DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2022-062

[redacted]
LTJG

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 July 13, 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 June 14, 2024, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a Lieutenant Junior Grade (LTJG/O-2), asked the Board to correct his record by removing a March 29, 2019, drug incident documented via a negative CG-3307 ("Page 7") wherein the applicant was counseled for a drug incident after he tested positive for marijuana. The applicant also asked the Board to remove a derogatory Officer Evaluation Report (OER) for the February 1, 2019, through May 22, 2019, rating period.

The applicant explained that on December 17, 2018, hair samples were collected onboard his cutter as a result of allegations of widespread drug use across units in the state. The applicant stated that as a result of the hair sampling, he was falsely accused of using illegal drugs and issued a drug incident via a negative Page 7. The applicant stated that immediately upon being informed of his positive drug test, he requested to be retested both verbally and in writing and/or to be given a urinalysis test, but neither of his requests were granted. The applicant alleged that the drug incident and subsequent derogatory OER are based solely on a single hair sample that was sent to a non-Department of Defense (DoD) testing facility. The applicant explained that the hair sample used was not accompanied by urinalysis, blood, or circumstantial evidence needed under the Military Justice Manual (COMDTINST M5810.1H) to establish that he knowingly ingested a prohibited substance. According to the applicant, these events occurred while he was excelling in his first six months as a Department Head and an afloat officer. The applicant claimed that he has

successfully defended his innocence regarding the allegations of drug use on two separate occasions, the first of which was at Captain's Mast conducted on April 12, 2019, overseen by Rear Admiral (RADM) B, after which all charges were dropped.

The applicant stated that the drug incident was entered into his record on March 29, 2019, fourteen days prior to the conclusion of the drug incident investigation and disposition at Captain's Mast. The applicant alleged that because the Page 7 remained in his record, he was forced to again defend himself against the allegations of drug use a second time at an official board inquiry on June 3, 2020, wherein no findings of misconduct were made and he was recommended for retention as a commissioned officer. The applicant stated that despite defending himself on two separate occasions, the negative Page 7 and derogatory OER remain in his record which are negatively affecting his promotions. The applicant further stated that although he fought hard to defend his innocence, receiving strong support from senior leadership, he currently faces separation due to being passed over for promotion twice.

The applicant claimed that the official proceedings[1] considered all the facts and evidence into allegations that he violated the Coast Guard's drug policy and ultimately concluded that there was no evidence of misconduct. The applicant alleged that the negative Page 7 and derogatory OER are based on an investigation that was at the time of issuance incomplete, factually inaccurate, and unsubstantiated by policy or law and based on the unprecedented and scientifically invalid evidence used. The applicant explained that the drug incident incorporated the Coast Guard's Drug and Alcohol Policy Manual, COMDTINST M1000.10 and described the procedures for determining whether or not a drug incident occurred, which includes urinalysis or blood testing, but there is no mention of using hair follicle testing as a permitted drug testing procedure. The applicant stated that Article 1.B. of COMDTINST M1000.10 states, "The authority for this Manual comes from Title 10 and Title 14, United States Code (U.S.C.)." According to the applicant, the authority is obtained in Title 10 of the United States Code § 978(a)(1)(A) which states that the Secretary concerned shall require that each person by required to "undergo testing (by practicable, scientifically supported means) for drug and alcohol use."[2]

The applicant stated that on June 3, 2020, the Chief Toxicologist at the Armed Forces Medical Examiner System, a GS-15 employee, testified under oath on the applicant's behalf that the use of hair follicle testing alone, without other evidence to determine wrongful drug use, is "scientifically unfounded." Furthermore, the applicant explained that 10 U.S.C. § 978(d) states, "The testing and evaluation required by subsection (a) shall be carried out under regulations prescribed by the Secretary of Defense in Consultation with the Secretary of Homeland Security. Those regulations shall apply uniformly throughout the armed forces."[3] The applicant claimed that according to statements from Coast Guard officials, a maximum of one thousand Coast Guard members out of 46 thousand total uniformed service members were involved in this one-time hair follicle testing that took place in 2018, which represents .02 percent of Coast Guard service members. The applicant argued that these small numbers do not meet the "uniform application" of

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[1] The Board is uncertain as to what "

[2] 10 U.S.C. § 978(a)(1)(A) is for testing requirements for "each person applying for an original enlistment or appointment in the armed forces." The applicant was not applying for his original appointment into the Coast Guard, but was already commissioned. Accordingly, 10 U.S.C. § 978(a)(1)(A) is not applicable here.

[3] See previous footnote.

drug testing regulations required by 10 U.S.C. § 978(d). In addition, the applicant claimed that the only drug testing method supported by policy is urinalysis.

