

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-065

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

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 February 1, 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 September 30, 2008, 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 from his record an Administrative Remarks form ("Page 7")¹ dated February 17, 2004, which purports to document his third "alcohol incident."² The applicant alleged that although the officer in charge (OIC) of his unit entered the Page 7 in his record, the Group Commander determined, based upon an investigation, that his conduct did not constitute an alcohol incident. The applicant further alleged that the Group Commander overruled the OIC and asked the Coast Guard Personnel Command (CGPC) to remove the Page 7 from his record, but his request was denied.

In support of his allegations, the applicant submitted various documents from his record and the following letter from the Group Commander, dated January 22, 2008, to this Board:

¹ An Administrative Remarks record entry, form CG-3307, is better known as a "Page 7" and is used to document a member's notification of important information, achievements, or positive or negative aspects of a member's performance in the member's military record.

² Article 20.A.2.d.1. of the Coast Guard Personnel Manual (COMDTINST M1000.6A) (hereinafter 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." Article 20.A.2.d.2. states that "[t]he member must actually consume alcohol for an alcohol incident to have occurred." Article 20.A.2.f. states that "[a]s used in this chapter, 'commanding officer' includes commanders, commanding officers, and officers-in-charge." Article 20.B.2.g. requires that an alcohol incident be documented in the member's record on a Page 7.

1. ... The following are my thoughts to the best of my recollection.
2. [The applicant] and his XPO^[3] at Station xxxxxxxx were often at odds with respect to their leadership philosophies. [The applicant] was more popular with the station crew, and the XPO felt [the applicant] undermined his authority. Because [the applicant] was retained on active duty after a second alcohol incident in 2001, I believe that the Station XPO was looking for an opportunity to give him a third incident that would lead to his permanent discharge. Such a situation occurred in February of 2004, which led to the Station OIC signing a CG-3307 to document a third alcohol incident.
3. As soon as I learned of the incident, I directed an investigation and ultimately conducted a Commanding Officer's mast^[4] to resolve the situation. After reviewing the facts of the incident, I determined that the situation did not constitute an alcohol incident and that the XPO had acted with prejudice. Unfortunately, the Station XPO had forwarded the 3307 directly to CGPC on the weekend of the incident. I consulted with CGPC-ADM regarding the unfair circumstances surrounding the 3307 and the process to have that document pulled from [the applicant's] record. ADM indicated that, as Group Commander, I had the authority to remove the 3307 and directed me to send a letter to that effect – [memorandum dated March 19, 2004].
4. Per CGPC's guidance at the time, the CG-3307 dated 17 February 2004 should not exist and should not be part of [the applicant's] personnel record.

SUMMARY OF THE RECORD

On October 13, 1992, the applicant enlisted in the Coast Guard. He was released to the Reserve on June 12, 1997. On September 11, 1997, he requested extended active duty and was given a two-year contract through September 30, 1999, to serve as a xxxxxxxxxxxxxxxx at the Coast Guard's xxxxxxxxxxxxxxxxxxxxxxxx.

On November 25, 1998, the commanding officer of the xxxxxxxxxxxx entered a Page 7 in the applicant's record about his exacerbation of, and poor judgment during, another member's domestic dispute. The commanding officer noted that the applicant had called police a few months earlier to intervene in a domestic dispute in his own family and that

[a]lcohol also appeared to be a factor in that incident. This is the second time that your name arose in the context of a domestic dispute with alcohol involvement. Your involvement in both these situations is indicative of a trend that is unacceptable for a Coast Guard member, particularly with your current assignment as a xxxxxxxxxxxxxxxx. ... An incident involving undesirable behavior and alcohol, whether or not you consume the alcohol, may constitute an alcohol-related situation,^[5] vice an alcohol incident, under Chapter 20 of the Personnel Manual. ... I am referring you to the

³ An Executive Petty Officer (XPO) of a station is the second-in-command below the OIC, just as an Executive Officer (XO) is the second-in-command below a Commanding Officer (CO).

⁴ Under Article 15 of the Uniform Code of Military Justice (UCMJ), commanding officers may hold a hearing ("mast") to investigate members' minor offenses against the UCMJ and may award nonjudicial punishment (NJP) instead of seeking a felony conviction by court-martial. 10 U.S.C. § 815. OICs may hold masts unless that authority has been expressly withheld by the officer exercising general court-martial jurisdiction over the unit. MANUAL FOR COURTS-MARTIAL UNITED STATES, Part V-2 (1995); Military Justice Manual, Chap. 1.A.3.a.

