DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-185

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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 after receiving the completed application June 29, 2009, 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 May 13, 2010, 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 a memorandum documenting his first "alcohol incident"[1] dated July 26, 2006, and a memorandum regarding the results of alcohol screening dated July 7, 2006. In addition, the applicant asked that his officer evaluation report (OER) for the evaluation period June 1, 2006, through August 24, 2007, be corrected by removing or upgrading the low mark of 3 that he received in the performance category "Health and Well-Being" and by removing the following two comments concerning the alcohol incident:

- From block 8: "Off-duty, atypical confrontation deemed alcohol incident."
- From block 10: "[The applicant] retains my utmost trust and confidence and I consider the alcohol incident aberrant to an otherwise promising career. [He] showed great character in admitting error, learning from it, and moving on."

The applicant alleged that in 2006, he was arrested "based on incomplete information, mistaken beliefs and merely being in the wrong place at the wrong time." He immediately reported his arrest to his command and received a letter documenting an alcohol incident based upon the police report of his arrest. He also received a letter noting that screening had indicated

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[1] Article 20.A.2.d.1. of the 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."

that he is not alcohol dependent. Both letters were entered in his record. Moreover, while the matter was pending in State court, the evaluation period ended, so his command prepared an OER documenting the alcohol incident.

The applicant alleged that he was "cleared of all misconduct resulting from the incident. The charges were dismissed by the State … and the court issued an order that all records of the arrest, events, and [his] prosecution be expunged for the purpose of clearing [his] record." The applicant stated that although the Coast Guard is not legally required to follow the court's example or order, it should do so voluntarily. The applicant argued that the alcohol incident letter and OER are incomplete, erroneous, and unjust because they do not show that he has been vindicated and cleared of the charges, and the State has determined that his arrest and prosecution "did not occur" since there are no records of them.

The applicant argued that the underlying basis for the disputed letters and OER comments "has been expunged from the record" and that their presence in his record "constitutes an unjust burden on [his] military career and on any future civilian career in law enforcement and intelligence."

The applicant alleged that his new commanding officer, CDR W, who signed the OER, supports the redaction of the disputed comments from the OER and the removal of the letters from his record. He also alleged that his old commanding officer, CDR E, who was in command at the time of the alleged alcohol incident and who signed the disputed letters, does not object to the removal of the letters from his record.

The applicant alleged that if his career has been prejudiced because he forthrightly reported his arrest immediately to his command and that if he had just delayed reporting the incident until the court had completed the matter, "there would have been nothing to report." He further alleged that he was recently denied employment by a federal agency because of the disputed documents in his record even though the agency was aware of the State's expungement order.

In support of his allegations, the applicant submitted a copy of a State court's "Order for the Destruction of Arrest Records," which orders that the records relating to the applicant's arrest be "dismissed, expunged and immediately destroyed." The order shows that the Circuit Solicitor consented to the expungement.

The applicant also submitted a statement from CDR W, the commanding officer who signed the disputed OER as the reviewer. CDR W stated the following:

> I am writing this letter in support of [the applicant]. As his Commanding Officer at the Maritime Law Enforcement Academy (MLEA) for twelve months of the fourteen-month period covered by subject OER, I performed the duty as OER Reviewer in accordance with [the Personnel Manual]. [The applicant] was a stellar performer for the entire period that I was his Commanding Officer. I trusted him with extremely important issues involving training and coordination with many different agencies and components. I could always trust that [he] would represent the MLEA professionally and complete the assigned project on time and in superb fashion. With respect to his OER dated 20070824, he did receive a mark of 3 in the Health and Well Being dimension as a result of a one-time event that was documented as an alcohol incident on 18 June 2006 in accordance with [the Personnel Manual]. As Reviewer, I felt the mark appropriate. I also felt that the previous Commanding Officer correctly documented the alcohol incident, based on the facts at

> the time. Had the events of 18 June 2006 never taken place, I think it fair to say that I would have expected [the applicant] to receive a mark of 6 or 7 in the Health and Well Being dimension based on the performance as documented in the OER. I consider this an unfortunate incident that has tarnished the otherwise stellar career of a solid Coast Guard officer. Likewise I would support correction of his record should the board decide it appropriate.

The applicant noted that his prior commanding officer, CDR E, would submit a statement directly to the Board. (A statement from CDR E was received with the Coast Guard's advisory opinion for this case and is quoted below under "Views of the Coast Guard.")

