's performance record and the drug incident, the Board understands why the CO opted not to describe the applicant as a "marginal performer" but also could not recommend him for increased responsibilities, much less challenging assignments, since the applicant would have to show cause for retention. The Board finds that the CO reasonably qualified the comparison scale mark by noting that he could not actually recommend the applicant for reassignment to a position of increased responsibility. The Board finds that the CO's mark and comment in this regard were not erroneous or unjust.

9. Applicant's Argument about References to Proceedings. The applicant alleged that his CO commented on two proceedings in the SOER contrary to Article 10.A.4.f.1. of the Personnel Manual, which states that a rating chain member shall not

> [m]ention the officer's conduct is the subject of a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings under the Uniform Code of Military Justice, civilian criminal proceedings, PRRB, CGBCMR, or any other investigation (including discrimination investigations) except as provided in Article 10.A.3.c. Referring to the fact conduct was the subject of a proceeding of a type described above is also permissible when necessary to respond to issues regarding the proceeding first raised by an officer in a reply under Article 10.A.4.g. These restrictions do not preclude comments on the conduct that is the subject of the proceeding. The only prohibit reference to the proceeding itself.

One of the CO's comments states that "ROO should be required to show cause for retention in the U.S. Coast Guard." The Board finds that this recommendation does not violate Article 10.A.4.f.1. because it is a recommendation that the applicant be subject to an administrative proceeding in the future, not a reference to an existing proceeding. Because the comment is a recommendation only and is in the block for making comments about an officer's potential and recommendations about future service, the Board finds that it is not impermissible.

Two of the CO's comments mention the completed investigation: "As a result of an investigation completed during this period, ROO was removed from his duties as xxxxx xxxxx and reassigned" and "An investigation further revealed that when ROO completed a local records check memo in Jan 2009, he was not truthful when responding to the question, 'Have

[9] Personnel Manual, Article 10.A.4.c.7.e.

you ever used a controlled substance?'" Whether these references to the completed investigation are prohibited under Article 10.A.4.f.1. is unclear because that article prohibits mentioning that the officer's conduct *is* the subject of an investigative proceeding, not that it *was* the subject of an investigative proceeding. On the other hand, the next sentence of Article 10.A.4.f.1. does use the past tense: "Referring to the fact conduct was the subject of a proceeding of a type described above is also permissible when necessary to respond to issues regarding the proceeding first raised by an officer in a reply under Article 10.A.4.g." The use of the past tense and the word "also" in the second sentence could mean two very different things: It could mean that the first sentence is intended to prohibit references to both pending and completed proceedings, or it could mean that mentioning a past proceeding is permissible and that mentioning a proceeding in response to an OER reply that mentions a proceeding is *also* permissible.

Prohibiting references to an unfinished proceeding is clearly warranted because as long as the proceeding is unfinished, the outcome is unknown. The mere mention of the proceeding might cause inaccurate speculation and unwarranted prejudice if the proceeding ultimately exonerates the officer. However, mentioning a proceeding that has already been completed and resulted in a finding of misconduct does not cause inaccurate speculation or prejudice about the officer's misconduct because the outcome is already known. The regulation clearly states that the misconduct that is the subject of a proceeding may be discussed in an OER. In this case in particular, because all drug incidents must be investigated[10] and the drug incident may be mentioned in the SOER as underlying conduct, any knowledgeable reader would know in any case that there had been an investigation, so mentioning an investigation is not prejudicial. Given the ambiguity of the prohibition in Article 10.A.4.f.1. of the Personnel Manual, the Board finds that the SOER's reference to the completed investigation does not clearly violate the policy.

10. Applicant's Arguments about the Reporting Period. The applicant alleged that the SOER must be expunged because it mentions and evaluates him based on conduct that occurred outside the reporting period, in violation of 10.A.4.f.11. of the Personnel Manual. His SOER was prepared in response to his relief from his primary duties, in accordance with Article 10.A.3.c.1.a. Because officers are normally relieved from their primary duties because of conduct committed during the normal reporting period, this article makes no provision for changing the dates of the SOER. Under Article 10.A.3.c.1.b., which requires SOERs when a member has received NJP or criminal conviction, the reporting period for the SOER and the performance categories evaluated in the OER are supposed to address only the period of the misconduct. Article 10.A.3.c.1.d., which requires SOERS when previously unknown past performance requires documentation, is silent on the reporting period of the SOER but states that the SOER should only evaluate the performance categories relating to the past performance.

The applicant's situation does not perfectly fit any of these situations because he was relieved for caused based on past performance, but that does not mean that his conduct cannot be addressed in an SOER. Encompassing all of his past performance in one SOER would require changing the start date to July 2006 because that is when he smoked marijuana and began not disclosing it. However, stretching the reporting period of the SOER back to July 2006 would not help him even though it would make the SOER conform to Article 10.A.4.f.11. The Board will

[10] Personnel Manual, Article 20.C.3.a.

not remove an otherwise valid SOER simply because the circumstances of the applicant's case do not fall perfectly within any one category of SOER but instead fall within two, both Article 10.A.3.c.1.a. and Article 10.A.3.c.1.d., which have slightly different requirements. Because the only way to make the SOER conform to every provision of the Personnel Manual would be to stretch the starting date back to July 2006, which would not be in the applicant's interest, the Board finds that it is not in the interest of justice to amend the SOER.

Finding about Other Documentation

11. The applicant asked the Board to remove from his record the memoranda concerning the drug incident and the results of his drug screening. Although he alleged that the memorandum documenting the drug incident should actually be considered an Administrative Letter of Censure and so should not be in his record, the Board finds that it is not a letter of censure; it is the documentation of his CO's finding of a drug incident. Pursuant to Enclosure 6 to the Personnel and Pay Procedures Manual, both drug incidents and substance abuse screening results are to be documented in a member's record. Although the manual provides the wording for documenting these matters on a Page 7 record entry, instead of in a letter or memorandum, Page 7s are normally used for counseling enlisted members and letters or memoranda are normally used for counseling officers. Because the applicant is an officer, the Board finds that the CO's use of a memorandum/letter format for documenting these matters was appropriate. Therefore, and because the applicant has not proved by a preponderance of the evidence that his CO erred in finding that he incurred a drug incident, the Board finds no grounds for removing these documents from the applicant's record.

Conclusion

12. The Board finds that the applicant has not proved by a preponderance of the evidence that the SOER and other disputed documents in his record are erroneous or unjust. Because the applicant's record was correct when it was reviewed by the LCDR selection boards, there is no basis for removing his non-selections for promotion from his record.

13. Accordingly, the applicant's requests should be denied. However, the Board notes that the applicant failed to submit the report of the investigation into his admission of past drug use and the transcript of his BOI, which might include significant evidence of these matters. If within six months of the date of this decision, the applicant submits the transcript of the BOI and the complete report of the investigation, the Board will grant further consideration of this case.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.