⁵ Under Article 20.B.2.d. of the Personnel Manual, an "alcohol-related situation is defined 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. A member does not have to consume alcohol to meet this criterion, e.g., purchasing alcohol for minors. Commands shall not use the term 'alcohol related situations' when a member's behavior clearly meets the criteria of an 'alcohol incident.' Members involved in alcohol related situations shall be counseled on their use of alcohol and informed of the conduct expected of Coast Guard members." There is no regulation requiring the discharge of a member following a second or third "alcohol-related situation."

Command Drug and Alcohol Representative (CDAR) for alcohol screening. ... Future behavior of this nature will be grounds for disciplinary and/or administrative action.

On January 8, 1999, the commanding officer of xxxxxxxxxxxxxx prepared a Page 7 to document the applicant's first alcohol incident, which the applicant acknowledged by signature:

You have been referred to the xxxxxxxx Addictions Prevention Specialist at xxxxxxxxxxxx concerning an incident involving your intemperate use of beverage alcohol on 99 JAN 01. At 2330 hrs, you were stopped by the xxxxxx Police Department Upon investigation, the police officer suspected that you were driving under the influence of alcohol. You were given a breathalyzer test and your Blood Alcohol Content was measured at .20. You were then charged with Driving While Intoxicated. Your behavior, which caused discredit to the Coast Guard, will not be tolerated. You were screened at the Medical Dispensary, USCG xxxxxxxxxxxxxxxx, on 99 JAN 04 and were diagnosed as Alcohol Dependent (DSM-IV 303.0). The following action will be taken:

You are scheduled to attend residential (inpatient) treatment at the Alcohol Rehabilitation Center, xxxxxxxxxxxx. Your treatment start date is 99 JAN 24.

This is considered your first documented alcohol incident. You have been made aware of the possible consequences of any further alcohol incidents in accordance with Chapter 20-B-2-g [of the Personnel Manual].

A second Page 7 dated January 8, 1999, in the applicant's record notified him that his qualification as a xxxxxxxxxxxxxxxx had been terminated because of the alcohol incident since he could no longer serve as xxxxxxxxxxxxxxxx.

On January 11, 1999, the applicant was convicted of driving while intoxicated in a civil court. In addition, the commanding officer awarded him nonjudicial punishment (NJP) and an unsatisfactory Enlisted Employee Review (EER).

On February 19, 1999, the Executive Officer (XO) of the applicant's unit entered a Page 7 in his record ordering him to abstain from drinking alcohol indefinitely, as follows:

On 17 FEB 99 you successfully completed a four-week inpatient treatment program at the Alcohol Rehabilitation Clinic (ARC), Naval Hospital, xxxxxxxxxxxxxxxx. ...

Continuing care is an important and mandatory continuation of this recovery process and the support you will find in your continuing care plan will go far in helping to ensure your success.

Your continuing care treatment plan shall consist of, but not be limited to:

- a) Abstinence from alcohol indefinitely.
- b) Participation in two support group (AA) meetings per week.
- c) Weekly meetings with the CDAR/DAR to monitor.
- d) A one-year evaluation of your performance, documented by quarterly aftercare reports.

Failure to comply with this continuing care plan or involvement in any alcohol related incident will result in your separation from the U.S. Coast Guard.

On March 30, 1999, the applicant reenlisted in the regular Coast Guard as a BM2. Upon reenlistment, he had accumulated 9 years, 4 months, and 11 days of prior active duty. On July 12, 1999, the commanding officer xxxxxxxxxxxx entered a Page 7 in his record stating that the

applicant had successfully completed treatment and counseling and so could again be a
XXXXXXXXXXXXXXXXXXXXXXXXXXXX.

