

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2001-011

**DECISION OF THE DEPUTY GENERAL COUNSEL
ACTING UNDER DELEGATED AUTHORITY**

 X I approve the recommended Order of the Board.

 I disapprove the recommended Order of the Board.

 I concur in the relief recommended by the Board.

Date: 9/24/01

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Rosalind A. Knapp
Deputy General Counsel
as designated to act for the
Secretary of Transportation

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BOARD FOR CORRECTION OF MILITARY RECORDS**

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the Coast Guard Record of:

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FINAL DECISION

[REDACTED]

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on November 24, 2000, upon the BCMR's receipt of the application.

This final decision, dated August 31, 2001, is 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 seaman (SN; pay grade E-3), asked the Board to correct his military record by removing an "alcohol incident" and negative "page 7" entry (Administrative Remarks; form CG-3307) dated .

The applicant alleged that on the morning of , he and a petty officer () approached the gate of the pier where their cutter was docked to show their military identification cards to the guard. He alleged that as he was putting his card away in his wallet, the guard noticed that he had a second military identification card and asked to see it. The guard looked at it, told him he was not supposed to have two cards, and asked him to wait while he made a telephone call. The applicant alleged that he "respectably cooperated."

The applicant alleged that the guard was apparently unable to contact whomever he was calling and began "taking an extended amount of time repeatedly making telephone calls." therefore "confronted the guard and asked him to return one of [the applicant's] ID cards" so they could go to the cutter. He alleged that the guard told

. “No, the big dogs are going to have to come out here and bump heads about this because I am not authorized to make any decisions concerning [the applicant] having two ID cards.”

The applicant alleged that _____ was “a little loud” in disagreeing with the guard, told him he was being unreasonable, and quarreled with the guard for a few minutes. Then, a car pulled up to the gate with _____ inside.¹ The applicant alleged that the guard approached the car to check their identification; asked the driver, _____, if he had consumed any alcohol and if there was any alcohol in the car; and returned to his booth to make another telephone call.

The applicant alleged that _____ went to the cutter to “tell the quarter deck watch stander to notify the OOD [Officer of the Deck].” The watch stander came and tried to resolve the problem, but the guard insisted that someone of higher rank was required, so the watch stander left to notify the OOD. Soon thereafter, the applicant alleged, two vehicles arrived carrying four more guards. The guards had _____ get out of his car and walk around to the back to take a sobriety test.

The applicant alleged that he then “approached the guards [conducting the sobriety test] in a calm non-threatening manner to notify them that our superior was expected to arrive on scene shortly.” He alleged that the guard standing closest to him took his hand and twisted it behind his back, walked him over to a bulkhead near the guard’s booth, and slammed him into it, saying “I am your superior, do you understand? I am your superior.” The applicant alleged that the guard then handcuffed him and put him in one of the guards’ vehicles. He alleged that he “did not resist arrest, was in no way whatsoever verbally abusive and remained calm, quiet and cooperative through this entire evolution to avoid further problems.”

In support of his allegations, the applicant submitted several written statements from crewmembers who were present at the scene and from his supervisor (see below).

SUMMARY OF THE RECORD

On December 13, 1999, the applicant enlisted in the Coast Guard for a term of four years. Upon completing boot camp, he was assigned to a cutter. On _____, his commanding officer signed and entered the following page 7 in his record:

On _____, as you were entering the gate at the ... [pier], you were observed to have in your possession 2 military ID’s. Upon further investigation it was determined that you were intoxicated. As the guard was asking you about your 2 ID’s, you became belligerent and abusive towards the guard and attempted to run away during the investigation. These actions brought discredit upon the Coast Guard.

¹ Because some of the persons involved had the same initials, those used in this decision are not necessarily the actual initials of the members.

You were counseled on policies concerning alcohol use/abuse and the serious nature of this incident. You will be screened by CAAC TRACEN upon a date to be determined upon arrival to homeport. You are to abstain from the use of alcohol until the results of the CAAC screening are known.

This is considered your first alcohol incident for documentation purposes. As per ref (a), any further alcohol incidents may result in your separation from the U.S. Coast Guard.

The page 7 notes that the applicant was counseled about the matter but refused to sign an acknowledgment.

On , an addiction prevention specialist at TRACEN wrote a report to the applicant's commanding officer. He stated that the applicant met the criteria for alcohol dependence listed in the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). The specialist reported that the applicant "disclosed a maladaptive pattern of substance use that has resulted in significant distress and is indicated by his increased tolerance for alcohol, drinking larger amounts than intended, spending most of his off duty time drinking, and use despite awareness of related problems." He recommended that the applicant abstain from drinking alcohol until the evaluation was confirmed and he was referred to a treatment facility. The specialist noted that since the applicant had only been in the Coast Guard for about four and one-half months, he could be discharged for having a pre-existing disqualifying medical condition.

