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

Application for Correction of
the Coast Guard Record of:

**BCMR Docket No. 2010-186**

**Xxxxxxxxxxxxxxxx**
**xxxxxxxxxxxxxxxx**

## 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 May 28, 2010, 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 February 24, 2011, 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 form CG-3307 ("Page 7") documenting a second "alcohol incident."[1] The Page 7 was issued by the commanding officer (CO) of the xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx and was signed by the applicant in acknowledgement on October 15, 2009. It states the following:

> 01Sep09: On this date you received an alcohol incident when your alcohol was determined to be a significant and causative factor in your behavior which brought discredit upon the Uniformed Services as a result of which you have been disenrolled from the xxxxxxxxxxxxxxxxxxxxxxxxxx course while serving on Temporary Active Duty (TAD) to the U.S. Coast Guard xxxxx. Upon your first day of class, you were informed during your orientation brief of the xxxxx eight-hour no drinking policy prior to training. On the morning of your second training day, the xxxxxxxxxxx contract cleaning crew opened the door to your assigned interagency barracks room for cleaning and vomit was discovered in your room. The vomit was located all over your pillow, sheets, blanket, night stand, wall, and floor. This was verified by the XXXXX Executive Officer, [LT Y, CWO X and BMC X]. [LT X] ([redacted]) interviewed you and your roommate in

[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." Article 20.B.2 h.2. states that "[e]nlisted members involved in a second alcohol incident will normally be processed for separation."

> which you stated that it was your bed and you had no memory of getting sick or vomiting. Initially you stated that you only consumed three beers, however later you indicated you may have consumed no more than five beers the night before. Upon consenting to a BAC using a calibrated ALCO Sensor IV, a result of .03 Blood Alcohol Content (BAC) was noted at approximately 1020 on 01 Sep 09. If you had consumed no more than 5 beers and followed XXXXX's eight hour no drinking policy prior to training, your BAC would have been a 0.00 by the time you began training.
>
> I have recommended to your unit that you meet with your unit Command Drug and Alcohol Representative (CDAR) to determine the nature of your relationship with alcohol, you receive medical screening and assessment to determine your dependency on alcohol, and that you abstain from the use of alcohol until your screening and assessment is completed. If this is your second alcohol incident, it is recommended to your unit that you be processed for discharge from the U.S. Coast Guard, as per chapter 20 of the Personnel Manual COMDTINST M1000.6 (series).

The applicant alleged that the CO of the XXXXX erred in deciding that he had incurred an alcohol incident. He alleged that he did not violate the academy's 8-hour policy because he drank only moderately and stopped drinking more than 8 hours before training began. He argued that "no discredit was brought upon the Coast Guard" because all that happened is that he got sick in his room and failed to clean it up immediately. In addition, he alleged that he had apologized profusely to the cleaning staff. The applicant stated that the breathalyzer test was improperly administered and that the results are unreliable because no one ensured that he had not had anything in his mouth during the 15 minutes before the test. In support of his allegations, the applicant submitted the report of an investigation conducted by his permanent command, the MSST, and a Missouri State court decision, which is summarized below.

In *Hurt v. Director of Revenue State, State of Missouri,* 291 S.W.3d 251 (Mo. Ct. App. 2009), the court upheld a decision to set aside the suspension of the plaintiff's driving privileges because his "breathalyzer test [result was] invalid due to the presence of chewing tobacco in his mouth throughout the 15-minute observation period preceding the test." The court deferred to the trial court's credibility determinations, and the trial court had believed the plaintiff, who said that he had put chewing tobacco in his mouth upon leaving a bar and still had it in his mouth when the test was conducted. The police officer who stopped the plaintiff's car reported that his eyes were glassy, he smelled of alcohol, and he failed three field sobriety tests. Two police officers who were observing him for 15 minutes prior to the test did not see any sign of chewing tobacco, but they did not ask him if he had anything in his mouth before conducting the test. The plaintiff's BAC was measured at 0.121%. The court noted that regulations and the instructions for the breathalyzer required no smoking or oral intake of any material during the 15 minutes prior to the test. The court also noted expert evidence that the "presence of compounds in the mouth at the time of breath collection will produce an extremely high breath alcohol value that is far from indicative of alveolar breath alcohol concentration" and that "[s]ome foreign objects in the mouth, such as chewing tobacco, may trap alcohol and affect the breath test." The court noted that in *Coyle v. Director of Revenue*, 181 S.W.3d 62 (Mo. 2005) (en banc), the Supreme Court of Missouri had found that the regulation requiring no smoking, vomiting, or oral intake of material during the 15 minutes before the test "creates a presumption that smoking, vomiting or oral intake of material during the 15-minute period invalidates the test results."

## SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on September 11, 2001, and became a boatswain's mate. On October 18, 2004, the applicant's commanding officer entered a Page 7 in his record documenting his first alcohol incident,[2] which occurred on October 1, 2004. The Page 7 states that he had violated a rule about not consuming alcohol during the 12 hours prior to a period of "alert duty status." A breathalyzer test had shown that his BAC was 0.037 when he reported for duty. The Page 7 states that he was counseled about the Coast Guard's policies regarding alcohol and specifically advised that any additional alcohol incident in the future would result in his discharge in accordance with Article 20 of the Personnel Manual.

On November 29, 2004, his commanding officer entered another Page 7 in the applicant's record stating that as a result of the alcohol incident, the applicant had undergone screening at a clinic, and the screening results indicated that he did not meet the criteria for alcohol dependence. The Page 7 notes that the applicant had been counseled about the regulations regarding alcohol in Article 20 of the Personnel Manual.

In 2009, the applicant was assigned to a Maritime Safety and Security Team (MSST). At the end of August 2009, he was assigned to temporary duty at the XXXXX, which is located at the xxxxxxxxxxxxxxxxxxxxxxx to attend a course from August 31 to September 4, 2009. On September 1, 2009, the CO of the XXXXX determined that the applicant had incurred an alcohol incident, which was his second,[3] and disenrolled him from the course.

On September 4, 2009, the CO of the MSST ordered a lieutenant, the Operations Officer of the MSST, to investigate the events that had resulted in the CO of the XXXXX disenrolling the applicant and issuing him a Page 7 documenting an alcohol incident. According to the report of the investigating officer (IO), dated September 14, 2009, the applicant was disenrolled for "bringing discredit upon the service by leaving vomit in his room which was allegedly due to an excessive amount of alcohol being consumed." The IO's report states that after the applicant went running on the evening of August 31, he went to a student lounge with two other petty officers, MST3 E and BM2 L, at about 8:00 p.m. and remained there until 10:30 p.m. The three of them shared pitchers of light beer and ate "stale popcorn." The applicant consumed an indeterminate amount of beer. Upon returning to his room, he watched television and spoke to his wife on the telephone. The IO noted that he was unable to find evidence proving whether or not the applicant drank alcohol after leaving the lounge.

The IO stated that early the next morning before class, MST3 E spoke to the applicant and later told the IO that he had not appeared "hung over" or sick. In addition, he could not recall smelling any odor of alcohol coming from the applicant. However, at 7:45 a.m., the applicant was pulled out of class because the cleaning staff had found vomit in and around his bed.

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[2] Under Articles 2.B.2.e. and 2.B.2.g. of the Personnel Manual, if a CO determines that a member has incurred a first alcohol incident, the member is counseled about alcohol policies and specifically the rule that a second alcohol incident will result in the member's discharge; a Page 7 is prepared to document the incident; and after the member has been screened for alcohol dependency, another Page 7 is entered in the record to document the results of the screening. The member is afforded the rehabilitative treatment required by the diagnosis.

[3] Article 20.B.2.h.2. states that "[e]nlisted members involved in a second alcohol incident will normally be processed for separation."

The applicant "verified that he was responsible but did not remember vomiting." The applicant was sent to the medical clinic, where a doctor noted that he "could have thrown up due to dehydration and not eating adequately the night before." The doctor found him fit for duty. However, a breathalyzer test conducted at 9:39 a.m. showed that the applicant's BAC was 0.03. The breathalyzer had been calibrated at 8:56 that morning.

The IO reported that the petty officer who conducted the test had not monitored the applicant during the 15 minutes prior to the test, as required by the instructions to the breathalyzer, to ensure that nothing happens to cause a false test result. In addition, the applicant was not questioned about whether "he had any food, drinks, or other foreign objects in his mouth and was not given any direction to flush or remove any potential residue from his mouth." However, a chief petty officer (BMC X) "stated that he was present with [the applicant] the entire time, excluding the four minutes inside the exam room at medical and never observed [the applicant] place any foreign matter in his mouth." The applicant, who was interviewed on September 8, 2009, told the IO that he was using smokeless tobacco within 15 minutes of when his BAC was tested. The applicant stated that he had "put a 'pinch' in his mouth while he was at medical when [BMC X] was not present because he was nervous since it would be his second potential alcohol incident." The IO also noted that the applicant initially stated that he was required to clean up his vomit before he took the breathalyzer but later corrected his statement.