SUMMARY OF THE RECORD

On January 13, 2002, the applicant was commissioned an ensign in the Reserve and began serving on extended active duty. He was assigned to a cutter and as an ensign received OERs with primarily average marks of 4, as well as some below standards marks of 3 and above standard marks of 5. He was promoted to lieutenant junior grade (LTJG) on August 13, 2003, and began to receive better OERs, with several marks of 5 and 6, as well as 4s, and no 3s. He usually received marks in the fourth (middle) spot on the comparison scale, denoting him as "one of the many competent professionals who form the majority of this grade."

On February 13, 2006, the applicant was promoted to lieutenant. On May 23, 2006, he received a commission in the regular Coast Guard. On an OER covering the weeks from February 14 to May 31, 2006, the applicant received eight marks of 5, nine marks of 6, and one mark of 7 (for Health and Well-Being) in the various performance categories and a mark in the fifth spot on the comparison scale, denoting him as an "excellent performer; give toughest, most challenging leadership assignments."

On June 26, 2006, the applicant's commanding officer, CDR E, prepared a letter as a "Record of Counseling for First Alcohol Incident." The letter states the following:

> 1. On 18 June 2006 you were arrested by the xxxxx Police Department on the charge of "Simple Assault" after allegedly striking a bouncer at a local establishment. I have determined that your use of alcohol was a significant and/or causative factor in your conduct and that your behavior has brought discredit upon the Coast Guard. Therefore, your behavior meets the standard set for in [Article 20 of the Personnel Manual] for classification as an "alcohol incident."
>
> 2. You were counseled on Coast Guard policies concerning alcohol use and abuse contained in [the Personnel Manual and Health Promotion Manual] as well as the serious nature of this incident. The unit Collateral Duty Addictions Representative (CDAR) has arranged an appointment with a provider who will determine the nature of your relationship with alcohol. It is recommended that you abstain from the use of alcohol until your screening and assessment is completed. Your initial screening appointment is scheduled for 28 June 2006 at the xxxxx Naval Hospital.
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> 3. This is considered your first documented alcohol incident. Any future incidents will result in you being processed for separation as per [Article 20 of the Personnel Manual].

On July 7, 2006, CDR E entered another letter in the applicant's record to document the result of his alcohol dependence screening. The letter states the following:

> 1. On 28 JUN 06 as a result of an alcohol incident you were evaluated by … at the xxxxx Naval Hospital where it was determined that you do not meet the criteria for a diagnosis of alcohol abuse

or substance dependence. You are to attend the IMPACT training on 14, 15, and 16 AUG at the xxxxx Naval Hospital.

2. You have been advised of the contents of [Article 20 of the Personnel Manual and Article 2 of the Health Promotions Manual] concerning the expected conduct of Coast Guard personnel.

On the disputed OER, which covers the period June 1, 2006, through August 24, 2007, the applicant received a mark of 3 for "Health and Well-Being, fourteen marks of 6, and three marks of 7 in the various performance categories and a mark in the fifth spot on the comparison scale. The mark of 3 is supported by the disputed comments quoted on page 1 of this decision.

In August 2007, the applicant transferred to Coast Guard Headquarters to serve as a project officer in counterterrorism. On an OER covering his service from August 25, 2007, through May 31, 2008, the applicant received one mark of 4, nine marks of 5, seven marks of 6, and one mark of 7 in the various performance categories and a mark in the fifth spot on the comparison scale.

VIEWS OF THE COAST GUARD

On November 20, 2009, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

The PSC submitted statements from the applicant's supervisor and reporting officer for the disputed OER and one from CDR E. Based on those statements, which are summarized below, and the regulations for OERs and alcohol incidents, the PSC stated that the applicant was arrested by civilian authorities for an incident that occurred when he was under the influence of alcohol. The PSC stated that the fact that the State dismissed the charge against the applicant and expunged the arrest from his record does not negate the alcohol incident because the definition of the latter does not require any arrest or conviction. The PSC stated that the commanding officer, CDR E, acted properly in documenting the alcohol incident and the subsequent alcohol dependence screening in the applicant's record.

The PSC stated that the disputed OER does not misstate the facts or violate any regulation and that there are no grounds for redacting it or for removing the alcohol incident and screening letters. The PSC stated that the reporting officer who was responsible for assigning the mark of 3 in the disputed OER and the supporting comments "was in the best position to observe the applicant's performance and provide a fair, accurate and objective OER." The PSC stated that the applicant has not submitted evidence that overcomes the presumption of regularity accorded the disputed OER and letters in his record.