The applicant explained that the DoD Instruction (DoDI) 1010.01 and 1010.10, both signed by the Under Secretary of Defense for Personnel Readiness represent the implementation of 10 U.S.C. § 978 and according to the applicant, both DoDIs explicitly call for urinalysis testing as the only acceptable test to be used as evidence of illicit drugs. The applicant claimed that the words hair follicle, hair testing, or similar words are not found in either DoDIs and are not contemplated. Even more, the applicant alleged that not only is hair follicle testing not found in any Department of Homeland Security (DHS) policy, but it has intentionally been excluded from all federal workplace drug testing. In addition, the applicant claimed that not only is drug follicle testing excluded from applicable policy, the labs that perform hair follicle testing are also excluded. The applicant claimed that the labs required by DHS and DoD drug testing policies are required to be certified for DoD drug testing and must be listed on the Department of Health and Human Services (HHS) of certified laboratories and Instrumented Initial Testing Facilities which meet the minimum standards to engage in drug testing for federal agencies. The applicant stated that the laboratory that conducted his hair follicle drug test is not listed on the HHS's certified laboratories.

The applicant claimed that hair follicle testing alone is not a legally available inspection option to commanding officers in the Coast Guard and therefore its use as the only evidence to determine a drug incident, without corroborating evidence, was outside of Coast Guard, DHS and DoD policy. The applicant further claimed that blood tests and urinalysis are the only approved tests under COMDTINST M1000.10. According to the applicant, the reason only .02% of Coast Guard members have ever experienced this form of testing is because it is not in policy, and is highly controversial within the world of workplace drug testing. The applicant claimed the testing is consistently litigated against due to its lack of scientific validity when used for this purpose. In fact, the applicant alleged that in 2018 the United States Supreme Court found that the use of hair follicle testing without an associated urine or blood analysis has a disparate impact on certain protected classes.[4] The applicant claimed that historically, the Coast Guard's only experience with hair follicle testing has been within Merchant Marine licensing adjudication in the private sector and has occurred only when the private company's drug and alcohol policy explicitly calls for hair follicle testing, collects a sample at the onset of employment, and typically is associated with an accompanying urinalysis. However, the applicant alleged that this was not the case in the Coast Guard's attempted use of hair follicle testing, as no baseline collection occurs, and no policy has been written, and no urinalysis was collected. The applicant claimed that in fact, hair follicle testing is not approved for use on employees of the Federal Government at all.

The applicant argued that at the time CAPT R entered his drug incident into his record, he did not have the sufficient findings indicative of a complete and thorough investigation, as the investigation had not yet been concluded nor had the results of the investigation been presented so that the applicant could present an appropriate defense. The applicant claimed that when a defense was allowed, fourteen days after the administrative entry, and all the evidence and facts of the case were presented, the elements required to be met for wrongful ingestion were clearly absent and no misconduct was found. The applicant alleged that the interpretation of testing results was given only by a third party for-profit company, contracted by the Coast Guard, as opposed to the required

[4] (Plaintiffs vs City Of Boston Police Department, 2018).

DoD or DHS medical officer's opinion normally associated with similar interpretation of results. Additionally, the applicant alleged that CAPT R failed to produce a complete and thorough report of investigation containing the required facts outlined in the Drug and Alcohol Policy, and Coast Guard Investigations Manual. The applicant contended that the required facts missing were a positive urine or blood test result that was found to have been collected in accordance with Coast Guard Policy. The applicant claimed that to date there is no evidence of drug use, and he has never been found to have committed misconduct, yet CAPT R was able to make this entry into his record based solely on an unprecedented and experimental test result interpretation that lacks any policy support.

The applicant claimed that due process was administered in his case and his innocence was established at an official board of inquiry that was convened in June 2020. According to the applicant, the board found that there was no misconduct and recommended that he be retained. The applicant stated that he has retained his Tier 3 security clearance, which was completed after the investigation into his alleged misconduct—an investigation that also considered all of the facts of the applicant's case. The applicant explained that his clearance remains active today, even with these unsubstantiated allegations from CAPT R and LCDR W. In addition, the applicant stated that he has received follow-on assignments, but was at risk of being twice passed over for LT, despite the fact that he was selected for promotion in 2018, prior to the investigation. The applicant explained that his promotion to LT was delayed and then denied, after which he chose to voluntarily separate with an honorable discharge due to these experiences and the toll on his family and reputation. The applicant stated that he is currently serving in the Select Reserves while pursuing a PhD in Strategic Leadership Studies and maintaining a 4.0 doctoral GPA. He contended that he has an unblemished record of sustaining high performance, going from E-3 to O-2 in 6 years, apart from CAPT R and LCDR W's entries.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on July 15, 2013, where he trained as a Boatswain's Mate and advanced to E-5.

On June 24, 2015, the applicant was commissioned as an Ensign (O-1) and transferred to the Reserve component and began serving on Extended Active Duty (EAD).

On June 2, 2018, the applicant executed Permanent Change of Station (PCS) orders to be the Weapons Officer onboard a cutter.

On December 16, 2018, the applicant's cutter Commanding Officer, CAPT R, issued a memorandum, "ORDER TO APPEAR AND SUBMIT TO UNIT WIDE ADMINISTRATIVE INSPECTION," wherein he stated, "Evidence of illicit drug activity amongst CGC [cutter] personnel has raised serious concerns and doubts surrounding the ability of CGC [cutter] crewmembers to safely execute the military mission and maintain acceptable standards of mission readiness." As a result, CAPT R ordered all members of the cutter to appear on December 17, 2018, for an administrative inspection, specifically involving the collection of a hair sample. CAPT R further stated, "No member of CGC [cutter] may shave, cut, or otherwise remove hair from their person until the administrative inspection has been completed."