The IO noted an article stating that "[o]ther common things that can cause false BAC levels are alcohol, blood or vomit in the subject's mouth, electrical interference from cell phones and police radios, tobacco smoke, dirt, and moisture," and that "[t]here are no facts or statements besides the breathalyzer that can confirm [the applicant] violated the XXXXX's alcohol consumption policy." The article states that "[r]esearch indicates that breath tests vary at least 15% from actual blood alcohol concentration. At least 23% … of all individuals tested will have a BAC reading higher than their actual BAC."

The IO noted that as a result of the incident, the CO of the XXXXX disenrolled the applicant, informed the applicant's command, and prepared and forwarded the Page 7 documenting the alcohol incident to the command because the applicant's conduct had "brought discredit upon the uniformed service due to his vomiting in his room." The IO stated that in his opinion, "there is too much circumstantial evidence to concur with the decision to disenroll [the applicant]." He stated that the applicant could have put tobacco in his mouth during the minutes he was in the medical examining room and that there is "no solid proof" that the applicant did not have tobacco residue in his mouth when the test was conducted. Therefore, he concluded, it cannot be determined whether the applicant drank alcohol past 11:00 p.m. on the evening of August 31, 2009 (less than 8 hours before class began at 7:00 a.m. on October 1, 2009). In addition, he concluded that although the applicant's consumption of alcohol could have contributed to his dehydration, "solely consuming alcohol was not a 'significant and causative factor' in relation to the member vomiting and him bringing discredit upon the service. His dehydration from a lack of water and not eating an adequate meal contributed to this." Therefore, he recommended that the CO of the MSST rescind the alcohol incident issued by the CO of the XXXXX if possible. The IO attached to his report several statements from witnesses to the events:

- LT Y stated that when the cleaning staff complained about the vomit, he went to the applicant's room with LCDR B, BMC X, and CWO X, and found "a large pile of vomit on the night stand and floor" beside the applicant's bed.

- CWO X stated that he was asked to accompany LT Y and BMC X to the applicant's room, and while the bed assigned to the applicant's roommate, BM2 S, was neatly made, the bed assigned to the applicant was unmade and there was vomit on the bed, the night table, the floor, the wall, and the pillow, which was on the floor. CWO X stated that he witnessed LT X's interview with the applicant, and the applicant denied knowledge of any vomit and denied having had too much to drink. The applicant stated that he had eaten the night before but had not gotten sick. When shown the vomit, the applicant said, "I guess I did," but denied that the vomit was due to consumption of alcohol. LT X told BMC X to escort the applicant to the health clinic.

- BMC X stated that when he was asked to accompany LT Y to the barracks with LCDR B and CWO X, they found vomit on the bed, the floor, the night stand, and the pillow. In addition, BMC X "noticed that there was an odor of an alcoholic beverage lingering in the room." He told the cleaning staff that the applicant would clean up the mess. BMC X and CWO X notified LT X, who told them to get the applicant from his classroom and escort him to LT X's office. In the office, the applicant said he had no idea how vomit had gotten all over his side of the bedroom. BMC X stated that he escorted the applicant to the clinic, where he was found fit for duty, and then escorted the applicant back to LT X's office for a breathalyzer test. BMC X stated that he was with the applicant the entire time except for when the applicant was in the examination room at the clinic for about four minutes. BMC X "never once noticed anything foreign in his mouth, nor did I notice [him] introduce any substances into his mouth. During the time I was with him, I never noticed him to exit any type of matter out of his mouth." After the test, LT X ordered the applicant to clean his room.

- Medical notes show that at 9:20 a.m. on September 1, 2009, the applicant was examined at the training center's health clinic. The applicant stated that he had vomited during the night but could not remember having done so. The applicant also stated that he had not eaten dinner the night before; had drunk three cups of beer before going to bed; and had run four miles before drinking. The doctor's comments are mostly indecipherable but the phrase "2° [secondary] to EtOH [alcohol] or food allergy" is legible.