The PSC also noted that the applicant did not submit a reply to the OER or apply to the Personnel Records Review Board for the corrections he is seeking.

Statement of the Applicant's Supervisor

LCDR H, who signed the OER as the applicant's supervisor, stated that the alleged alcohol incident occurred before he arrived at the MLEA. LCDR H stated that the applicant's "demeanor and professionalism [were] consistently above reproach."

Statement of the Applicant's Reporting Officer

CDR F, who served as the Executive Officer of the MLEA and the applicant's reporting officer throughout the evaluation period for the disputed OER, stated that because of LCDR H's late arrival at the MLEA, he worked closely with the applicant in the summer of 2006. CDR F stated that the State's decision not to proceed with criminal charges against the applicant

> does not change the fact that, while under the influence of alcohol, [he] was involved in physical altercation with a bouncer at an establishment in xxxxxxxxx. Having spoken to both the arresting officer and the other party in the altercation, I am convinced the incident took place. That said, the other party in the altercation (a bouncer and part owner of the establishment) was not a sympathetic person and may have played some role in escalating the incident. This does not excuse the behavior of [the applicant], who at the time of the incident was serving as a law enforcement instructor at the MLEA, though it is a mitigating factor. Due to [the applicant's] otherwise stellar performance and due to this mitigating factor, I recommended to the then commanding officer, [CDR E], this matter be handled administratively as opposed to seeking approval from the Judge Advocate General of the Coast Guard to concurrently proceed with charges under the Uniform Code of Military Justice while civilian charges remained pending. … [The applicant's] behavior was properly deemed an alcohol incident and was correctly documented by the memo as it is currently written. … [A]s [the applicant] was properly ordered to undergo screening for alcohol dependence based on that determination, the "Result of Alcohol Dependence Screening Memo" was also properly completed and filed. … I believe the incident was properly and fairly document in [his] Officer Evaluation Report (OER). Again, due to [his] otherwise excellent performance, this OER was otherwise very strong. In drafting this OER, both the supervisor and I went to great pains to attempt to minimize the negative effects of this incident. … If the BCMR has the discretion and authority to remove this incident from his record even though it has been properly documented, I would not object.

Statement of CDR E, Past CO of the MLEA

CDR E, who was the applicant's commanding officer at the time of the alleged alcohol incident, stated that

> while the State of xxxxxx order for destruction of arrest records is clearly in their purview, the documented alcohol incident was appropriate and was processed [in accordance with Commandant] policy. Member admitted alcohol ingestion was a contributing factor to his striking a bouncer at a local xxxxxx South Carolina establishment on 18 June 2006. That said, in the overall scheme of his career progression, it is my opinion that this behavior was an isolated incident that does in no way reflect negatively on the current or future potential as an otherwise excellent officer. While expected, [the applicant's] accepting responsibility for his actions and admitting error speaks positively of his character. Additionally, had I continued in his chain of command … [he] would have retained my utmost confidence in his knowledge, skills, and abilities. As such, I have no objection to a BCMR considering previous/current positive performance and my endorsement of my confidence in his abilities in the board's contemplation of removal from record his 18 June 2006 alcohol incident and the above associated memorandums.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 3, 2010, the applicant submitted his response to the advisory opinion. The applicant alleged that he could properly have "waited until this contested charge was adjudicated in criminal court to report it. At that point, I would not have needed to report this incident because I was acquitted of the criminal charges and the court expunged the record. I chose to do what I thought was right and self-report the incident immediately." He also argued that the letters should be expunged because he cooperated with his command by participating in the screening program and was found not to be alcohol abusive or dependent.

The applicant stated that at the time the OER was prepared, it was accurate and that the expungement happened later. He stated that he pled not guilty and requested a hearing, but the judge dismissed the charges during a pre-hearing. He alleged that the charges were dismissed "because they truly were incredible." The applicant alleged that he did not apply to the PRRB for the correction of his record because he did not immediately receive and understand the records of the expungement from his attorney.

The applicant stated that the expungement of his arrest means that "there is no record that the event ever happened." He admitted having consumed alcohol before the incident but alleged that the "bouncer apparently had a reputation and I defended myself against an aggravated assault." The applicant argued that based on the advisory opinion, if he had been hit by a car while walking home after drinking a beer, he would have incurred an alcohol incident. The applicant alleged that he "was not drunk, disorderly, out-of-control or otherwise inebriated to have the incident considered an alcohol incident. Not a single witness has alleged I was drunk or well on my way there when I was attacked."

