

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-111

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

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 Chair docketed the case on March 8, 2007, upon receipt of the application, and subsequently prepared the final decision as required by 33 C.F.R. § 52.61(c).

This final decision, dated November 15, 2007, 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 remove an administrative remarks (page 7) entry documenting his first alcohol incident from his record. The applicant stated that it recently came to his attention that his record contained this documentation. He claimed that his command told him at the time of the incident that the page 7 would not be placed in his record and that it would be considered as an in-house matter. He also alleged that policy was not followed, but he did not explain what he meant. In this regard, he stated "I was directed to see the CDAR (Collateral Duty Alcohol Representative) or [to undergo] an alcohol screening outlined in the [Personnel Manual] . . ."

The applicant stated that he did not discover the alleged error until January 1, 2007. He stated that an alcohol incident was documented in his record on January 3, 2007 (his second), and is now being processed for separation.

The applicant submitted a statement from his former officer-in-charge, who wrote the following:

I was [the applicant's] officer in charge at ANT xxxxxx from July 2003 until June 2004. I have been informed by [the applicant] that he has recently been placed on report for a second alcohol related incident. [He] was involved in an incident prior to my arrival at ANT xxxxxx. The previous command handled the incident

and discipline. I don't recollect the details of the incident, except for what is written in the page 7 dated 21 July 03. If this [page 7] was issued to [the applicant] then [he] would have been screened by the Group xxxxxxxx CDAR and or medical staff at the xxxxxxxx Naval Hospital and should be verified in his medical record. I believe I held the [page 7] suspension to further determine my assessment of [the applicant's] performance. I don't recall any further need for administrative action in regards to [the applicant].

* * *

[The applicant] has at times displayed a disposition that was not always sunny or friendly, but his personality traits were not a performance problem. He used to make mistakes much as any young PO would. I will say he did rest upon his laurels and lost his motivation for advancement. I suspect due to the premium duty that ANT xxxxxxxx afforded.

SUMMARY OF RECORD

On August 26, 1997, the applicant enlisted in the Coast Guard for four years. On July 3, 2003, the applicant was taken to non-judicial punishment (captain's mast) under Article 15 of the Uniform Code of Military Justice (UCMJ). He was give 14 days of extra duties for an unauthorized absence and for larceny.

As a result of the NJP the applicant's eligibility period for earning a good conduct award was terminated on July 3, 2003. The applicant acknowledged this entry with his signature.

On July 21, 2003, a page 7 was placed in the applicant's record documenting an alcohol incident on June 19, 2003. The page 7 stated that the applicant removed public safety signs and that alcohol was involved in the incident. The applicant was warned that this was his first alcohol incident and that any further such incidents would result in his separation from the Coast Guard. The page 7 also stated that the applicant was "counseled on policies concerning alcohol use/abuse and the serious nature of this incident" and that he would be screened by CAAC at a Navy hospital. The applicant signed this entry and stated that "I have read and understand the above entry."

VIEWS OF THE COAST GUARD

On July 31, 2007, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. Attached to the advisory opinion as Enclosure (1) was a memorandum from the Commander, Coast Guard Personnel Command (CGPC), which the JAG asked the Board to accept as the Coast Guard's advisory opinion. CGPC recommended that relief be denied and offered the following:

The applicant maintains that the documentation regarding his June 19, 2003 alcohol incident was not to be made a matter of his official personnel record. The July 21, 2003 CG-3307 entry documenting this incident . . . is a part of the appli-

cant's permanent personnel data record. The applicant has provided a statement from his former [OIC] that supports the applicant's assertion that the [page 7] entry may have been withheld.

However, there is no provision within the Personnel Manual for the command to hold a [page 7] entry documenting an alcohol incident to evaluate the service member's subsequent performance. [Article 20.B.2.g. of the Personnel Manual] prescribes that such entries shall be made to document an alcohol incident. Neither the applicant nor his former [OIC] disputes the nature of the alcohol incident only the formality of placing the properly executed [page 7] entry in the applicant's record. Any withholding of such documentation from the applicant's record would be contrary to the provisions of the Personnel Manual.

The applicant contends that he did not receive counseling and treatment in accordance with applicable policies after his incident. While his record does not contain [page 7] entries documenting such subsequent actions, this does not support the removal of the original [page 7] entry required to document the incident. The applicant's record reveals that he received commanding officer's NJP for [absence and larceny offenses].

The [page 7] entry documenting his first alcohol incident should remain a part of his permanent record. The potential lack of counseling and treatment regarding the applicant's first alcohol incident may have bearing upon any potential discharge proceedings based upon a subsequent alcohol incident. This does not necessitate or justify the removal of the existing documentation of the first incident.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 2, 2007, the Chair sent the applicant a copy of the view of the Coast Guard and allotted him thirty days to submit a reply. The BCMR did not receive a response from the Applicant.