- LT X stated that LT Y, CWO X, and BMC X told him about the complaint from the cleaning staff that the applicant's vomit was "abundantly scattered throughout his room." He ordered the applicant to his office and questioned him. The applicant told him he had drunk only three drinks the night before and "did not throw up in his room. [The applicant] informed me that he went to his room after calling his wife and went to sleep. [He] then informed me he woke up, showered and went to muster." LT X went to the room with the applicant, CWO X, and BMC X. They "discovered vomit covering the entire sleeping surface of the mattress, the entire pillow, a portion of the nightstand, and the floor area to the side of the bed." The applicant commented, "Well, I guess I did throw up." LT X ordered BMC X to escort the applicant to the clinic for an evaluation and ordered a petty officer to

conduct a breathalyzer test, which showed that the applicant had a BAC of 0.03 at about 9:39 a.m.

- MK1 X stated that he calibrated the breathalyzer machine after being notified of the need at about 8:45. At 9:35, he was called to LT X's office to conduct the test. He explained the test instructions to the applicant and conducted the test, which showed a BAC of 0.03. He thought that LT X had been monitoring the applicant.

- MST1 M, who was the class sponsor, stated that he witnessed the breathalyzer test and was told by LT X to go with the applicant to his room to ensure that he did a thorough job of cleaning it. Once in the room, the applicant "stated that he did not understand why it was such a big deal wasn't this part of their job in cleaning the rooms." MST1 M told him the cleaning staff was "not responsible for cleaning your vomit." After the applicant did a thorough job of cleaning the room, they returned to the classroom, but were called to LT X's office again at about 10:45 a.m. LT X asked the applicant to explain again what had happened the night before, listened to what the applicant said, and then stated that he would be recommending disenrollment.

- MST3 E stated that he and the applicant are assigned to the same MSST. He went to the student lounge at about 8:00 p.m. on August 31, 2009, and saw the applicant there with several other students. He sat around a table and shared pitchers of beer and baskets of popcorn with the other students. He did not see the applicant drinking excessive amounts of alcohol and no one was getting out of control. MST3 E left the lounge at about 10:00 to 10:30. He heard the applicant express his intention to leave the lounge as well.

- BM2 L stated that he had run into the applicant in the hall at about 7:00 p.m. on August 31, 2009. The applicant, who was covered in sweat after a run, agreed to meet him in the lounge after showering to "catch up on old times." They met in the lounge at about 7:45 p.m. MST3 E joined them at their table. They "ordered 3 – 4 pitchers between all of us, as well as shared some of our pitchers with friends coming up to the table for a few minutes." They left the lounge by 10:30 p.m. and headed back to their rooms. The applicant did not seem intoxicated. In addition, BM2 L stated that he spoke to the applicant before class the next morning and that the applicant "seemed normal and nothing was out of the ordinary." He could not recall the applicant smelling like alcohol.

- The applicant stated that on the evening of August 31, 2009, he first ran two miles and then, instead of eating dinner, he went to the student lounge and shared three pitchers of light beer with MST3 E and BM2 L. At about 10:00 p.m., the applicant left the lounge to go to his room, where he watched television and spoke to his wife on the telephone until about 11:00 p.m. He awoke when his alarm rang at 6:30 a.m., took a shower, put on his uniform, and mustered in the mess hall at 7:15 a.m. After he was pulled out of class, LT X asked him if he had been sick the night before, and he said he had not. He was escorted to his room and shown the vomit and then escorted to the clinic. When he was sitting in the examination room waiting for the doctor, he put a pinch of smokeless tobacco in his mouth where it would not be noticed. The doctor said his vomiting was likely due to dehydration or a food allergy. After the medical examination, LT X told the applicant to clean up his room. MST1 M went

with him. Later, on their way back to the administrative building, the applicant took the tobacco out of his mouth and threw it under a bush. Once inside, LT X asked him if he had been drinking the night before, and he said he had drunk his "share of a pitcher, approximately three beers, at the on-base club." Then the breathalyzer was administered, but no one asked him if he had anything to eat or drink recently.

The applicant stated that he had drunk between three and five light beers in the evening of August 31, 2009. Therefore, he was shocked by the result of the breathalyzer because he realized he would be discharged and he did not initially try to figure out how the test result could be 0.03 after drinking moderately the evening before. However, when he returned to the MSST, his supervisor asked him why his BAC had been above zero if he had not drunk alcohol in more than ten hours. His supervisor "reminded me of the potential for foreign objects in the mouth to cause inaccurate readings and advised me to retrace my actions prior to the test. Acting on this I recalled the tobacco use." The applicant stated that he had not taken a breathalyzer test for more than two years before the incident and so forgot that he should have washed the tobacco out of his mouth and waited 15 minutes to take the test.