The applicant alleged that his conduct on June 18, 2006, was not an alcohol incident. He noted that the definition of an alcohol incident requires that it result in a member's loss of ability to perform assigned duties, bring discredit upon the Uniformed Service, or be in violation of law. He argued that the expungement shows that the State's judicial system found that he had not violated the law. In addition, he was off-duty when he was arrested and reported for work without any loss of time. Therefore, his conduct can only be considered an alcohol incident if it brought discredit upon the Uniform Services, but as indicated in the statements from his superiors, he has "represented the CG proudly and respectfully throughout [his] career." The applicant also alleged that the expungement by the judge is evidence that he did not discredit the Uniformed Services.

The applicant stated that the fact that all procedures were followed and that the disputed documents were accurate at the time they were prepared "does not mean that today in light of the expungement, a reconsideration of the facts should not merit a different outcome." The applicant noted that the advisory opinion does not respond to the statements from his superiors indicating that they would not object to his record being corrected or to the statement from CDR W, who said that he "would support correction of his record should the board decide it appropriate."

The applicant stated that even if the Coast Guard's refusal to expunge the documentation of the alleged alcohol incident is not erroneous, it is unjust and the Board can correct injustices. He stated the following:

> I think that injustice defines my case. I did everything required. I cleared my name and expunged the records. Now a CG opinion says don't change the records. True justice from the CG would support my request. It costs the CG nothing to correct my records. This is especially true when the officers involved appear to clearly understand the injustice and have no objection. … I am asking to be treated fairly and within the leadership principles I have exemplified. The officers I served understand and exemplify those same leadership principles and have no objection to my request.

APPLICABLE REGULATIONS

Article 8.B.2.a. of the Personnel Manual states that "[a]ny Coast Guard member arrested or detained by civil authorities shall immediately advise their commanding officer, OOD or DCO and state the facts concerning such arrest and detention."

Article 20.A.2.d.1. 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.e.1., entitled "Alcohol Screening," states that "[a]ny member who has been involved in an alcohol incident or otherwise shown signs of alcohol abuse shall be screened in accordance with the procedures outlined in the Health Promotions Manual, COMDTINST M6200.1 (series), Ch 2. <u>The results of this alcohol screening shall be recorded and acknowledged on a CG-3307 entry or letter</u>, as appropriate, in the member's PDR with a copy to Commander (CGPC-epm) or (CGPC-opm), as appropriate, and (CGPC-adm-3)." (Emphasis added.)

Article 20.B.2.g. states that "[t]he first time a member is involved in an alcohol incident, except those described in Article 20.B.2.f., the commanding officer shall ensure this counseling is conducted; … For officers the record of counseling shall be by letter with copy to Commander (CGPC-opm) and (CGPC-adm-3). <u>This entry is in addition to that required by Article 20.B.2.e.</u>" (Emphasis added.) This article further states that the officer shall be counseled on Coast Guard policy regarding alcohol abuse and warned that a second alcohol incident will result in their being processed for separation from the Coast Guard.

Article 20.B.2.h.1. states that "[o]fficers will be processed for separation following a second alcohol incident."

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

2. The applicant asked the Board to remove from his record the letters documenting his alcohol incident and the results of his alcohol screening. The Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[2] Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."[3]

3. Article 20.B.2.e.1. of the Personnel Manual requires entry of a letter documenting the results of alcohol abuse and dependency screening whenever an officer incurs an alcohol incident. Article 20.B.2.g. requires entry of a separate letter documenting an officer's counseling about an alcohol incident and the consequences of a second alcohol incident. The disputed letters were entered in the applicant's record in accordance with these rules.

4. The applicant argued that the disputed letters should be removed because his conduct and arrest on June 18, 2006, did not qualify as an alcohol incident pursuant to the definition in Article 20.A.2.d.1. of the Personnel Manual. That article requires that a member commit "[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." The applicant argued that his behavior did not meet these criteria because he was not drunk, because he lost no time at work, because the charges against him were dismissed, because he acted in self defense, and because he has "represented the CG proudly and respectfully throughout [his] career." However, the applicant's commanding officer at the time, CDR E, clearly concluded that an alcohol incident did occur and stated that the applicant "admitted alcohol ingestion was a contributing factor to his striking a bouncer." Under Article 20.A.2.d.1., a member need not be "drunk" to incur an alcohol incident, and his misconduct need not be prosecuted or result in a conviction to be considered a violation of the Uniform Code of Military Justice.[4]

5. With respect to the applicant's claim of self defense, there is no evidence in the record that the bouncer and part owner of the establishment confronted or manhandled the applicant without good reason or provocation or that striking the bouncer was reasonable behavior under the circumstances. The fact that, according to CDR E, the bouncer was "not a sympathetic person" is not evidence that he launched an unprovoked attack on one of his customers. CDR E stated that the bouncer "may have played some role in escalating the incident" but also that the circumstances did "not excuse the behavior of [the applicant]." None of the evidence submitted by the applicant suggests that he was defending himself against an unprovoked attack on the

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[2] 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)).