APPLICABLE LAW

Personnel Manual (COMDTINST M1000.6A)

Article 20.A.2.b. of the Personnel Manual states that alcohol abuse is a general term of the misuse of alcohol which interferes with the user's health, safety, job performance, family life, or other required social adaptation.

Article 20.A.2.d. defines "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 (UCMJ), 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." This provision further states, "The member must actually consume alcohol for an alcohol incident to have occurred."

Article 20.B.2.e. states that any member involved in an alcohol incident shall be screened and the results of this alcohol screening shall be recorded and acknowledged on a page 7 entry describing the facts of the incident or risk factors, the results of the screening, the position and organization of the individual conducting the screening, and a statement of the treatment recommended, if any.

Article 20.B.2.g. states that upon a first alcohol incident an enlisted member shall be counseled and a page 7 documenting the counseling shall be placed in the member's PDR, with the member's written acknowledgement. The counseling should include advice on the Coast Guard policy on alcohol abuse and a warning that a subsequent incident normally will result in separation action.

Article 20.B.2.h.2. states that enlisted members involved in a second alcohol incident will normally be processed for separation in accordance with Article 12.B.16. of the Personnel Manual (unsuitability).

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 applicant claims that the page 7 documenting his first alcohol incident should not be in his record because his command told him at the time that the alcohol incident would be handled as an in-house matter. The applicant's former OIC for the period from July 2003 to June 2004 wrote in a recent statement that he believed he held the page 7 in suspension to further assess the applicant's performance, and he does not recall that there was any further need for administrative action with respect to the applicant.

3. However, the Board is not persuaded that this document was included in the applicant's record by accident. First, the Board questions the reliability of the OIC's current statement due to his admitted faulty memory about the specifics of the incident and his ability to recall only what is written on the page 7. If the OIC cannot remember the specifics of the alcohol incident, the Board finds it difficult to rely on his memory about what he may have told the applicant about the page 7. Second, even if the OIC told the applicant that he would hold the page 7 in suspension to further assess his performance, his statement that the applicant rested upon his laurels and lost his motivation for advancement indicates that the OIC had a legitimate performance-related basis for placing the page 7 in the applicant's record.

4. Moreover, the OIC has discretion on deciding whether or not an incident is an alcohol incident, but Article 20.B.2.g. makes clear that once that determination is made the page 7 becomes mandatory. This provision states that upon a first alcohol incident an enlisted member *shall be counseled and a page 7 documenting the counseling shall be placed in the member's PDR*, with the member's written acknowledgement. The counseling should include advice on the Coast Guard policy on alcohol abuse and a warning that a subsequent incident normally will result in separation. By preparing and properly executing the page 7, the OIC had determined that the applicant was involved in an alcohol incident, at which point he was duty bound to place it in the applicant's record. The statement by the OIC, with admitted memory deficiencies, is not sufficient to overcome the requirements of the regulation or the presumption of regularity, i.e. that the document was properly placed into the applicant's record by someone with the authority to do so.¹

5. In addition, as the Coast Guard's advisory opinion pointed out, neither the applicant nor the OIC stated that the applicant was not involved in an alcohol incident on June 19, 2003.

6. With respect to the applicant's allegation that proper policy was not followed, the Board is unsure as to what the applicant meant since he failed to explain it. He mentioned that he was directed to see the CDAR or to undergo an alcohol screening as outlined in the Personnel Manual. However, the applicant does not state that he was not screened only that he was directed to be screened. Article 20.B.2.e. of the Personnel Manual states that any member involved in an alcohol incident will have an alcohol screening, the result of which shall be recorded and acknowledged on a page 7. While the Coast Guard admitted there is no page 7 in the applicant's record documenting this screening, the Board agrees with the advisory opinion that the failure of the command to screen the applicant does not make the page 7 documenting the alcohol incident invalid. As stated above, a page 7 is required when a determination has been made that a member was involved in an alcohol incident. Its validity is not dependent upon the creation of another page 7 documenting the results of the applicant's subsequent alcohol screening. As the advisory opinion stated, if the command failed to screen the applicant as a result of the alcohol incident, such information would be relevant in any discharge proceeding against the applicant due to involvement in alcohol incidents.

7. Accordingly, the Board finds that the applicant has failed to prove an error or injustice in this case, and relief should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

¹ See *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979) (holding that absent evidence to the contrary, the court presumes that government officials have acted "correctly, lawfully, and in good faith").

ORDER

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