On June 1, 2001, the applicant advanced to BM1. A Report of Offense dated June 25, 2001, in his record indicates that the applicant was arrested for being drunk and disorderly on June 24, 2001, by the local police in XXXXXXXXXXXXXXXXXXXX, where his new duty station was located. The police reported that the applicant had assaulted his wife and someone else; actively resisted arrest; and threatened to find and kill a police officer at a later date. Also on June 25, 2001, the OIC of the applicant's unit in XXXXXXXXXXXX entered a Page 7 in his record to document his misconduct as his second alcohol incident:⁶

On 24 JUN 01 you were arrested by the XXXXXXXXXXXX Public Safety Department for Assault and Battery, Disorderly Conduct, and Domestic Violence. This was in direct violation of your after-care program⁷] and Coast Guard regulations.

On 25 JUN 01 you were referred to the Group XXXXXXXXXXXX Command Drug and Alcohol Representative (CDAR) for evaluation and were counseled on policies concerning alcohol use/abuse and your failure to follow your prescribed aftercare program.

⁶ Article 20.B.2.h.2. of the Personnel Manual states that “[e]nlisted members involved in a second alcohol incident will normally be processed for separation” and provides the following regulations for exceptions to this rule:

a. Commanding Officers retain the authority to request retention of those enlisted members who they believe warrant such exception. However, retention of enlisted members following a second alcohol incident should not be considered a routine action. In those cases when a commanding officer feels that mitigating circumstances or an exceptional situation warrants consideration for retention, a letter request for retention and treatment, including the medical screening results, treatment plan, and commanding officer's recommendation concerning treatment shall be forwarded via the chain of command to Commander (CGPC-epm) who shall consult with Commandant (G-WKH) and direct the appropriate action regarding retention. The command recommendation for retention will be submitted as a cover letter to the required discharge package.

b. For those enlisted members entitled to an Administrative Discharge Board (ADB), a discharge package including everything short of convening a Board, shall be forwarded to Commander (CGPC-epm). If Commander (CGPC-epm) concurs with proceeding with the Command's decisions, the package is returned to the Command and an ADB is convened unless the member declines. If retained, the member will again be counseled and the counseling will be documented as in Article 20.B.2.g., except that the member will be advised that another alcohol incident will result in discharge. (Administrative Separation Board Manual, COMDTINST M1910.2 (series)).

c. Only after serious consideration, will enlisted members described in Article 20.B.2.f., be retained beyond a second alcohol incident. These members have already received one exceptional retention and have belied the faith placed in them.

⁷ Article 20.B.2 k.1. of the Personnel Manual states that “members ... violating an alcohol rehabilitation aftercare plan normally are processed for separation.” Article 20.B.2.l. states that

[m]embers diagnosed as alcohol-dependent must abstain from alcohol use to maintain sobriety. When commanding officers become aware that a recovering alcohol dependent member, after successful completion of an aftercare program, is again consuming alcohol, he or she will refer the member for alcohol screening to include consultation with a medical officer. An aftercare plan will be reinstated in accordance with the Health Promotions Manual This counseling, referral, aftercare program, and other pertinent information shall be recorded and acknowledged on a CG-3307 entry in the member's PDR for enlisted members or a letter for officers. The commanding officer, after reviewing the information pertinent to the case, will recommend separation, retention, or further treatment to Commander (CGPC-opm) or (CGPC-epm). A second episode (an occurrence of alcohol consumption without an associated incident) after completing any aftercare program by members who have been diagnosed as alcohol dependent will result in separation from the Coast Guard.

This is considered your second alcohol incident for documentation purposes. As outlined in Chapter 20 of the Personnel Manual ..., you are being processed for separation from the U.S. Coast Guard due to continued alcohol abuse. You are advised that you may be eligible for further alcohol treatment by the Department of Veterans Affairs in the future.

On July 27, 2001, the applicant received NJP and an unsatisfactory EER for his misconduct on June 24, 2001. He was awarded extra duties for ten days and reduction to BM2. On September 12, 2001, the Group Commander prepared a Page 7 for him stating the following:

You have been referred for alcohol screening twice resulting from a second documented alcohol incident. Once at Child and Family Services of xxxxxxxxxx, with a diagnosis of "Alcohol Abusive," and once at Naval Hospital xxxxxxxxxx with a diagnosis of "Alcohol Dependency in Sustained Partial Remission." Together with the screening at Naval Hospital xxxxxxxxxx after your first incident, these results indicate varying degrees of difficulties with alcohol, but difficulties nonetheless. In accordance with Chapter 20, Personnel Manual, ... you have been placed on the following aftercare plan IOP (Intensive Outpatient Program):

You will receive a minimum of 8 weeks IOP at the Child Family Service of xxxxxxxx. Group therapy will begin in September 01. You will adhere to the treatment program and the requirements outlined below:

- a. Abstinence from alcohol.
- b. Attend 1 group therapy session per week for a minimum of 8 weeks.
- c. You will meet with Master Social Worker ... once per week or as needed ...
- d. You will contact your unit CDAR at least once per week to monitor progress until the program is complete.