On December 17, 2018, the applicant appeared for administrative inspection, as ordered by CAPT R, and provided a hair sample to the assigned testing company. The applicant signed a "Forensic Drug Testing Custody and Control Form" wherein he acknowledged and consented to the following:

> Donor Certification and Authorization for Release of Test Results: I provided the sample in the Sample Acquisition Card (SAC), the sample was cut close to the skin, and I witnessed the collector seal the sample in the SAC. I consent to the testing of the sample by [redacted] and to the release of the results to the authorized recipient.

On January 21, 2019, the applicant's command received his test results which showed that the applicant's hair had tested positive for metabolites of marijuana. According to CAPT R, upon informing the applicant of his positive drug test, the applicant immediately claimed his positive drug test must have been through second-hand smoke due to his wife's prescription marijuana.

On March 22, 2019, a Report of Offense and Disposition, and Record of Non-Judicial Punishment was completed, wherein the applicant was cited for violating Article 112(a)—Wrongful Use, Possession of a Controlled Substance, of the Uniform Code of Military Justice (UCMJ). The applicant's Executive Officer (XO) recommended that the applicant's misconduct be disposed of at a Captain's Mast or a Flag's Mast.

On March 28, 2019, the applicant signed the Report of Offense and acknowledged that his commanding officer had chosen to dispose of his charges at a Captain's Mast. The Captain's Mast was scheduled for April 11, 2019. However, the Coast Guard stated that there is no record that the Captain's Mast was conducted as alleged by the applicant. This position is supported by the fact that the third and final page of the Report of Offense was not completed as required after a Mast is convened. Accordingly, there is no evidence that the applicant's Mast was ever held.

On March 29, 2019, CAPT R issued the applicant a drug incident via a negative Page 7 wherein he was counseled for his illegal use of drugs and violation of the Coast Guard's Drug and Alcohol Policy Manual, COMDTINST M1000.10. CAPT R informed the applicant that he would be processed for separation in accordance with the Military Separations Manual, COMDTINST M1000.4.

On May 22, 2019, as a result of the applicant's positive drug test and subsequent drug incident, the applicant was removed from his primary duties (RPD) and issued a derogatory OER to document the removal as required by Coast Guard policy.[5]

On July 17, 2019, the applicant acknowledged receipt of his derogatory OER. Out of 18 performance dimensions, the applicant received two 2s (on a scale of 1 to 7, with 1 being the lowest and 7 being the highest possible mark), five marks of 5, seven marks of 4, one mark of 3, two marks of 2, and one mark of 1. On the Comparison Scale, the applicant received a mark of "Unsatisfactory" which is the lowest of seven marks. In addition, the applicant received the following comments:

> Drafted unit Training Instruction & revised 6 add'l Base Instructions, ensured mil/civ relations maintained & sought/received union concurrence. Developed comprehensive Base Org Chart representing 6 depts, 15

[5] Article 10.B. of the Officer Evaluation System Procedures Manual, PSCINST 1611.1C.

> divisions, & over 350 personnel; facilitated enhanced/effective personnel development planning/strategy. Quickly transitioned to TDY duties, honed admin skills, & provided immediate value-add to heavily taxed Base Admin staff during 5-wk Govt shutdown; enhanced Base's workforce while decreasing dept workload & expediting admin processes. Dedicated time to develop junior mbrs; provided trng to multiple E3-E6 on job interview techniques, improved skills for separating members. Exercised poor judgment, breach of Core Values, and displayed an inability to adhere to Coast Guard policy by using drugs. This officer received a Drug Incident on 29 March 2019 after ROO's hair tested positive for an illicit and/or controlled substance. Specifically, ROO's hair tested positive for marijuana during a drug screening conducted onboard CGC [cutter] on 17 December 2018. Actions brought discredit to the unit and member; resulted in a complete loss of confidence in this officer's ability to serve in the Coast Guard.
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> Reporting Officer Comments: ROO is a motivated & passionate officer w/significant potential. However, recent conduct indicates this officer is not fit for continued service; ROO's actions run counter the Core Values and necessitate ROO's immediate separation from the Service. Positive drug test result/D[redacted] eroded this officer's ability to effectively enforce good order & discipline and execute the role of a Dept Head onboard this cutter. Recommend revocation of this officer's commission/discharge from the Service. Not recommended for promotion.

On June 3, 2020, a special board convened to determine if the applicant should be retained in the service or separated. The board stated that it was satisfied that the sample taken was administered correctly and that it was in fact from the applicant. The board also stated that the sample provided by the applicant had tested positive for c-THC (marijuana). However, the board decided to retain the applicant based on the fact that there was a lack of professional and scientific consensus as to whether the presence of c-THC in a particular hair sample was the result of ingestion of THC by the sample's donor or by deposition from an external source. The board ultimately concluded that the test results could not prove that the c-THC present in the applicant's hair was the result of intentional ingestion or through secondhand smoke as alleged by the applicant.

