

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-013

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

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 on November 14, 2008, upon receipt of the applicant's completed application, 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 June 18, 2009, 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 asked the Board to correct his military record by expunging his officer evaluation report (OER) for the period March 10, 2004, through September 30, 2004, "or have a Special OER written to provide closure to this incident and correct the page 7 that states that I was arrested for several alleged crimes." The applicant alleged that the disputed OER and Page 7 are unjust because the negative comments therein are "vague and incorrect" and "paint[] an incorrect picture of the incident and could effect future promotions." He alleged that, contrary to the comments in the disputed OER, there was no "brawl" and "no personal weapon was used." He further alleged that he was never given a sobriety test and was not, in fact, even mildly intoxicated. The applicant complained that the OER "concludes the alleged incident to be true and never provides closure to what happened (the facts of the incident)."

The applicant stated that he did not file this application for correction of his military record previously because he was unaware of the impact the disputed OER would have on his eligibility for promotion until he recently consulted the Officer Personnel Management division of the Personnel Command.¹ During that consultation, he learned that the members of a selec-

¹ The records reviewed by selection boards for selecting officers for promotion include such items as "page 7 entries, documentation of alcohol incidents, and reports of civil arrests, performance evaluations, education information, and awards and discipline documentation." UNITED STATES COAST GUARD, COMDTINST M1000.6A, PERSONNEL MANUAL, Art. 14.A.4.d. (Change 38, Feb. 2, 2004) (hereinafter "PERSMAN").

tion board would likely assume that the allegations in the disputed OER were true, which assumption would adversely affect his military career.

In support of his allegations, the applicant submitted copies of the disputed OER; a Page 7 dated November 2, 2004, documenting the applicant's first "alcohol incident";² and another Page 7, dated November 22, 2004, noting that the applicant had undergone screening for alcohol abuse or dependency and did not appear to meet the diagnostic criteria for either condition.

SUMMARY OF THE RECORD

The applicant received his commission as an ensign in the Reserve and began serving on extended active duty on March 10, 2004, after attending Officer Candidate School. The disputed OER covers his first seven months as an officer from the date of his appointment through September 30, 2004. During this period, he was assigned as an Assistant Unit Law Enforcement Officer at a Marine Safety Office in Xxxxx, Xxxxx.

The disputed OER contains good numerical marks³ and laudatory comments about his performance for fourteen of the eighteen performance categories evaluated in the OER. However, the applicant received low marks in four categories evaluated by his Reporting Officer, including a mark of 1 for "Responsibility," a 2 for "Professional Presence," and two 3s for "Judgment" and "Health and Well-Being." In addition, his Reporting Officer⁴ assigned the applicant a mark in the first (lowest) spot on the comparison scale, meaning "Unsatisfactory."⁵ These low marks are supported by the following written comments by the Reporting Officer:

Demonstrated singularly poor judgment & brought discredit to CG after involvement in a bar brawl in which alcohol & use of personal weapon was a contributing factor; subsequent detainment by local authorities only discovered by supervisor when police were called after member was absent without authorized leave. Unwilling to take responsibility for actions, placed blame on others to explain own situation. Failed to meet sobriety standards; use of alcohol and mild intoxication led to a bar fight and arrest. ...

² The Coast Guard Personnel Manual defines an "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 the Uniform Code of Military Justice, Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident." PERSMAN, Art. 20.A.2.d.1.

³ In OERs, Coast Guard officers are evaluated on their performance in various categories, such as "Professional Competence," "Teamwork," and "Judgment," on a scale of 1 (worst) to 7 (best). UNITED STATES COAST GUARD, Form CG-5310, OFFICER EVALUATION REPORT (OER) (March 2003) (hereinafter "OER form CG-5310"). A middle mark of 4 is the "expected standard of performance." PERSMAN, Art. 10.A.4.c.4.g.