You have been advised of the content of Chapter 20, Personnel Manual ... regarding the expected conduct of the Coast Guard personnel and treatment plans available for those who have problems with alcohol abuse/dependency. This is considered your second documented alcohol incident. IAW the Personnel Manual, the discharge process has been initiated and could result in your separation from the Coast Guard.

CGPC, however, did not discharge the applicant because of the second alcohol incident. (Presumably, the OIC or the Group Commander requested his retention in accordance with Article 20.B.2.h.2.a. of the Personnel Manual.⁸)

On February 17, 2004, the OIC signed another Page 7 for the applicant's record, documenting a third alcohol incident:⁹

On 13 FEB 04 you attended a "going away" party for one of the unit's members. While at that party you began to horse-play with another crew member. The horse-play got out of hand, and the XPO and a BM3 stepped in to break it up. You then physically assaulted the BM3 by grabbing him by the throat. The XPO then had to separate you from the crew and take you outside in an attempt to calm things down where you were verbally abusive to him. Your actions will be considered an alcohol incident.

⁸ Personnel Manual, Article 20.B.2.h.2.a. (stating that after a second alcohol incident, "Commanding Officer retain the authority to request retention of those enlisted members who they believe warrant special exception.").

⁹ Article 20.B.2.i. of the Personnel Manual states that "[e]nlisted members involved in a third alcohol incident shall be processed for separation from the Service under Article 12.B.16. Cases requiring Administrative Discharge Boards because of the character of discharge contemplated or because the member has served eight or more years, will be processed under Articles 12.B.31. and 12.B.32."

This is your third alcohol incident for documentation purposes. As outlined in Chapter 20 of the Personnel Manual, ... you are being processed for separation from the U.S. Coast Guard due to continued alcohol abuse. The process of separation will include a screening by a discharge review board.

You are advised that you may be eligible for further alcohol treatment by the Department of Veterans Affairs in the future. This matter has been referred to the xxxxxxxxxxxx CDAR. You are directed to abstain from alcohol until your relationship with alcohol can be further evaluated.

In addition, the OIC entered a Page 7 in the applicant's record to notify him that because of an ongoing investigation into his conduct, his qualification as a Boarding Officer, his right to wear issued weapons, and his access to the armory had been revoked.

On March 12, 2004, the applicant was taken to mast and awarded NJP by the Group Commander for violating Article 92 of the Uniform Code of Military Justice (UCMJ) for failing to obey the Group Commander's order to abstain from drinking alcohol. A charge of assaulting a petty officer under Article 128 of the UCMJ was dismissed. The NJP awarded was seven days of extra duty, forfeiture of \$500.00, and a reduction in pay grade to BM2, which was suspended for six months. (Because the suspension was never vacated, the applicant remained a BM1.) The Court Memorandum indicates that at the party on February 13, 2004, the applicant had violated the Group Commander's written order by failing to abstain from drinking alcohol.

Also on March 12, 2004, the applicant's rating chain prepared an unsatisfactory EER with low marks. The supporting comments for the low marks note that the applicant had "been ordered not to use alcohol but continues to do so in the presence of junior personnel. By doing so he has set a poor example and the inability to display positive judgment and make sound decisions." The applicant was not recommended for advancement on the EER because of his "failure to obey direct written orders to abstain from alcohol ... unwillingness to modify your personal behavior to what is expected of a senior petty officer. You must also discontinue your inappropriate social behavior with junior personnel."

On March 19, 2004, the Group Commander sent CGPC a memorandum (of which CGPC apparently has no record) in which he wrote the following:

Based on the investigation and statements made during the NJP proceedings arising from this event, I have determined that the incident documented in the administrative remarks entry for [the applicant] dated February 17, 2004, was not an alcohol incident as outlined in [the Personnel Manual], and the administrative remarks should be removed from his record.