On October 19, 2020, Commander of Personnel Service Center (PSC) informed the applicant of the special board's decision, but also issued a supplemental memorandum, "Proposed Special Selection Board," wherein the applicant was notified that the Commander of PSC was initiating a Board of Officers to determine whether or not the applicant should be removed from the 2019 Lieutenant Active Duty Promotion list. The applicant was given the opportunity to submit a statement on his behalf and an optional command endorsement.

On April 7, 2021, the Board of Officers convened and recommended that the applicant should be removed from the 2019 Lieutenant Active Duty Promotion list. The applicant was informed that a removal from the list was the same as being passed over for promotion. Specifically, the board stated:

> LTJG [Applicant's] military record contains a Drug Incident CG-3307 and associated OER. The board acknowledges the increased levels of responsibility and authority required of lieutenants in the Coast Guard, and determined that LTJG [Applicant] did not display the judgment necessarily required of the paygrade. The board expected a more proactive approach from the officer in terms of communicating with the command and addressing the presence of a controlled substance at the residence at any time before the positive hair strand test. LTJG [Applicant] should be reviewed at a subsequent promotion board against the records of a full zone of officers that will measure this officer's performance of duties.

On March 24, 2021, the applicant submitted a memorandum wherein he requested to be voluntarily released from active duty after he received official notice of being accepted into a

doctorate program. The applicant's command positively endorsed the applicant's request. As a result, the applicant was released from active duty on August 1, 2021, with an Honorable characterization of service.

VIEWS OF THE COAST GUARD

On January 24, 2023, a Judge Advocate (JAG) for the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

The JAG argued that the applicant failed to carry his required burden to prove that the issuance of the drug incident was erroneous or unjust. The JAG further argued that while the applicant claimed that the hair follicle testing was erroneous and unjust because only urinalysis and blood tests are approved by Coast Guard policy, the applicant failed to prove that Coast Guard policy prohibited the use of hair follicle testing. Moreover, the JAG stated that CAPT R's memorandum wherein he ordered all members to report for administrative inspection cited Military Rules of Evidence (MRE) 313(b), which expressly states that, "inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those being inspected." The JAG claimed that the applicant's evidence does not rebut the presumption that the use of hair follicle testing was a reasonable aid to assist the command with this inspection. Furthermore, the JAG stated that the applicant failed to acknowledge that on December 17, 2018, he signed a voluntary consent to the hair follicle testing, which led to his positive drug test.

The JAG explained that MRE 314(e)(1) states that searches may be conducted of any person with lawful consent and MRE 314(e)(2) states that a person may consent to a search of his body. Finally, MRE 314(e)(3) states that the consent may be limited in any way by the person granting consent. The JAG stated that although the command conducted the inspection lawfully pursuant to MRE 313(b), there is an alternate theory of admissibility for the hair follicle testing pursuant to MRE 314(e) because the applicant consented to the testing. The JAG argued that the applicant failed to prove that the command erred in utilizing hair follicle testing as the basis for determining that the applicant was involved in a drug incident.

Regarding the applicant's claims that the drug incident was erroneous and unjust because CAPT R did not wait for all of the available information and the conclusion of the investigation or NJP proceedings, the JAG argued that the applicant's claims are incorrect. The JAG stated that there is no requirement for a command to wait until after adjudication of a proceeding to issue a drug incident.[6] According to the JAG, the command was only required to consider all available evidence. The JAG argued that the applicant failed to provide sufficient evidence to rebut the presumption that his command did not follow required policy. The JAG explained that the applicant's command specifically noted that the applicant was offered the opportunity to participate in the investigation, but the applicant declined to do so. Regardless, the JAG stated that the applicant's command did not issue the drug incident until after the fact finding process was completed. The JAG argued that if there was information that the applicant believed should have been considered by the command prior to the issuance of the drug incident, he was given the opportunity to present that information. The JAG stated that the applicant's failure to avail himself

[6] Article 5.E. of the Coast Guard's Drug and Alcohol Policy Manual, COMDTINST M1000.10.

of those opportunities does establish or create an error on the part of the applicant's command. Furthermore, the JAG claimed that while the applicant contended that his command based the drug incident solely off of the positive drug test, that was only one piece of evidence considered by the command. According to the JAG, in determining whether or not a drug incident had occurred, the applicant's command had the positive drug test, but they also had conflicting statements made by the applicant, in addition to observations of the applicant's demeanor, which allowed the command to assess the credibility of the applicant's statements.

Next, the JAG argued that the applicant's claims that because his charges were dismissed at a Captain's Mast and the board of inquiry recommended that he be retained, the issuance of a drug incident was erroneous, are unsupported by fact and policy. First, the JAG noted that the applicant failed to provide any evidence that a Captain's Mast concluded no misconduct had occurred. Second, the JAG claimed that dismissing charges at a particular forum such as NJP is not equivalent to a finding of no misconduct. The JAG explained that there are many equities being considered when deciding the outcome and disposition of a particular matter, and unless there is an affirmative finding of no misconduct, a decision to dismiss charges does not equal a finding of no misconduct. Second, the JAG stated that the board of inquiry's recommendation to retain the applicant is also insufficient to rebut the drug incident finding. The JAG explained that the only issue before the board of inquiry was a decision to retain or separate the applicant, which does not equate to a finding of no misconduct. The JAG claimed that any evidence the board of inquiry heard went to the decision to retain or separate the applicant, and was not considered in the context of relitigating the underlying drug incident. Because of this, the JAG argued that no inference should be drawn from a retention decision regarding the validity of the underlying drug incident because that was not within the scope of the board's consideration.