⁴ All Coast Guard officers are evaluated by a "rating chain" of three superior officers, including the Supervisor, who assigns the marks for the first thirteen performance categories on an OER and supports them with written comments; the Reporting Officer—normally the Supervisor of the Supervisor—who assigns the last six marks, including the comparison scale mark, and supports them with written comments; and the Reviewer, who reviews the OER for consistency and compliance with regulation and may add a page of comments before forwarding it to the Personnel Command. PERSMAN, Arts. 10.A.2.a., 10.A.2.d.1.a., 10.A.2.e.1.a., and 10.A.2.f.1.a.; OER form CG-5310.

⁵ The comparison scale is not numbered, but the scale has 7 possible marks, ranging from the first spot ("Unsatisfactory") to the seventh ("A Distinguished Officer"). A Reporting Officer completes the scale by comparing the reported-on officer with all other officers of the same rank whom the reporting officer has known throughout his or her career. *See* OER form CG-5310.

[The applicant's] initial performance indicated a promising future in the CG. However, his disreputable conduct made it necessary for this command to revoke his security clearance, suspend his BTM qualification and prohibit his weapons & armory access. These constraints make it impossible for him to continue performing any [law enforcement] function that requires a security clearance or an ability to use lethal force. He has lost the confidence of this command to assume any responsibility other than completing administrative tasks. His potential for assuming positions of increased authority & responsibility is poor. [He] is not recommended for promotion with his peers.

Because of the marks of 1, the OER was a “derogatory” report,⁶ and so the applicant was entitled to submit an addendum for inclusion in his record. The applicant opted to submit both an addendum and an OER Reply.⁷ In his OER Reply, dated November 24, 2004, the applicant stated, regarding his alleged lack of responsibility, that his performance on the job had “demonstrated a significant amount of work related to responsibility.” He argued that his performance during the reporting period met all of the criteria for a mark of 2 and at least some of the criteria for a mark of 4 in the category “Responsibility,” so under the rules for preparing OERs, he should have received a mark of 3 for “Responsibility.” Regarding the “Unsatisfactory” mark on the comparison scale, the applicant alleged that the mark is inconsistent with the many good marks and comments in the disputed OER. The applicant stated that he is a “qualified officer who has made a huge mistake in my personal life,” from which he had learned a lot about appropriate conduct. The applicant stated that he had never received any instructions on what to do if arrested by local police and therefore he did not contact his command immediately. Nor did he promptly inform his family. He stated that he did not know that it was necessary to inform them because the incident occurred on a Wednesday evening; he believed he would be released within a few hours; and he was not due to report for duty again until Friday. He stated that he intended to inform his command and his family upon his release, and he did so. The applicant acknowledged that his personal life affects his career, but also noted that he had done his job as expected, had a large amount of remorse for his conduct, and would like another chance.

In his addendum to the OER, dated December 15, 2004, the applicant accepted “full responsibility for [his] actions and poor judgment on the night of September 15, 2004.” He admitted that his behavior was inconsistent with the expected conduct of a Coast Guard officer and “brought discredit to the entire organization, as well as [him]self.” He acknowledged the need to use sound judgment even when feeling threatened. He stated that although he “possess[es] a license to carry a concealed weapon, [he] realize[s] that the decision to carry [his] weapon with [him] that night was not a good one.” He stated that he chose to carry the weapon that night for his personal safety and did not “have intentions of using the weapon or causing harm to anyone. [He] also had a weapon drawn on [him]. It was [his] request that the police be called to resolve the situation.” The applicant stated that his internalization of his feelings and

⁶ A “derogatory report” includes any OER that “[d]ocuments adverse performance or conduct that results in the removal of a member from his or her primary duty or position.” PERSMAN, Art. 10.A.4.h.1.c. Submitting an addendum to a derogatory report “provides the Reported-on Officer an opportunity to explain the failure or provide their views of the performance in question.” PERSMAN, Art. 10.A.4.h.2. The Supervisor and Reporting Officer may prepare written comments concerning matters address in the addendum, and these comments are also attached to the OER and the addendum. The Reviewer “shall ensure that the evaluation of the Reported-on Officer is consistent and that the derogatory information is substantiated. If the Reviewer finds otherwise, he or she shall return the report to the Reporting Officer for additional information and/or clarifying comments.” *Id.*