CGPC did not remove the Page 7 dated February 17, 2004, from the applicant's record, but neither was the applicant discharged as a result of his third documented alcohol incident.

On June 1, 2007, the applicant's new command noted that the applicant's record contained documentation of a third alcohol incident (which, under the Personnel Manual, would result in his separation) and asked CGPC to remove it from his record. In addition, the command asked CGPC to include in the applicant's record a memorandum reflecting the fact that CGPC had authorized the applicant's retention on active duty following his second alcohol incident.

On November 28, 2007, CGPC advised the applicant's unit that the request for removal of the Page 7 had been disapproved pursuant to Article 4.D.2.b. of COMDTINST M1080.10G. CGPC stated that "[w]hile it appears that the Group Commander determined there was no alcohol incident, the signature authority on the CG-3307 was ..., the Officer-in-Charge, Coast Guard Station xxxxxxxxxx. Consequently, any request to remove that CG-3307 must be determined by [him]."

VIEWS OF THE COAST GUARD

On June 4, 2008 the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case.

The JAG stated that after the applicant's first alcohol incident—his conviction for DWI on January 1, 1999—he was diagnosed as alcohol dependent, provided inpatient treatment and an aftercare plan, and ordered to abstain from alcohol indefinitely, as shown on the Page 7 dated February 19, 1999. However, on June 24, 2001, the applicant was arrested for being drunk and disorderly, in violation of the order. Because of his second alcohol incident and violation of his aftercare plan, the Coast Guard began discharge proceedings in accordance with Articles 20.B.2.h.2 and 20.B.2.k.1. of the Personnel Manual. However, he was retained on active duty, pursuant to Article 20.B.2.h., placed in another aftercare plan, and again ordered to abstain from alcohol consumption, as shown in the Page 7 dated September 12, 2001. However, on February 13, 2004, the applicant consumed alcohol¹⁰ and got involved in a scuffle with crewmates at a party. His OIC documented it as the applicant's third alcohol incident on February 17, 2004. The JAG noted that although the Group Commander dismissed the assault charge at mast and concluded that no alcohol incident had occurred, he did award the applicant NJP for having consumed alcohol in direct violation of orders and his aftercare program.

The JAG stated that the OIC of the applicant's unit signed the Page 7 documenting the third alcohol incident on February 17, 2004, and that "any removal request must be submitted by the signature authority." The JAG stated that the OIC "exercised reasonable discretion in the execution of [his] duties in this case" and has never asked for the Page 7 to be removed. The JAG stated that despite the Group Commander's determination that no alcohol incident occurred, "there is sufficient evidence to indicate that the event documented in the CG-3307 in question constituted the applicant's third alcohol incident, which would have mandated his separation from service" under Article 20.B.2.i. of the Personnel Manual.

The JAG further stated that leaving the Page 7 dated February 17, 2004, in the applicant's record does not "shock the sense of justice." He noted that the applicant normally would have been discharged after his second alcohol incident but instead was retained on active duty and promoted to BM1. "The applicant has a pattern of alcohol abuse, and the record supports that alcohol contributed to the incident on 13 Feb[ruary] 2004." Since the applicant "should have been separated from the Coast Guard ... disapproving removal of the [Page 7] in question would not constitute an injustice."

¹⁰ The Page 7 documenting the February 13, 2004, incident did not expressly state that the applicant had consumed alcohol, as alleged by the JAG.

The JAG included with his advisory opinion a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC), which also recommended denying the requested relief. CGPC stated that under Article 4.D.2. of COMDTINST M1080.10G, documents in a member's official military record can only be corrected by the Commandant, CGPC, the Personnel Records Review Board, or the BCMR,¹¹ although minor corrections may be made by the command under Article 14.B.2. of the Personnel Manual.¹² CGPC further stated that it has no record of having timely received the Group Commander's memorandum dated March 19, 2004. CGPC stated that it did receive the memorandum from the applicant's current command dated June 1, 2007, but the request was reviewed and disapproved by CGPC-epm.

Regarding the Group Commander's determination that the XPO had acted with prejudice, CGPC pointed out that it was the OIC, not the XPO, who determined that the applicant was involved in an alcohol incident and signed the Page 7. Moreover, CGPC argued, the Group Commander's finding at mast that the applicant had consumed alcohol in violation of his orders and aftercare plan actually affirms the OIC's determination that an alcohol incident occurred.¹³

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 9, 2008, the Chair sent the applicant copies of the views of the Coast Guard and invited him to respond within thirty days. No response was received.