On , the applicant was evaluated by a medical officer, who confirmed the diagnosis and referred the applicant to attend a four-week outpatient program. According to the Coast Guard Personnel Command (CGPC), the applicant attended the program in .

SUMMARIES OF STATEMENTS

Statement of Submitted by the Applicant

stated that on the night in question, he was at the gate with the applicant when the guard noticed that the latter had two identification cards. He stated that the applicant was very accommodating and complied with the guard's requests. He alleged that the guard was "getting unnecessarily angry, while [the applicant] remained calm, courteous and otherwise cooperative." Therefore, left to get the OOD.

Statement of [redacted] Submitted by the Applicant

[redacted] stated that when he drove up to the gate that night, he saw the applicant leaning against the wall next to the booth and asked him if he needed a ride to the cutter. Then the guard came up, checked their identification, and asked if he had been drinking. When [redacted] said "yes," the guard told him to wait and went to the booth to telephone. While the guard was telephoning, the applicant came over to explain why he was waiting, but the guard ordered him back to the wall. The applicant returned to the wall without saying anything.

[redacted] stated that when two shore patrol vehicles arrived, the guards asked him to get out and walk behind his vehicle to take a sobriety test. "When the test started, [the applicant] walked to my passenger side door and told the shore patrol officers that our superior is on the way. From the point of view I was at the guard grabbed [the applicant's] arm and twisted it behind his back; then forced him into the wall near the guard shack and placed him in handcuffs. [The applicant] was then released to the OOD after about ten minutes. At no time did I witness [him] resist the guards verbally or physically."

Statement of [redacted] Submitted by the Coast Guard

² [redacted] stated that when he pulled up to the gate in his truck, he and his passengers got their identification cards out and showed them to the guard. The guard then said something to the applicant and walked to the front of his truck. [redacted] asked the applicant if he needed a ride to the cutter. The guard came back to the side of the truck, took [redacted] identification card, and asked if he had been drinking. After [redacted] said "yes," the guard asked him to step out of the truck. When he did, [redacted] looked back and saw that three or four shore patrol vehicles had arrived. [redacted] was given a field sobriety test, which he failed, and was taken to the base nearby, where a breathalyzer test indicated that his blood alcohol content was 0.19. He was cited for driving under the influence.

Statement of [redacted] Submitted by the Applicant

[redacted] stated that when the vehicle he was in stopped at the gate, he saw the applicant leaning against a wall near the booth. [redacted] asked him if he wanted a ride to the cutter. Then the guard came to check their identification and asked [redacted] if he had been drinking. When [redacted] admitted that he had, the guard began to make some telephone calls. [redacted] stated that while the guard was telephoning, someone in the vehicle asked the applicant why he was waiting there. The applicant walked over to explain, but the guard saw him

² This statement by [redacted] and the statements by [redacted] that were submitted by the Coast Guard are marked as Enclosures 4, 5, 6, and 7 to an unidentified document. The BCMR asked the Chief Counsel's office to submit the entire document, assuming it was the report of a formal or informal investigation into the incident. The Chief Counsel's office denied that there was ever a formal investigation of or investigative report on the incident and could not explain why the statements were marked as Enclosures 4 through 7.

and instructed him to return to the wall. stated that the applicant calmly returned to the wall.

stated that when more guards arrived in two vehicles, they took to the rear of the vehicle to conduct a sobriety test. "While was at the back of the car [the applicant] walked towards the car and told [one of the guards] that our OOD was on his way. The officer grabbed [him], put him against the wall, and placed him in handcuffs. [The applicant] did not show any type of aggression before or during the time I was there. [He] was released to [the OOD]."

Statement of Submitted by the Coast Guard

stated that when the vehicle he was in pulled up to the gate, he and the other passengers saw the guard talking to the applicant. The guard walked over and asked them to "stand by." A few minutes later, the guard came back and asked to step out. "For reasons unknown MP's pulled up behind us. We were never informed of what was going on until we were asked to get out of the car" and told to walk to the cutter since was under arrest.