Finally, the JAG argued that the applicant failed to provide sufficient evidence to meet his burden for the correction of an OER. The JAG explained that under *Hary v. United States*, the applicant must do more than merely allege or prove that an OER seems inaccurate, incomplete, or subjective in some sense, he must demonstrate, by competent evidence (1) a misstatement of a significant hard fact, (2) clear violation of specific objective requirement of statute or regulation, or (3) factors adversely affecting the ratings which had no business being in the rating process.[7] In this instance, the JAG stated that the applicant failed to raise or prove the required elements from *Hary* because he failed to point to any misstatement of significant hard fact within the OER, a violation of a specific policy or regulation, or factors adversely affecting the OER that had no business being in the rating process.

To support his advisory opinion, the JAG submitted two sworn declarations from the applicant's command. The first was the applicant's Executive Officer, CDR W, who recommended that no changes be made to the applicant's record. CDR W stated that he believed, based on his knowledge of the applicant, the facts, and several conflicting statements the applicant made throughout the incident, that a preponderance of the evidence established that the applicant knowingly and willfully ingested an illegal substance, specifically, marijuana. Because the Commanding Officer, in this case, CAPT R, is responsible for issuing a drug incident and because CAPT W's sworn declaration contained almost identical statements as CAPT R's sworn

[7] *Hary v. United States*, 223 Cl. Ct. 10, 18, 618 F.2d. 704, 708 (1981).

declaration, the Board will only record CAPT R's sworn declaration in its entirety here. CAPT R's sworn declaration reads as follows:

- I, Captain [R], United States Coast Guard, declare as follows, pursuant to Title 28 United States Code § 1746:

  2. I am currently retired from Active Duty in the Coast Guard. At the time of observation, I was the Commanding Officer and Reporting Officer of Applicant.

  3. As Commanding Officer, I was LTJG [Applicant's] direct supervisor from 02JUN2018 through the period in question, including the OER and CG-3307 subject of this application.

  4. I do not recommend changing the applicant's OER, nor the CG-3307 in question, as I believe the applicant did indeed use illegal substances. This opinion is based off of a positive result from drug testing, interactions with the applicant, and contradicting statements made by the applicant through the course of the investigation.

  A. On 21JAN2019, the results of the hair sample testing came back positive for marijuana. In accordance with guidance provided by [redacted] Area Legal Office, my servicing legal advisor, the hair sample testing was considered justified, valid and legal. Therefore, I believe LTJG [Applicant] used the illegal substance of marijuana.

  B. When I informed LTJG [Applicant] of the positive results from the drug test, he immediately said his wife smokes medicinal marijuana in their woodshed, therefore he must have gotten 2nd hand smoke ingestion from his wife medicinal marijuana in their woodshed. In my opinion, his demeanor and immediate response sounded pre-scripted and rehearsed, not genuinely surprised and disbelief of a positive result for illegal drugs. Also, per my servicing legal advisor, the results of the hair test sample were too high to be considered 2nd hand smoke. Therefore, I do not believe LTJG's [Applicant] ingested 2nd hand smoke from his wife's medicinal marijuana.

  C. Subsequent to LTJG [Applicant's] statement that he ingested 2nd hand smoke from his wife's medicinal marijuana, LTJG [Applicant] claimed during the investigation that he was unaware of his wife smoking marijuana. The fact that LTJG [Applicant] made conflicting claims about his knowledge of his wife's use of marijuana let [*sic*] me to believe LTJG [Applicant] was lying about using illegal substances.

  D. Based on a positive result from drug testing procedures, LTJG [Applicant's] demeanor during my interactions with him, and his conflicting statements about his knowledge of his wife smoking medicinal marijuana, the preponderance of the evidence led me to believe that LTJG [Applicant] used marijuana. Therefore, I recommend LTJG [Applicant's] OER and CG-3307 in question remain in the member's record as signed.

  I declare under penalty of perjury under the laws of the United States of America that the forgoing is true and correct.

  Executed this 12th day of October, 2022.

APPLICANT'S RESPONSE TO VIEWS OF THE COAST GUARD

On January 31, 2023, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. As of the date of this decision, no response has been received.

APPLICABLE LAW AND POLICY

Title 14 U.S.C. § 271(f)(1) states, "The promotion of an officer may be delayed without prejudice if any of the following applies:

. . .

> (C) The Secretary determines that credible information of an adverse nature, including a substantiated adverse finding or conclusion described in section 2115(a)(3), with respect to the officer will result in the convening of a special selection review board under section 2120a of this title to review the officer and recommend whether the recommendation for promotion of the officer should be sustained.