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:

¹¹ Article 4.D.2.a. of COMDTINST M1080.10G states that information may be "[c]orrected, added or removed from the CGPC (I) PDR [personal data record] by CGPC (adm-3) only when authorized by Commandant (CG-1), Commandant (CG-12), Commandant (CG-13), or Commander, CGPC (epm/opm/rpm) when directed by a PRRB, or BCMR." Article 4.D.2.b. states that information in the PDR may be "[c]orrected or removed only as Commander, CGPC (epm/opm/rpm) or Commandant (CG-13) authorize in all other cases not requiring administrative discretion."

¹² Article 14.B.2.a. of the Personnel Manual states the following:

Most errors in personnel records are minor ones, such as charging a member with too many days of leave, mistakenly canceling an allotment, etc. Normally, such errors can be corrected by requesting, either orally or in writing, the member's Personnel Reporting Unit (PERSRU) to initiate the needed change. If a member believes a personnel record entry is unfair, an appeal through the member's chain of command usually is the simplest and fastest means for seeking correction or deletion of the entry. The level in the chain of command to which the appeal should be directed is dependent upon all of the circumstances. As an example, for a member who receives an Administrative Remarks, CG-3307 from his or her division chief documenting purported substandard watchstanding, an appeal through the division chief and the executive officer to the commanding officer should suffice. (This appeal may be in the form of a so-called 'Request Mast' pursuant to Article 9-2-3, Coast Guard Regulations, COMDTINST M5000.3 (series).)

¹³ On August 25, 2008, the BCMR staff asked the JAG and CGPC for a copy of any written report of the investigation mentioned by the Group Commander in his memoranda dated March 19, 2004, and January 22, 2008. On September 23, 2008, the JAG informed the BCMR staff that no written report of the investigation had been found.

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.¹⁴

2. 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.

3. The applicant alleged that the Page 7 dated February 17, 2004, which documents a third alcohol incident in his record, is erroneous and unfair and should be removed. The Board must begin its analysis by presuming that the disputed Page 7 is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.¹⁵ Absent evidence to the contrary, the Board presumes that a member's military records have been prepared "correctly, lawfully, and in good faith."¹⁶

4. In support of his allegation, the applicant submitted two memoranda from the Group Commander, dated March 19, 2004, and January 22, 2008, neither of which is in the applicant's official military record. In these memoranda, the Group Commander states that he determined at mast on March 12, 2004, that no alcohol incident had occurred; that the charge against the applicant was a result of bias on the part of the station XPO; and that he asked CGPC to remove the disputed Page 7 from the applicant's record to no avail. CGPC and the JAG argue, however, that it was the OIC—not the XPO—who determined that an alcohol incident had occurred; that the OIC has never requested removal of the Page 7; that the Group Commander himself found at mast that the applicant had disobeyed a direct order by consuming alcohol, in violation of Article 92 of the UCMJ;¹⁷ and that, therefore, an alcohol incident occurred and the disputed Page 7 is neither erroneous nor unjust.

5. The disputed Page 7 is signed by the station OIC, who had authority¹⁸ to decide whether the applicant was involved in an "alcohol incident," as defined by Article 20.A.2.d.1. of the Personnel Manual, and to document the alcohol incident on a Page 7 in the applicant's record.¹⁹ There is no evidence in the record indicating that the OIC was biased against the applicant. The text of the Page 7 focuses on the applicant's involvement in a scuffle with other petty officers and the XPO on February 13, 2004, and does not mention that he drank alcohol except by implication in that it documents an alcohol incident, the definition of which requires the

¹⁴ The application was received more than three years after the disputed Page 7 was entered in the applicant's record, but under *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994), section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940 "tolls the BCMR's [3-year] limitations period during a servicemember's period of active duty."

¹⁵ 33 C.F.R. § 52.24(b).

¹⁶ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

¹⁷ 10 U.S.C. § 892 (2008). Article 92 of the UCMJ, "Failure to obey order or regulation," states that "[a]ny person subject to this chapter who – (1) violates or fails to obey any lawful general order or regulation; (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct." *See also* MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 16.a., part IV-23 (2008 Ed.).

