

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-036

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

FINAL DECISION

Ulmer, Chair:

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on December 8, 2003, upon receipt of the applicant's completed application and military records.

This final decision, dated September 9, 2004, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct her military record by removing (1) an administrative remarks (page 7) page that terminated her eligibility period for a Good Conduct award, (2) a page 7 documenting her First Alcohol Incident, and (3) an unsatisfactory conduct mark on her performance evaluation for the period ending December 30, 2002.

APPLICANT'S ALLEGATIONS

The applicant denied that she was involved in an alcohol incident on December 18, 2002. She stated that she was late for work on the morning of December 18, 2002, because she forgot to set her alarm clock and overslept. She denied that her tardiness was the result of alcohol she consumed the previous night. She stated that she was not given a Blood Alcohol or Breathalyzer test and that a Navy counseling and assistance center found that she did not abuse alcohol and that she was not alcohol dependent.

The applicant alleged that other individuals at the unit who had engaged in behavior similar to that she is alleged to have committed were given warnings that any such future behavior would result in disciplinary action. In contrast, she was not given a warning but a page 7 documenting a First Alcohol Incident. The applicant submitted the following examples of the page 7s given to other members of the unit who were involved in situations similar to her own.

1. One individual was counseled on a page 7 because he reported to work 3.5 hours late due to oversleeping.

2. A second individual was given a page 7 documenting an Alcohol Related Situation when an officer smelled alcohol on this individual's breath and observed that the individual was having some difficulty performing his duties while standing watch.

3. A third individual received a page 7 documenting an Alcohol Incident after he reported to work six hours late after a night of drinking. This individual had been warned two weeks earlier about his behavior when he reported to work one hour late smelling of alcohol.

4. A fourth individual was given a page 7 documenting an Alcohol Incident after the individual was arrested for driving under the influence with a blood alcohol level of 0.14% and for leaving the scene of an accident.

SUMMARY OF THE RECORD

The applicant failed to report to work by 0645 on December 18, 2002. Subsequently, unit personnel contacted her by telephone at home. After being awakened by the telephone call, the applicant quickly got dressed and reported to work around 0805. According to the record, her chief petty officer, YNC D, detected an odor of stale alcohol coming from the applicant while counseling her about her tardiness. He reported the event to his supervisors. The applicant was placed on report for being on unauthorized absence from 0645 to 0805 on December 18, 2002. The command ordered a preliminary investigation into the alleged unauthorized absence and surrounding circumstances.

The preliminary investigating officer (IO) completed the investigation into the alleged unauthorized absence charge on December 27, 2002. He found that YNC D, CWO2 K, and LT W detected an odor of alcohol coming from the applicant on the morning in question.

The IO offered the following opinions:

1. [The applicant] went out with her visiting family and friends on the night of 17 December 2002 and had drinks. [The applicant] got back late and went to bed. She overslept the following morning.
2. Upon being woken up by a phone call from a co-worker [the applicant] got dressed and went to work in a hurried manner and did not take the time to carry out a morning routine of personal hygiene. When she arrived at work she had the odor of alcohol from the previous night.
3. Based on her supervisor's statements of her being a proven performer, and her ability to carry out her duties uninterrupted on the day in question, I think that [the applicant] rushed to get to work and did not take the time to ready herself properly for the work day, i.e., no breakfast, no shower or brushing teeth. This contributed to the alcohol smell on her.
4. There is no indication of previous tardiness to work, or any other documentation of alcohol situations or incidents in relation to [the applicant]. I believe that this was a one-time occurrence and will not happen in the future.

The IO made the following recommendation with respect to disposing of the charge against the applicant.

I recommend that no NJP [non-judicial punishment] be awarded. However, I do recommend that [the applicant] be counseled and administrative remarks be drafted to document this occurrence.

On December 30, 2002, the executive officer dismissed the unauthorized absence charge against the applicant.

On December 30, 2002, a page 7 was entered into the applicant's record documenting an alcohol incident under Article 20.B. of the Personnel Manual. The CO informed the applicant that he had determined that her abuse of alcohol was a significant and causative factor in her unauthorized absence on December 18, 2002. He further informed the applicant that the incident was considered her First Alcohol Incident.

An enlisted employee review (EER)¹ dated December 30, 2002, was prepared as required by the Personnel Manual because of the CO's determination that the applicant had been involved in an alcohol incident.

¹ EER is the current name for an enlisted performance evaluation.

On February 18, 2003, the applicant was evaluated by a Naval hospital to determine whether she abused alcohol or required alcohol related treatment. The evaluation report stated that the applicant did not meet the criteria for alcohol abuse or any criteria for treatment. It further stated that she was returned to duty.

On April 23, 2003, the applicant was counseled that the unsatisfactory mark in conduct terminated the running of her eligibility period for a Good Conduct award.

Statements submitted by the applicant

The applicant's command master chief submitted a letter on the applicant's behalf. He stated that outstanding was the only word to describe the applicant's performance. He further stated the following:

After reviewing the investigation and in my professional experience I would have determined that the situation was an alcohol related situation vise an alcohol incident. [The applicant] was forty-five minutes late to work, but did work all day and past the working hours without loosing [sic] any productivity. I greatly appreciate the board to take into consideration my request of eliminating this page seven from her record. [The applicant] is truly the example of our future Coast Guard generation and the Coast Guard Core Values.

An YN1 also wrote a statement for the applicant. He agreed with the comments of the command master chief.

VIEWS OF THE COAST GUARD

On March 30, 2004, the Judge Advocate General (TJAG) of the Coast Guard submitted an advisory opinion in which he adopted the facts, analysis, and recommendation of the Commander, Coast Guard Personnel Command (CGPC), which was attached to the advisory opinion as Enclosure (1).