Coast Guard Policies & Instructions

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

> Article 5.A. **Objective.** Detect and separate military members who misuse or abuse, traffic in, or unlawfully possess illicit, controlled, and certain non-controlled, substances. The following are Coast Guard substance abuse policy enforcement tenants.
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> > 1. Enforce the prohibition of illicit and controlled substances, and substances prohibited by lawful order. Controlled substances are scheduled in 21 U.S.C. § 812 and are referenced by the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a, Article 112a.
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> . . .
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> 5.C. **Drug Incident.** Any of the following conduct constitutes a drug incident as determined by the CO/OIC:
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> > 1. Intentional use of drugs for non-medical purposes;
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> . . .
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> 5.D. **Drug Incident Investigations.**
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> > 1. Summary. The Coast Guard does not tolerate the intentional use of illegal drugs, illicit chemical analogues, or prescription drug misuse. This includes ingestion of hemp oil or products made with hemp seed oil; however, does not include food items regulated and approved by the Federal Drug Administration (FDA) that contain hemp ingredients. ***Coast Guard members are expected to comply with the law and not use illegal drugs***; additionally, ***as law enforcement agency members, to maintain a life-style that neither condones substance abuse by others nor exposes the Service member to accidental intake of illegal drugs.*** Impairment puts members, crews, and missions at risk and is not a behavior consistent with the Coast Guard culture and Core Values.
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> . . .
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> > 2. Initiating an Investigation. Upon receiving a positive, confirmed urinalysis result ***or other evidence of misuse***, trafficking, or unlawful controlled substance possession within a command, COs/OICs must promptly notify and consult with the regional Coast Guard Investigative Service (CGIS) office regarding the specific incident circumstances. In the vast majority of incidents, COs/OICs will be able to resolve the matter without further CGIS involvement beyond initial consultation. However, in some cases, additional CGIS investigative efforts may be needed to protect broader government criminal enforcement interests. This includes, but is not limited to, identifying and dismantling controlled substance distribution networks, potential misuse of Coast

Guard authorities to obtain controlled substances, or government property theft, including seized contraband.

. . .

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

. . .

E. **Determining a Drug Incident.**

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.

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.

b. Disciplinary Action. Military members who commit drug offenses are subject to disciplinary action under the UCMJ in addition to any required administrative discharge action.

c. Medical Treatment Eligibility. Military members who are identified as drug-dependent or diagnosed with a “drug use disorder-severe,” must be offered treatment prior to discharge. Reference (a), Coast Guard Substance Abuse Prevention and Treatment Manual, COMDTINST M6320.5 (series), outlines substance abuse medical referrals, screenings, and action policy. If it is determined that treatment is needed and accepted, the member must be discharged from the Service upon completion. Members who are diagnosed as drug/chemical dependent but refuse treatment are required to sign an Administrative Remarks, Form CG-3307, entry acknowledging that they may waive the right to benefits for chemical dependency treatment under the Department of Veterans Affairs.

Article 1.F.2.b. of the Military Assignments and Authorized Absences Manual, COMDTINST M1000.8A, discusses the circumstances that warrant removal of a commissioned officer from his primary duties as follows:

> An officer may be considered for permanent removal from primary duties under the following circumstances:
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> 1) The officer fails to perform primary duties such that their performance significantly hinders mission accomplishment or unit readiness, or
> 2) After an adequate amount of time at the unit (normally at least six months), it becomes clear to the command that the officer has neither the ability nor desire to perform assigned duties, or
> 3) The officer's actions significantly undermine their leadership authority.

Article 1.F.2.d. of Military Assignments and Authorized Absences Manual discusses the process of removing an officer from their primary duties as follows:

1) At the time's discretion, an officer may be temporarily removed from primary duties at any time. Upon determining that an officer meets the requirements of Article 1.F.2.b. of this Manual for permanent removal from primary duties, the command will submit an OER in accordance with Article 5.A.3.c. and 5.a.4.h. of reference (q), Officer Accessions, Evaluations, and Promotions, COMDTINST M1000.3 (series). That command should inform the officer of the RPD process and way forward.

2) After the OER is routed to Commander (CG PSC-OPM-3) or (CG PSC-RPM) per Article 5.A.2.i. of reference (q), Officer Accession, Evaluations, and Promotions, COMDTINST M1000.3 (series), Commander (CG PSC-OPM) or (CG PSC-RPM) will review and make the final decision on removal from primary duties.

Article 5 of the Officer Accessions, Evaluations, and Promotions Manual in force at the time, COMDTINST M1000.3A, provides the following guidance on an officer being removed from his primary duties and the subsequent derogatory OER that must follow:

> Article 5.E.7. Removal from Primary Duty (RPD).
>
> a. This OER must be submitted when permanently removing an officer from their primary duties as a result of conduct or performance which is substandard or as directed by the permanent relief authority's final action on a permanent relief for cause request in accordance with Reference (q), Military Assignments and Authorized Absences, COMDTINST M1000.8 (series).
>
> b. The OER will be defined as derogatory and must follow the policies and standards for derogatory OER stated in Article 5.H. of this Manual.
>
> . . .
>
> **Article 5.H. Derogatory OERs**. A derogatory OER is any regular or non-regular OER that indicate the Reported-on officer has failed in the accomplishment of assigned duties.
>
> 1. Derogatory reports are only those OERs which:
>
> . . .
>
> c. documents conduct or performance which is adverse or below standard and results in the removal of a member from their primary duty or position.
>
> 2. The rating chain must provide an authenticated copy to the reported-on officer and counsel the reported-on officer of their option to prepare an addendum.