⁷ Any officer may submit an OER Reply for inclusion in his military record within 14 days of receiving an official copy of an OER. PERSMAN, Art. 10.A.4.g.

intent to stay focused on his duties may have given his superiors the erroneous impression that he had not taken responsibility for his actions. He alleged that he understood “the magnitude of the entire ordeal and that the lack of [his] outward expression of emotion in no way diminishes [his] remorse.” The applicant stated that his performance prior to the incident on September 15, 2004, demonstrated his great potential for promotion and leadership and that it was “an isolated incident and not a true reflection of [his] overall character.” The members of the applicant’s rating chain forwarded the addendum for inclusion in his record without adding further comments.

In addition, the applicant’s record contains two Page 7s (CG-3307 forms) dated in November 2004, which also resulted from the incident on the night of September 15-16, 2004. The first, dated November 2, 2004, notes that the applicant was being referred for alcohol screening because he had been arrested for “several alleged crimes” committed on September 16, 2004, when he became involved in “a fight that occurred after leaving a bar where you had been consuming alcohol. The police report stated that you were moderately intoxicated and the smell of alcohol was present. Your behavior, which caused discredit to the Coast Guard, will not be tolerated.” The Page 7 notes that the events of that night constituted the applicant’s first “alcohol incident” and that the applicant had been counseled about the Coast Guard’s alcohol policies and about the consequences⁸ of any further alcohol incidents. The second Page 7, dated November 22, 2004, reported that based on his answers during the alcohol screening, the applicant did “not appear to meet the diagnostic criteria for alcohol abuse or dependence. This appears to be an isolated incident.” The Page 7 notes that the applicant was again counseled about the alcohol policies and treatment plans available to him upon request.

The applicant has continued to serve on extended active duty. He was promoted to lieutenant junior grade on July 1, 2008.

VIEWS OF THE COAST GUARD

On March 4, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant’s request.

The JAG argued that the applicant has not proved that the disputed OER contains any factual errors or other injustice. The JAG noted that the rating chain based their actions and comments on the police report and that the applicant’s own statements in the addendum to the disputed OER support the accuracy of the rating chain’s comments. In this regard, the JAG noted that in the addendum, the applicant admitted that he had displayed poor judgment, that he had brought discredit upon the Coast Guard, and that “his personal weapon was a factor.” The JAG argued that the applicant failed to overcome the presumption of regularity accorded the disputed OER and his rating chain’s actions.

The JAG also adopted the findings and analysis provided in a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC). In preparing the memorandum, CGPC sought and submitted declarations from the applicant’s rating chain, which are summarized below. CGPC stated that the applicant knew or should have known of the likely impact the

⁸ “Officers will be processed for separation following a second alcohol incident.” PERSMAN, Art. 20.B.2.h.1.

disputed OER would have on his career. CGPC also stated that there are no grounds for entering a “Special OER” in the applicant’s record to provide “closure” for him, as that is not the purpose of an OER.

Based on the rating chain’s declarations, the applicant’s records, and the regulations, CGPC argued that in preparing the disputed OER, the rating chain fulfilled their duties in accordance with Coast Guard policies and that the negative marks and comments in the disputed OER are supported by the applicant’s own statements in the OER Reply and addendum and the declarations of the rating chain. CGPC pointed out that the applicant’s allegations about inaccuracies of the OER comments are contradicted by his own admissions in the OER Reply and addendum. CGPC concluded that there is no evidence in the record that overcomes the presumption of regularity or warrants expungement of either the disputed OER or the Page 7 documenting the applicant’s alcohol incident.

Declaration of the Supervisor

The Supervisor stated that since his part of the OER is not in dispute, he will not address the disputed comments. The Supervisor stated that he does not now have access to the documentation of the incident but was allowed to review the report of the investigation in 2004. He stated that he believes that

the consumption of alcohol, use (brandishing or drawing) of a personal weapon, and an altercation with another person outside of a local bar were determined to be factors that led to [the applicant’s] detainment and arrest by local law enforcement officials. While to my knowledge the personal weapon was not discharged, I believe that the police report stated that [the applicant] drew and pointed a weapon at another person in the parking lot outside of the bar. Therefore, it is my opinion that both the Reporting Officer and Reviewing Officer comments in the subject OER are accurate.