Statement of Submitted by the Applicant

stated that when their vehicle came to the gate, asked the applicant if he needed a ride to the cutter. Then the guard checked their identification and asked if he had been drinking. When said "yes," the guard went to the booth to make a telephone call. Someone asked the applicant why he was standing there, and he walked to the car to explain. But when the guard ordered him back to the wall, he returned there without comment.

stated that when two vehicles arrived with more guards, they took to the back of the vehicle and started talking. The applicant "approached the car again and tried to tell the cop that our OOD was on the way. The cop grabbed [the applicant] and forced him into the wall with his arm behind his back. The cop then put [him] in handcuffs and placed him into the cop car. [The applicant] was released to the OOD [and] did not try to do anything that would be considered violent."

Statement of Submitted by the Coast Guard

stated that when the vehicle he was in pulled up to the gate, he saw the guard speaking to the applicant. After they showed their identification cards to the guard, he told them to "hold on" and continued to talk with the applicant. "After a minute or two," the guard came back to the vehicle and asked if he had been drinking. The guard then asked to get out and told and the other passengers to "sit tight." stated that as soon as got out, he noticed that there were three military police vehicles behind them. The military police gave a sobriety test, and after about 20 minutes, the guard told them to get out and walk to the cutter, since was under arrest.

Statement of [redacted] Submitted by the Coast Guard

[redacted] stated that, when the vehicle he was in pulled up to the gate, he saw the guard speaking to the applicant. He and the others in the vehicle showed the guard their identification cards. The guard told them to “hold on” and told the applicant to stand against the wall. The guard asked [redacted] if he had been drinking and then asked him to step out of the vehicle. The guard told him and the other passengers to stay in the car.

[redacted] stated that, as [redacted] was getting out, “2 cops and the MP’s pulled up.” They took [redacted] behind the car to talk. Then “[t]he police officers grabbed [the applicant] and threw him in the cop car,” and administered sobriety tests to [redacted]. Afterwards, the guard told them to get out and walk to the cutter since [redacted] was under arrest.

Statement of the Applicant’s Supervisor

The applicant’s supervisor, a chief petty officer, wrote that the alcohol incident should be removed from the applicant’s record because it was entered “without full understanding of the facts.”

Statement of the XO of the Cutter Submitted by the Coast Guard

The executive officer (XO) of the cutter, who investigated the incident, stated that his investigation had revealed the following:

In the early morning of [redacted], [the applicant] ... arrived at the gate, [where a civilian security guard employed by the Navy was on duty]. ... [T]he gate guard asked [him] for his Armed Forced ID Card (AFID) for access to the pier. [The applicant] opened his wallet and the gate guard observed that he possessed not one, but two (2) AFID cards. The gate guard immediately began to question [the applicant] as to why he held two AFID cards and whether he had been drinking alcohol.

At some point after detaining [the applicant] at the gate, [he] became belligerent with the gate guard. The gate guard then instructed [him] to remain at the gate and then called the U.S. Navy Security patrol to come deal with [him]. At some point after calling for uniformed security, [the applicant] attempted to leave the gate area but was restrained. After the uniformed Navy patrol arrived, [he] was handcuffed and held [until the OOD] arrive to take him back to our vessel. Subsequently, the security guard filled out a “violation citation” for possible violations of UCMJ Article 134 (Drunk and disorderly and False or unauthorized pass offense) and provided the citation to the [cutter’s] OOD.

I subsequently investigated the incident and determined that [the applicant] 1) had been drinking alcohol; 2) did, in fact, possess two (2) AFIDs, and; 3) had been disorderly with the gate guard. After consulting with the Commanding Officer, we determined [his] actions constituted an alcohol incident per Chapter 20, CG Personnel Manual and properly documented that matter in a CG-3307. However, we decided against taking military justice action regarding the possible violations of UCMJ Article 134.

VIEWS OF THE COAST GUARD

On May 1, 2001, the Chief Counsel of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant’s request for lack of proof.

The Chief Counsel alleged that on _____, the applicant was “involved in an alcohol-related confrontation” with a civilian security guard at the gate after consuming alcohol on liberty. He later received an adverse page 7 “for belligerent and abusive behavior toward a gate guard ... after consuming alcohol while in a liberty status.” The Chief Counsel alleged that after this incident, his command conducted an investigation and determined that the event constituted an “alcohol incident.” He alleged that the applicant was properly notified of this fact, referred for alcohol screening, and found to be alcohol dependent.

The Chief Counsel alleged none of the statements submitted by the applicant “prove by a preponderance of the evidence that Applicant’s military superiors acted improperly or without a proper bases when they drafted and signed the disputed [page 7].” He alleged that all four of the fellow crewmembers who submitted statements for the applicant had been drinking alcohol that night. He alleged that _____ was found to have a blood alcohol content of 0.19 that night and was arrested for driving under the influence. The Chief Counsel also alleged that “there are enough inconsistencies between the statements provided in Applicant’s application and the statements taken from the same members by the command along with discrepancies among those statements (e.g. the number of patrol cars, where Applicant was standing) that it is highly likely that Applicant’s witnesses could have failed to see or misinterpreted the behavior which is not at issue.”