3. The reported-on officer has the option to prepare an addendum limited to two pages with no enclosures.

4. The supervisor and the reporting officer must be afforded the opportunity to address the reported-on officer's addendum via individual one page signed endorsements to the reported-on officer's addendum.

. . .

10. The reviewer must ensure that the evaluation of the reported-on officer is consistent and that the derogatory information is substantiated. If the reviewer finds otherwise, they must return the report to the reporting officer for additional information and/or clarifying comments. Substantive changes to the OER require its return to the reported-on officer to provide another 14-day opportunity for the reported-on officer to revise the addendum.

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

b. **Lawful Inspections**. An 'inspection' is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle. Inspections must be conducted in a reasonable fashion and, if applicable, must comply with Mil. R. Evid. 312. ***Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected.***

Military Rules of Evidence 314 of the Manual for Courts Martial provides the following guidance on lawful searches that do not require probable cause:

e. **Consent searches**.

(1) *General rule.* Searches may be conducted of any person or property with lawful consent.

(2) *Who may consent.* A person may consent to a search of his or her person or property, or both, unless control over such property has been given to another. A person may grant consent to search property when the person exercises control over that property.

(3) *Scope of consent.* Consent may be limited in any way by the person granting consent, including limitations in terms of time, place, or property and may be withdrawn at any time.

FINDINGS AND CONCLUSIONS

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

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

2. The application was timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

3. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.[8]

4. The applicant alleged that the drug incident issued on March 29, 2019, was erroneous and unjust because 1) the Coast Guard used hair follicle testing which is not a supported testing procedure under federal guidelines, 2) because his command failed to wait until after the investigation and NJP proceedings were completed to issue the drug incident, and 3) NJP proceedings found that no misconduct had occurred and the board of inquiry found that no misconduct occurred and recommended he be retained in the Coast Guard. The applicant further alleged that the derogatory OER was erroneous and unjust and should be removed from his record because he should never have been given a drug incident and without the drug incident, there was no reason to remove him from his primary duties. 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.[9] 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."[10]

5. The applicant alleged that alleged that the drug incident issued on March 29, 2019, was erroneous and unjust because 1) the Coast Guard used hair follicle testing which is not a supported testing procedure under federal guidelines, 2) because his command failed to wait until after the investigation and NJP proceedings were completed to issue the drug incident, and 3) NJP proceedings found that no misconduct had occurred and the board of inquiry found that no misconduct occurred and recommended he be retained in the Coast Guard. For the reasons outlined below, the Board disagrees:

a. Hair Follicle Testing. The record shows that after receiving concerning evidence that the applicant's cutter at large had been engaging in illicit drug activity, which raised serious concerns by the applicant's command over the cutter's crew being able to safely execute their military mission and maintain acceptable standards of mission readiness, the cutter's commanding officer, CAPT R, issued a general order to all cutter personnel to report for an administrative inspection on December 17, 2018, for inspection for illegal contraband that would be conducted using hair follicle testing. The applicant appeared for inspection on December 17, 2018, and signed a consent form permitting the collection of his hair for the purpose of testing for illegal substances and the release of the results to his commanding officer. However, the applicant alleged that the hair follicle test that was used to support

[8] *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).
[9] 33 C.F.R. § 52.24(b).
[10] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

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

The applicant pointed to numerous federal statutes and regulations, but again, still failed to establish that the Coast Guard was specifically prohibited from using any other technologically accepted means of testing. In addition, Rule 313 of the Military Rule of Evidence in the Manual for Courts Martial (MCM) states "***Inspections may utilize any reasonable natural or technological aid*** and may be conducted with or without notice to those inspected. The record also shows that the applicant was informed of the reason for the hair removal in CAPT R's December 16, 2018, general order to appear for administrative inspection. The applicant was informed of the basis for his search and knew that if the drug test results were positive, they could be used against him in criminal and administrative proceedings.[11]

The Board notes that the cutter's command had received evidence of illicit drug use amongst the cutter's crew. Given that hair follicle tests are known for their reliability for detecting drug use that occurred longer than 30 days ago, the Board finds that the Coast Guard's reliance on hair follicle drug testing in this situation was not unreasonable. Nor has the applicant shown that it was contrary to law or policy.

b. The applicant alleged that the Coast Guard erred in issuing him a drug incident because they did not wait until the completion of the investigation or NJP proceedings. However, there is no policy that requires a commanding officer to wait for the completion of an investigation or for NJP proceedings to be conducted to issue a drug incident. All that is required is that the commanding officer, in this case CAPT R, find that a preponderance of the evidence, that is when all evidence is fairly considered, including its reliability and credibility, it is more likely than not the member intentionally ingested drugs. Here, CAPT R, even in retirement, willingly submitted a sworn declaration attesting to his finding that a preponderance of the evidence—which included his knowledge of the applicant and the applicant's conflicting statements—established that the applicant more likely than not willingly ingested an illegal substance. The Board finds CAPT R's declaration persuasive. It has long been this Board's position to defer to commanding officers who are tasked with issuing drug incidents because they are better situated to weigh the contemporaneous evidence, including the reliability of witness testimony, which in this case includes the applicant's statements. Specifically, CAPT R stated that his legal advisor informed him that the applicant's cTHC levels were too high to be considered second-hand smoke. In addition, CAPT R noted that subsequent to the applicant's statements to him about his wife's medical marijuana usage, during the investigation the applicant claimed to have been unaware of his wife's medical marijuana usage. The applicant's commanders clearly believed that the applicant was not being honest about his drug use and the Board is hesitant