¹⁸ Personnel Manual, Articles 20.A.2.d.1. and 20.A.2 f. (authorizing commanding officers to determine whether an alcohol incident has occurred and noting that "[a]s used in this chapter, 'commanding officer' includes commanders, commanding officers, and officers-in-charge.")

¹⁹ Personnel Manual, Article 20.B.2.g. (requiring documentation of alcohol incidents).

member to have consumed alcohol.²⁰ However, the EER prepared by the applicant's rating chain on March 12, 2004, cites the applicant's "failure to obey direct written orders to abstain from alcohol." In addition, the Court Memorandum of the mast on March 12, 2004, shows that even though the Group Commander dismissed the assault charge against the applicant, he determined that the applicant had disobeyed an order by consuming alcohol in violation of Article 92 of the UCMJ. The applicant's record shows that on both February 19, 1999, and September 12, 2001, he had received written orders to abstain from consuming alcohol indefinitely because he had been diagnosed as alcohol-dependent. There is no evidence that these orders were ever rescinded. Article 20.B.2.k.1. of the Personnel Manual requires members who have been diagnosed as alcohol-dependent to abstain from alcohol use or be subject to discharge.

6. Under Article 20.A.2.d.1., an alcohol incident includes "[a]ny behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor, that ... is a violation of the Uniform Code of Military Justice 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." The preponderance of the evidence shows that on February 13, 2004, the applicant disobeyed longstanding written orders to abstain from consuming alcohol and that his failure to obey the orders violated Article 92 of the UCMJ. Therefore, despite the Group Commander's finding at mast on March 12, 2004, that the applicant's conduct did not constitute an alcohol incident,²¹ the applicant has not proved by a preponderance of the evidence that the OIC erred in determining that the applicant incurred a third alcohol incident on February 13, 2004, when he consumed alcohol contrary to orders. Because the applicant had been lawfully ordered to abstain from consuming alcohol indefinitely, his consumption of alcohol violated Article 92 of the UCMJ and so met the definition of an alcohol incident under Article 20.A.2.d.1. regardless of his other conduct at the party.

7. Although the OIC found that the applicant incurred a third alcohol incident and documented it in his record in accordance with Article 20.B.2.g. of the Personnel Manual, the applicant argues that the Page 7 must be removed because the Group Commander later overruled the OIC's determination. Article 20.B. of the Personnel Manual does not provide any procedure for appealing an OIC's determination of an alcohol incident to a higher authority or for a Group Commander to overrule the determination of a subordinate officer. The JAG and CGPC argue that under Article 4.D.2. of COMDTINST M1080.10G, only the Commandant, CGPC, the PRRB, and the BCMR have authority to remove a Page 7 documenting an alcohol incident from a member's record, and so the Group Commander's finding at mast was not dispositive. Article 14.B.2.a. of the Personnel Manual states that a member may appeal a personnel record entry through his chain of command and that the "level in the chain of command to which the appeal should be directed is dependent upon all of the circumstances. As an example, for a member

²⁰ Personnel Manual, Article 20.A.2.d.2. (see *supra*, note 2, for definition of "alcohol incident").

²¹ The Group Commander's statement that no alcohol incident occurred is not actually in the applicant's military record because the disposition of UCMJ charges at mast and alcohol-incident determinations are separate proceedings, and "alcohol incident," *per se*, is not a legal charge under the UCMJ to be decided at mast or court-martial or to be included in the documentation of a UCMJ proceeding. See 10 U.S.C. § 801 *et seq.* It is possible for a member to incur an alcohol incident without being charged with any offense under the UCMJ, and it is possible for a member to be charged under the UCMJ for alcohol-fueled offenses without having an alcohol incident documented in his record (see, e.g., Final Decisions in BCMR Docket Nos. 2007-160, 2006-142, and 2005-137), although commands often pursue both courses of action.

who receives [a Page 7] from his or her division chief documenting purported substandard watchstanding, an appeal through the division chief and the executive officer to the commanding officer should suffice.” These two regulations seem to conflict with each other as the former suggests that commanding officers do not have final authority to remove any document from a member’s record once it is entered, whereas the latter suggests that a commanding officer does have such authority for minor record entries. A Page 7 documenting an alcohol incident, however, is a very significant record entry because having just two of them normally causes a member to be discharged.²² The JAG and CGPC have stated that the Group Commander did not have authority to order removal of a Page 7 documenting an alcohol incident from the applicant’s record, and there is no regulation clearly contradicting that assertion. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that his OIC’s reasonable determination that he incurred a third alcohol incident on February 13, 2004, was legally overturned by the Group Commander’s contrary finding.