[3] *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 fact, the second sentence of Article 20.A.2.d.1. of the Personnel Manual states that "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." A commanding officer uses the preponderance of the evidence standard in determining whether an alcohol incident occurred.

night of June 18, 2006. Therefore, although the statements of the rating chain show that the applicant is usually a fine representative of the Coast Guard, the Board finds that he has not proved by a preponderance of the evidence that CDR E committed error or injustice in finding that his conduct on the night of June 18, 2006, constituted an alcohol incident.

6. The applicant alleged that the disputed letters should be removed from his record because his alcohol screening did not result in a diagnosis of alcohol abusive or dependent. Alcohol screening consists primarily of a member answering dozens of questions about his alcohol consumption, and the diagnosis depends on the member's own answers. Nothing in the regulations states that only members who are diagnosed as alcohol dependent or abusive should have alcohol incidents and screening results documented in their records pursuant to Articles 20.B.2.e.1. and 20.B.2.g. of the Personnel Manual.

7. The applicant alleged that the disputed letters should be removed from his record because the State court dismissed the charges and expunged his arrest from the State's criminal records. He alleged that the charges were dismissed and the arrest expunged because the charges were "incredible." The applicant submitted no evidence showing that he did not strike a bouncer, and CDR E's statement indicates that the applicant admitted to having struck the bouncer while under the influence of alcohol. Criminal charges may be dismissed and matters expunged for any number of reasons. Even if the Board were to assume that the matter was dismissed and expunged because the judge found that the applicant's conduct did not violate State law, the disputed letters would still be proper because the elements of an alcohol incident are not the same as those of a simple assault. Having a Coast Guard officer under the influence of alcohol behave in an establishment in such a way that he is confronted by a bouncer and then strikes the bouncer is clearly a prime example of conduct that "brings discredit upon the Uniformed Services." The court's actions in dismissing and expunging the matter do not persuade the Board that the alcohol incident did not occur or that it is unjust for the alcohol incident to be documented in the applicant's record.

8. The applicant alleged that the disputed letters should be removed because he could have chosen not to report his arrest, in which case the Coast Guard would not have discovered it since it was expunged by the court. However, it is also possible that the Coast Guard would have discovered his arrest before its expungement and, under Article 8.B.2.a. of the Personnel Manual, members are supposed to report arrests by civil authorities.[5] The fact that the applicant could theoretically have kept the Coast Guard in ignorance of his arrest does not persuade the Board that the alcohol incident should not be documented in his record.

9. The applicant pointed out that neither CDR E nor the members of the rating chain who prepared the disputed OER object to the removal of the disputed letters from his record. These officers' statements show that their lack of objection to the applicant's request for correction stems not from any question about whether an alcohol incident occurred, but from the applicant's usual excellent performance. The fact that the applicant has joined the ranks of excellent

[5] *But see United States v. Serianne*, 68 M.J. 580 (NMCCA, 2009) (holding that a member could not be convicted of dereliction of duty for failing to report his arrest for driving under the influence (DUI) to his command, as required by Navy regulations, because the Fifth Amendment to the Constitution guarantees that no one may be "compelled in any criminal case to be a witness against himself").

officers who have one alcohol incident in their record is unfortunate, but the Board does not believe that the quality of an officer's work justifies removal of the accurate and proper documentation of an alcohol incident and alcohol screening that is required by Articles 20.B.2.e.1. and 20.B.2.g. of the Personnel Manual.

10. The applicant asked the Board to remove two comments in his OER referring to the alcohol incident and to remove or upgrade the mark of 3 he received for "Health and Well-Being." To be entitled to correction of an OER, an applicant 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.[6] The applicant has not shown that the disputed comments and mark in the OER are erroneous, contrary to law, or the result of bias or prejudice. The Board finds no basis for making the requested changes to the disputed OER.

11. Accordingly, the applicant's requests should be denied because he has not proved by a preponderance of the evidence that the disputed letters and OER are erroneous or unjust.[7]

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

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[6] *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).

[7] *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 military authorities that "shocks the sense of justice").

ORDER

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