[11] This finding is consistent with the Board's decision in Docket No. 2020-149, wherein the applicant made the same claims regarding the use of hair follicle testing.

to disrupt that finding without more than just blanket claims of error, as the applicant has provided here.

c. The applicant alleged that his drug incident was erroneous and unjust because NJP proceedings found that he had not committed any misconduct and the board of inquiry found that no misconduct occurred and recommended he be retained in the Coast Guard. However, Coast Guard policy does not require a finding of guilt from a judicial or nonjudicial proceeding in order for a drug incident to be issued. As noted in Finding 5.b. above, all that is required is the commanding officer find that the preponderance of evidence shows that the service member more likely than not engaged in the drug use as alleged. Not all drug incidents result in NJP proceedings. Under Article 5.E.3.a. once a commanding officer finds that a preponderance of the evidence establishes the drug use, the commanding officer is required to process the service member for separation by reason of misconduct pursuant to the Military Separations Manual, COMDTINST M1000.4 (series), as appropriate.

Regarding the applicant's claims that the board of inquiry found the applicant innocent and recommended that he be retained, the Board finds the applicant's claims unsubstantiated and misguided. The board of inquiry was not convened to decide the applicant's guilt or innocence, but to decide if, under the circumstances, he should be retained in the Coast Guard. After exhaustive testimony, the board of inquiry found that while there was no doubt as to the accuracy of the applicant's hair test, what was in doubt was whether or not the positive drug test was the result of intentional ingestion or the result of second-hand smoke as alleged by the applicant. Given the uncertainty of the evidence, the board recommended that the applicant be retained. Accordingly, contrary to the applicant's claims, the board of inquiry's recommendation does not amount to a finding of innocence, nor does it prove that he did not intentionally use an illegal substance and thereby invalidate his drug incident. This is further supported by Article 1.A.14.h7.c. of the Military Separations Manual, COMDTINST M1000.4, which states, "[a]fter the board determines the findings, it makes an appropriate recommendation, ***limited to either retention or separation without qualifications***."

The Board made a similar finding in BCMR Docket No. 2019-152 (reconsideration of 2016-077) wherein the applicant illegally used marijuana to treat the side effects of his chemotherapy treatments. In 2019-152 the applicant claimed that his drug incident should be removed because the board of inquiry found that he should be retained. However, the Board found that the decision by a board of inquiry to retain a servicemember does not automatically invalidate a drug incident. The Board maintains the same position here, that the findings of a drug incident are separate and distinct from a board of inquiry's recommendation to retain a servicemember and a recommendation to retain does not equate to a finding of innocence nor does it nullify the finding of a drug incident based upon the preponderance of the evidence.

6. The applicant alleged that he never used drugs while on active duty and that, had the Coast Guard conducted a urinalysis test instead of a hair follicle test, his name would have been cleared. However, the record shows that the applicant admitted to his commanding officers,

CAPT R and CDR W, that he had multiple encounters with illegal substances, namely marijuana, due to his wife's medicinal use of marijuana, yet knowing his exposure the applicant never reported his wife's use to his command or proper authorities. Finally, the record shows that the applicant made various inconsistent statements about his knowledge of his wife's use of marijuana. Moreover, the applicant claimed that his wife's medical usage took place in a shed located at their residence. For the applicant to have encountered the second-hand smoke, he would have had to have joined her in the shed while she smoked the marijuana on multiple occasions, all while knowing that as a law enforcement officer, he is prohibited from such contact. Again, the Board notes that the applicant was aware of the reason for the administrative inspection and could have at the time of inspection informed his command of the potential for a false positive due to his wife's medical use of marijuana. However, there is no evidence that he made any objections or raised any concerns until after he tested positive. Under Article 20.C.3.e of the Personnel Manual, provides the following:

> **Preponderance of Evidence Standard.** 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.

The record is presumptively correct, and the applicant has failed to show that his CO erred when, after considering all of the evidence fairly, concluded that it was more likely than not that the applicant had intentionally ingested drugs while on active duty. In addition, policy states that a member's positive confirmed drug test, standing alone, may be sufficient to establish intentional use and thus suffice to meet the burden of proof.

7. Derogatory OER. The applicant alleged that the derogatory OER for the period of February 1, 2019, through May 22, 2019, was erroneous and unjust because he never should have been given a drug incident. However, the derogatory OER was issued in accordance with Article 5.E.7. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, after the applicant was removed from his primary duties. Because the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that his drug incident was erroneous and/or unjust, there is no reason to remove the derogatory OER from his record.

8. 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.[12] He has not proven, by a preponderance of the evidence, that either his documented drug incident or his subsequent derogatory OER were erroneous or unjust. Accordingly, the applicant's requests for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

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

ORDER

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

June 14, 2024

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