CGPC recommended that the Board correct the applicant's record as follows:

- a. Remove from the applicant's records the Administrative Remarks [page 7] dated December 30, 2002, documenting the events of December 17-18, 2002, as an Alcohol Incident, and replace [it] with a new administrative remarks documenting [the event] as an Alcohol Related Situation.
- b. Remove from the applicant's record the Employee Review dated December 30, 2002 and any associated Administrative Remarks that document the award of a bad conduct mark. (Although the applicant only

requests removal of the bad conduct mark, the entire evaluation should be removed since the original reason for conducting the evaluation will no longer exist.)

c. Restore the applicant's Good Conduct Award eligibility period effective to December 30, 2002.

CGPC stated that the CO's determination that the applicant's drinking was a causative factor in the applicant's behavior on December 18, 2002 was reasonable, despite a different opinion of the situation by the investigating officer, the command master chief, and a YN1. CGPC noted that despite the incident, the applicant's CO holds a high opinion of her and her performance and her potential for a successful career in the Coast Guard.

In recommending relief, CGPC noted that the CO was given the opportunity to review the applicant's BCMR application and to provide input and recommendations. CGPC stated that the CO had reconsidered his original determination in this matter and requested that the applicant's record be corrected to reflect this event as an alcohol related situation. CGPC stated that he respected and supported the CO's recommendation to grant relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 1, 2004, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond. No response was received.

APPLICABLE LAW

Personnel Manual (COMDTINST M1000.6A)

Article 10.B.2.a. states that supporting remarks are required for an unsatisfactory conduct mark. An unsatisfactory conduct mark resulting from an alcohol incident must be supported by an adverse remarks entry.

Article 10.B.5.b. states that a special employee review (EER) is required for a member who has an alcohol incident.

Article 10.B.8. (Good Conduct Award Eligibility) states that a new period of eligibility for the Good Conduct award begins any time a member receives an

unsatisfactory mark in conduct. It further states that the rating chain must assign an unsatisfactory mark in conduct whenever an individual has an alcohol incident.

Article 20.A.2.d. defines a Alcohol Incident as "[a]ny behavior, in which alcohol is determined, **by the commanding officer**, to be a significant or causative factor that results in the member's loss of ability to perform assigned duties, brings discredit upon the uniformed services, or is a violation of [law] . . ."

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. The Board finds the evidence of record insufficient to support a conclusion that the applicant's tardiness to work on December 18, 2002, resulted from her use of alcohol the night before. The applicant was out late the night of December 17, 2002, and had a few drinks with family and friends. After being awakened by a telephone call from her unit the next morning, the applicant rushed without hesitation and reported to work. She smelled of alcohol, but there is no other definitive evidence that alcohol was a significant factor in her tardiness. The odor of alcohol on the applicant, by itself, is insufficient evidence for the Board to conclude that she overslept because of consuming alcohol, rather than a failure to set her alarm clock as she claimed. In this regard, the Board notes there was no evidence that she was hung over, listless, or demonstrated any other signs of oversleeping due to alcohol consumption the night before. Moreover, upon reporting to her unit and after some counseling she went right to work. She worked the remainder of the day, completing all of her assignments, without any problem. Therefore, the Board finds that the page 7 documenting the event of December 18, 2002, as an Alcohol Incident and the corresponding performance marks, particularly the unsatisfactory conduct mark were placed in the applicant's record in error.

3. The Board is persuaded in the above finding by the CO's support of the applicant's request and his belief that the event of December 18, 2002 should have been documented as an Alcohol Related Situation rather than as a First Alcohol Incident.

4. Therefore, the Board agrees with the Coast Guard's recommendation for relief and will direct that the applicant's record be corrected in accordance therewith, including substituting a page 7 documenting the event of December 18, 2002 as an Alcohol Related Situation rather than an Alcohol Incident. Article 20.B.2.d. of the Personnel Manual defines Alcohol Related Situation "as any situation in which alcohol

was involved or present but was not considered a causative factor for a member's undesirable behavior or performance." This provision requires that members be counseled and that the counseling is documented on a page 7.

5. The Board's order for a substitute page 7 documenting an Alcohol Related Situation accurately reflects the circumstances as attested to by the CO and does not offend the Board's policy of not adding documents to a record that would make the record worse. In this case, a page 7 documenting an Alcohol Related Situation is a counseling tool and not detrimental to the applicant's career. Nor does it require the preparation of an EER. In contrast, a page 7 documenting a First Alcohol Incident is detrimental to a career because a second such entry normally requires administrative processing for separation from the Coast Guard. See Article 20.B.2.h. of the Personnel Manual. In addition, the applicant did not submit any objection to this recommendation, which was a part of the relief recommended in the advisory opinion that was mailed to the applicant on April 1, 2004. Therefore, the Board concludes that she is satisfied with the relief recommended by the Coast Guard.

5. Accordingly, the applicant is entitled to relief.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of XXXXXXXXXXXXXXXX, USCG, for correction of her military record is granted and her record shall be corrected as follows.

The Administrative Remarks (page 7) dated December 30, 2002, documenting an Alcohol Incident shall be removed from her record and replaced with a page 7 documenting an Alcohol Related Situation. Such page 7 shall be prepared and processed in accordance with all applicable provisions of the Personnel Manual.

The employee review dated December 30, 2002, and all related page 7 entries documenting an unsatisfactory conduct mark and the termination of the applicant's Good Conduct award eligibility period shall be removed from her record.

The applicant's Good Conduct award eligibility shall be restored retroactive to December 30, 2002, as if it were never terminated.

Julia Andrews

James E. McLeod

Marc J. Weinberger