8. Under Article 20.A.2.d. of the Personnel Manual, a member must actually consume alcohol for an alcohol incident to have occurred. The Board notes that in the text of the Page 7 dated February 17, 2004, the OIC failed to state expressly that the applicant drank alcohol at the “going away” party on February 13, 2004, which could lead one to question whether the applicant was involved in an “alcohol-related situation,” under Article 20.B.2.d., rather than an “alcohol incident.” However, the Board is satisfied based upon a preponderance of the evidence in the record that the applicant drank alcohol during the party. This evidence includes the Page 7’s use of the phrase “alcohol incident” twice and its references to “alcohol abuse,” “alcohol treatment,” the applicant’s “relationship with alcohol,” and the order to “abstain from alcohol.” Furthermore, the Board notes that the Group Commander found at mast that the applicant had consumed alcohol at the party in violation of orders and that the applicant’s chain of command prepared an unsatisfactory performance evaluation for him, pursuant to the mast, with a written comment that he “fail[ed] to obey direct written orders to abstain from alcohol.” Therefore, despite the OIC’s failure to state expressly on the Page 7 that the applicant drank alcohol at the party, the Board finds by a preponderance of the evidence that he did drink alcohol at the party, contrary to orders, and so incurred a third alcohol incident. Therefore, his military record with respect to a third alcohol incident is correct.

9. The Board recommends that the Coast Guard amend its regulations to require that Page 7s documenting alcohol incidents state expressly that the member drank alcohol to ensure that the Page 7 reflects the requirements for an alcohol incident under Article 20.A.2.d. of the Personnel Manual. Article 20.B. of the Personnel Manual does not require the text of a Page 7 to state that the member drank alcohol, but the absence of such an express statement could lead to confusion. For instance, in this case, the Page 7 focuses on the applicant’s involvement in a scuffle and does not state that he consumed alcohol. As written, the Page 7 could be interpreted as describing an alcohol-related situation, rather than an alcohol incident.

10. The applicant has not proved by a preponderance of the evidence that his OIC erred in determining that he incurred a third alcohol incident at the party on February 13, 2004. However, under 10 U.S.C. § 1552(a), the Board must also consider whether the third alcohol

²² Personnel Manual, Article 20.B.2.h.2. (“Enlisted members involved in a second alcohol incident will normally be processed for separation.”)

incident in his record constitutes an injustice.²³ In this regard, the Board notes that Coast Guard regulations require the discharge of an enlisted member following a third alcohol incident.²⁴ Although the Coast Guard erred in failing to separate the applicant in a timely manner after his third alcohol incident, since four years have passed, the Coast Guard must be considered to have waived that opportunity to separate him since he has invested four more years of service toward his eligibility for retirement on his 20th active duty anniversary. There is no complaint or evidence that CGPC is going to discharge him belatedly based upon the alcohol incident on February 13, 2004. Moreover, even if the Page 7 documenting his third alcohol incident were removed from his record, the applicant would be no less vulnerable to discharge at this point. Whether he now has two or three documented alcohol incidents in his record, he will be equally subject to discharge if he incurs a new alcohol incident because it would be either his third or fourth alcohol incident and members are subject to discharge after just two or three such incidents.²⁵ Although the Coast Guard failed to discharge the applicant after he incurred the third alcohol incident in 2004, as required by Article 20.B.2.i. of the Personnel Manual, the Board's sense of justice is not shocked by the fact that the documentation of that alcohol incident remains in his record.

11. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

²³ See *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577 (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (finding that for purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is "treatment by the military authorities that shocks the sense of justice but is not technically illegal").

²⁴ Personnel Manual, Article 20.B.2.i. ("Enlisted members involved in a third alcohol incident shall be processed for separation from the Service."). Officers must be discharged following a second alcohol incident. Personnel Manual, Article 20.B.2.h.1.

²⁵ *Id.*; and Personnel Manual, Article 20.B.2.h.2.

ORDER

The application of [REDACTED], USCG, for correction of his military record is denied.