Therefore, the Chief Counsel argued that the applicant has “failed to provide sufficient evidence to overcome the strong presumption of regularity afforded his military superiors who determined that [he] was belligerent and abusive toward the civilian gate guard after he was properly detained for possessing two [identification cards].” *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). The Chief Counsel alleged that the applicant’s behavior had brought discredit upon the Coast Guard. Therefore, he concluded that the applicant’s command “exercised reasonable judgment and discretion in determining that the confrontation was alcohol-related,” in accordance with Article 20.A.2.d. of the Personnel Manual, based on the investigator’s interviews with the guards and crewmembers.

The Chief Counsel submitted with his advisory opinion several statements made by crewmembers who were present at the scene and by the cutter’s executive officer (XO), who investigated the incident (see above). The Chief Counsel also submitted a memorandum prepared by the CGPC, which stated that the applicant underwent screening on _____, was found to be alcohol dependent, and was ordered to attend an outpatient treatment program. CGPC stated that the applicant underwent treatment in _____ and that the declaration of the cutter’s executive officer dated _____, “provided [the] basis for which the alcohol incident was determined.”

APPLICANT’S RESPONSE TO THE COAST GUARD’S VIEWS

On May 2, 2001, the BCMR sent the applicant a copy of the Chief Counsel’s advisory opinion and invited him to respond within 15 days. No response was received.

APPLICABLE LAWS

Article 20 of the Personnel Manual (COMDTINST M1000.6A) contains the regulations regarding alcohol abuse by Coast Guard members. Article 20.B.2.g. states that “[t]he first time a member is involved in an alcohol incident, ... the commanding officer shall ensure this counseling is conducted; for enlisted members recorded on a CG-3307 entry in the member's PDR; The member shall be counseled on Coast Guard policy on alcohol abuse contained in this article. ... Enlisted members will be advised an additional incident normally will result in discharge. For enlisted members, a statement shall be made that the member has been involved in his or her first alcohol incident and a subsequent incident normally will result in separation action.”

Article 20.A.2.d. defines an “alcohol incident” as

Any behavior in which the use or abuse of alcohol is determined to be a significant or causative factor and which 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 (UCMJ) or 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 (NJP) for the behavior to be considered an alcohol incident. However, the member must actually consume alcohol for an alcohol incident to have occurred.

Article 20.B.2.b. states the following:

The definition of an alcohol incident (Article 20.A.2.d.) gives commands broad latitude in curbing intemperate alcohol use. However, the member must actually consume alcohol for an alcohol incident to have occurred. Simply being present where alcohol is consumed does not constitute an alcohol incident. The member may be counseled on appropriate behavior or may be held jointly responsible for any damage or untoward behavior associated with the group. Purchasing alcohol for use by minors is not an alcohol incident, but does represent a serious breach of discipline and subjects the member to civil or military (UCMJ) penalties.

Article 20.B.2.e. states that “[a]ny member who has been involved in alcohol incidents or otherwise shown signs of alcohol abuse shall be screened in accordance with the Alcohol Abuse Treatment and Prevention Program, COMDTINST M6330.1 (series). The results of this alcohol screening shall be recorded and acknowledged on a CG-3307 entry The entry shall describe the facts of the incident or risk factors, the results of alcohol screening, the position and organization of the individual conducting the screening, and a statement of the treatment recommended, if any.” Under Article 20.A.2.b. and c., “alcohol dependence” is determined in a screening by competent medical authority based on the criteria in DSM-IV. Under Article 20.B.2.1., any member found to have consumed alcohol after completing a treatment program must be discharged.

According to Article 20.B.2.h.2., “[e]nlisted members involved in a second alcohol incident will normally be processed for separation in accordance with Article 12.B.16.” Under Article 20.B.2.i., enlisted members must be discharged after a third incident.

According to Article 20.B.2.n., “members diagnosed with alcohol abuse or alcohol dependence within six months of enlistment are not physically qualified for enlistment” and may be recommended for discharge under Article 12.B.16. of the Personnel Manual and Chapter 3.D. of the Medical Manual.

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 over this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The applicant argued that the page 7 and “alcohol incident” should be removed from his record because he “remained calm, quiet and cooperative” throughout the incident at the pier gate on . He alleged that the page 7, which states he was “belligerent and abusive towards the guard and attempted to run away,” was false.