Declaration of the Reporting Officer

The Reporting Officer disagreed with the applicant’s allegations that the marks and comments in the disputed OER are unjust, vague, or incorrect. He alleged that the disputed OER accurately documented the applicant’s actions. He alleged that the Xxxxx police report

substantiated the fact that [the applicant] was involved in a fight at a bar. The word “brawl” that is used in the OER to document this event is defined by Webster’s 9th New Collegiate Dictionary as “a noisy quarrel or fight,” which is what he was in fact a part of. In addition, [he] was determined to be “mildly intoxicated” after he was arrested and a field sobriety test was administered by the Xxxxx Police. As a result, [he] was taken into custody and checked into a local detoxification center until he sobered up.

Declaration of the Reviewer

The Reviewer, who was the Executive Officer of the Marine Safety Office, stated that he does not recall if the Xxxxx police used the term “bar brawl” or not. He does remember that the applicant “was involved in an altercation at a bar that culminated in the brandishing of a loaded weapon on a public street and arrest at gunpoint by local police officers.” In addition, he stated, the police reported that the applicant was “mildly intoxicated,” and he had no reason to doubt

their assessment. The Reviewer stated that to the best of his recollection, the applicant got into an altercation at the bar, went to his apartment to retrieve a firearm, returned to the vicinity of the bar, confronted the person with whom he had had the altercation on the street outside the bar, drew his firearm, chambered a live round, and pointed the gun at that person in the presence of a number of other people.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 2, 2009, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

APPLICABLE REGULATIONS

OER Regulations

Article 10.A.1.b.1. of the Personnel Manual in effect in 2004 provides that "Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command."

Article 10.A.4.h.2.d. states that when an OER is "derogatory" because of a mark of 1 or because it documents the officer's removal from his primary duty, the "Reviewer shall ensure that the evaluation of the Reported-on Officer is consistent and that the derogatory information is substantiated. If the Reviewer finds otherwise, he or she shall return the report to the Reporting Officer for additional information and/or clarifying comments."

Article 10.A.4.c.7. instructs Reporting Officers to assign marks and write comments for the last five performance categories on an OER form as follows (similar instructions appear in Article 10.A.4.c.4. for Supervisors, who complete the first thirteen performance categories on an OER):

b. For this evaluation area, the Reporting Officer shall review the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each performance dimension, the Reporting Officer shall carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards. The Reporting Officer 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 standard best describes the Reported-on Officer's performance and qualities during the marking period, the Reporting Officer fills in the appropriate circle on the form in ink.

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d. In the "comments" block following this evaluation area, the Reporting Officer shall include comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a four. The Reporting Officer shall draw on his or her own observations, information provided by the Supervisor, and other information accumulated during the reporting period.

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. Well-written comments must be sufficiently specific to paint a succinct picture of the officer's performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area. Mere repetition or paraphrasing of the standards is not sufficient narrative justification for marks.

- f. Citing weaknesses does not make the OER derogatory unless the OER contains a derogatory mark in accordance with Article 10.A.4.h.
- g. All comments shall be confined to the space allotted to the Reporting Officer. No comments shall be continued from one comment block to another.

Article 10.A.4.c.8.a. instructs the Reporting Officer to complete the comparison scale on an OER by filling in the circle that most accurately reflects his or her ranking of the reported-on officer in comparison to all other officers of the same grade whom the reporting officer has known.

Alcohol Regulations

Article 20.A.2.d.1. of the Personnel Manual in effect in 2004 defines an “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 the Uniform Code of Military Justice, Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident.”

Article 20.B.2.g. states that after a member’s first “alcohol incident,” the member shall be counseled about the Coast Guard’s alcohol abuse policies under Article 20, including the fact that a second “alcohol incident” will result in an officer’s separation from the Coast Guard, and the incident and the counseling will be documented in the member’s record.