3. Absent strong evidence to the contrary, government officials—including the shore patrol guards, the executive officer of the cutter who investigated the incident, and the commanding officer of the cutter who signed the page 7—are “presumed to have executed their duties correctly, lawfully, and in good faith.” *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

4. In support of his allegations, the applicant submitted a statement from the petty officer, , who arrived at the gate with him. stated that the applicant remained “calm, courteous and otherwise cooperative” at the gate when he was stopped for having two military identification cards, but the guard became “unnecessarily angry.” Therefore, left to get a superior officer from the ship to handle the situation.

5. In support of his allegations, the applicant also submitted statements by three of four crewmembers who arrived at the gate in a truck sometime after the petty officer had departed. Their statements indicate that the applicant was leaning against a wall, speaking calmly with the guard when they arrived, and that he remained calm while they were at the gate and cooperated with the guards.

6. The Chief Counsel submitted statements from the four crewmembers in the truck, apparently written for the executive officer who investigated the incident. He alleged that the discrepancies between these statements and those submitted by the applicant cast doubt on the validity of the latter.

7. The Board finds no significant discrepancies between the statements given to the investigator and those submitted by the applicant. Although the statements include different details, they do not necessarily contradict each other. The fact that some of the crewmembers remembered seeing three or four shore patrol vehicles behind them when the driver was asked to step out of the car does not mean that the new guards did not arrive in just two vehicles, as indicated in the statements submitted by the applicant. More importantly, there are no significant discrepancies concerning the demeanor and actions of the applicant. None of the crewmembers' statements to the investigator indicates that the applicant acted belligerently or uncooperatively toward the guards.

8. The executive officer who investigated the incident for the commanding officer stated that his investigation led him to believe that the applicant had acted belligerently toward the guard and that he had "attempted to leave the gate area but was restrained." He also stated that the applicant had been drinking alcohol. He did not explain how he came to these conclusions.

9. The Board finds that the applicant has proved by a preponderance of the evidence that the descriptions of his actions in the disputed page 7 are false or at least grossly exaggerated. The statements of [redacted] and the other crewmembers provide a coherent description of his calm, cooperative behavior while they were present. Although in theory, the belligerent behavior and attempted escape could have occurred after [redacted] left and before the truck arrived at the gate, the Board finds it highly unlikely that if the applicant had acted belligerently and attempted to escape, the crewmembers in the truck would have found him and the guard talking calmly by the guard's booth upon their arrival. The applicant would already have been "restrained" in some way, as the investigator indicated. Yet the crewmembers' statements indicate that the civilian gate guard had taken no physical action to restrain the applicant at all. Moreover, upon the arrival of other guards, the gate guard had them conduct sobriety tests on [redacted] instead of dealing with the applicant, which would certainly have been his first priority if, in fact, the applicant had been acting belligerently and attempting to escape. However, the evidence indicates that the applicant was not restrained in any way until a guard took offense when he mentioned that his "superior" was expected to arrive soon.

10. The Chief Counsel alleged that the applicant's command properly documented the incident as an "alcohol incident," in accordance with Article 20.A.2.d. of the Personnel Manual, because the applicant had been drinking and his behavior brought discredit upon the Coast Guard. Although the applicant may have been drinking, there is no evidence in the record as to how the investigator came to this conclusion. Regardless of whether the applicant had been drinking, however, the Board finds that no "alcohol incident" occurred because the preponderance of the evidence in the record proves that his behavior at the gate did not bring discredit upon the Coast Guard, result in a loss of ability to perform his assigned duties, or violate the UCMJ.³

³ Although the applicant had two military identification cards that night, his command declined to prosecute him for that fact. Therefore, and in the absence of evidence to the contrary, the

11. As a result of the incident at the gate, the applicant was screened for substance abuse. On the basis of his own admissions, he was found to be alcohol dependent and treated in an outpatient program. He did not allege or submit any evidence indicating that the diagnosis was erroneous. Therefore, whether or not he has an “alcohol incident” in his record, the applicant remains subject to immediate discharge under Article 20.B.2.1. of the Personnel Manual if at any time in the future, he is discovered to have consumed alcohol.

12. Accordingly, the applicant’s request for relief should be granted.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

Board assumes that there was a reasonable, exculpatory explanation for his possessing both cards.

ORDER

The application of _____, USCG, for correction of his military record is granted.

The page 7 (CG-3307) in his record dated _____, documenting the events of _____, shall be removed from his record. In addition, no “alcohol incident” shall be considered to have occurred for him on that day, and any other documentation of an “alcohol incident” on that day shall be removed from his record.