Article 20.B.2.e.1. states any member involved in a “alcohol incident” shall be screened for alcohol abuse and the results and any recommended treatment shall be documented in the member’s record.

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 submission, and applicable law:

1. The Board has jurisdiction over this matter pursuant to 10 U.S.C. § 1552. The application was timely.⁹
2. The applicant has asked the Board to expunge the disputed OER because, he alleged, the marks are unfair and that the comments are vague and inaccurate. The Board begins its analysis by presuming that the disputed OER in an applicant’s military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the OER is erroneous or unjust.¹⁰ Absent specific evidence to the contrary, the Board presumes that

⁹ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that section 205 of the Soldiers’ and Sailors’ Civil Relief Act of 1940 “tolls the BCMR’s limitations period during a servicemember’s period of active duty”).

¹⁰ 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the “clear and convincing” evidence standard recommended by the Coast Guard and adopting the “preponderance of the evidence” standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

the members of an applicant's rating chain have acted "correctly, lawfully, and in good faith" in preparing their evaluations.¹¹ To be entitled to relief, the 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.¹²

3. The applicant has failed to submit any evidence, aside from his own allegation, to prove that the marks and comments in the disputed OER are inaccurate or unfair. Not only is the OER presumptively correct, but its accuracy is amply supported by the applicant's admissions in his OER Reply and addendum and in the declarations of the rating chain. In addition, the Board notes that the Reporting Officer's low numerical marks for the categories "Judgment," "Responsibility," "Professional Presence," and "Health and Well-Being" are supported by comments citing specific aspects of the applicant's performance and conduct that warranted deviation below a mark of 4, as required by Article 10.A.4.c.7.d. of the Personnel Manual.

4. The applicant argued that the OER comments are too vague. Given the space limitations on an OER form, it is generally impossible for a Supervisor or Reporting Officer to describe in perfect detail every aspect of a member's conduct and performance that justifies a particular numerical mark, and such specificity is not required under Article 10.A.4.c. of the Personnel Manual. The Board finds that the negative comments entered in the disputed OER by the Reporting Officer are "sufficiently specific to paint a succinct picture of the officer's performance" that warranted the low marks for the categories "Judgment," "Responsibility," "Professional Presence," and "Health and Well-Being," as required by Article 10.A.4.c.7.e. of the Personnel Manual.

5. The applicant has failed to overcome the presumption of regularity accorded the disputed OER or to prove that it 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.¹³ The Board finds no grounds for expunging or making any changes to the disputed OER.

6. The applicant asked the Board to order the Coast Guard to prepare a "Special OER" for him to provide "closure." Providing "closure" is not the purpose of the Officer Evaluation System, and the applicant has not shown that preparation of a "Special OER" is either required or warranted under the Personnel Manual.

7. The applicant asked the Board to correct or expunge from his record the Page 7 dated November 2, 2004, which documents his first "alcohol incident." He argued that it is unfair and inaccurate because it indicates that he was intoxicated and that he was arrested for "several alleged crimes" but does not provide "closure." The applicant submitted no evidence to prove that the Page 7 is inaccurate, and such military records are presumed by the Board to be

¹¹ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

¹² *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).

¹³ *Id.*

accurate until proved inaccurate.¹⁴ Under Article 20.A.2.d.1. of the Personnel Manual, an officer need not undergo a blood alcohol content test or breathalyzer test or be convicted of any crime to have his conduct be deemed an “alcohol incident.” The Page 7 documenting the “alcohol incident” was prepared in accordance with Article 20.B.2.g. of the manual, and it succinctly describes how his conduct met the definition of an “alcohol incident” under Article 20.A.2.d.1. by bringing discredit upon the Coast Guard. The Board finds no grounds for correcting or expunging the Page 7 dated November 2, 2004.

8. Accordingly, the applicant’s requests should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

¹⁴ 33 C.F.R. § 52.24(b); *Arens*, 969 F.2d at 1037; *Sanders*, 594 F.2d at 813.

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is denied.

Bruce D. Burkley

Robert F. Parker

Richard Walter