On September 14, 2009, the applicant emailed the IO to say that two events in his statement were out of order. He stated that he had taken the breathalyzer test before he cleaned up his room. But he repeated his allegation that he had thrown his tobacco in a bush just a few minutes before the test was administered.

- The applicant's wife stated that she received three telephone calls from the applicant on the night of August 31, 2009. At 6:30 p.m., he told her he was going running; at 8:30 p.m., he said he was in a bar on the base and was catching up with an old friend from a prior duty station; and at around 10:00 p.m., he called her again and said he was back in his room, laying in bed, and watching television. He told her funny stories he had heard from his friend. They talked for about 30 minutes and he did not sound drunk.

The applicant applied to the Personnel Records Review Board (PRRB) seeking removal of the disputed Page 7. The CO of the MSST strongly supported his request because he does not think that "discredit was sufficiently brought upon the armed services as a result of his actions." The CO stated that because he was dissatisfied with how the XXXXX handled the incident, he initiated his own investigation. The CO alleged that the XXXXX's failure to follow proper procedures before conducting the BAC test cast doubt on the result, as did the doctor's "assessment that the member likely vomited because of dehydration from the exercise he had done combined with the lack of food and water." The CO alleged that before making the decision about whether to document the event as an alcohol incident, the CO of the XXXXX had checked to see whether the applicant had a prior alcohol incident and had said he believed that the applicant has "an alcohol problem." The CO stated that he was "most disappointed that [the applicant] didn't simply clean up the vomit, and didn't have the presence of mind to tell the staff that the tobacco he had may have skewed the test." The CO stated that the applicant, who was being processed for separation, "is an outstanding performer at this unit."

The IO also submitted a statement to the PRRB on behalf of the applicant. He stated that as Operations Officer of the MSST, he relies heavily on the applicant "to keep the division on

course and constantly progressing." He praised the applicant's attitude, expertise, and professionalism. The IO stated that the applicant should not be penalized because the XXXXX conducted the test improperly and that he "find[s] it difficult to believe that the documented accusations were indeed true. … It would be a shame for the Coast Guard to lose such a high performer as [the applicant] over this incident."

The PRRB denied the applicant's request to remove the Page 7. The PRRB noted that in response to the applicant's allegations, on March 18, 2010, the XXXXX conducted an experiment to see how use of smokeless tobacco affected the results of a breathalyzer test and found that the "use of the smokeless tobacco did not affect the results of the test." In addition, the PRRB contacted the executive officer of the MSST, who reported that the applicant had "not been able to explain how he could have vomited in his sleep, [woken] up, take[n] a shower and report[ed] to class without knowing what had occurred or even discover the vomit." The PRRB stated that the CO of the XXXXX relied on the following facts in deciding that an alcohol incident had occurred: vomit was found in and around the applicant's be; he did not remember vomiting or discover it when he awoke; and the breathalyzer showed his BAC was 0.03. The PRRB noted that no one saw the applicant insert or remove the smokeless tobacco, and he only claimed that he had used it days after he returned to his permanent unit.

The PRRB concluded that the applicant had not rebutted the presumption that the CO of the XXXXX acted correctly and appropriately in his apprehension of an alcohol incident. The Director of Personnel Management approved the PRRB's decision to deny relief.

According to the Personnel Service Center, the applicant remains on active duty despite having two alcohol incidents in his record.[4]

## VIEWS OF THE COAST GUARD

On October 8, 2010, 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 stated that the determination by the CO of the XXXXX that the applicant incurred an alcohol incident was the official determination and that the MSST's subsequent

[4] Article 20.B.2.h.2.a. of the Personnel Manual states the following regarding the retention of enlisted members following a second alcohol incident:

> 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 [PSC] 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.

investigation has no bearing on the validity of that determination. The PSC stated that the PRRB correctly found no basis for removing the disputed Page 7 from the applicant's record.

## APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 19, 2010, the Chair sent a copy of the views of the Coast Guard to the applicant's attorney. On November 10, 2010, it was returned by the Post Office as undeliverable. Subsequent attempts by the staff to contact the applicant and his attorney were unsuccessful.

## 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 Page 7 documenting his second alcohol incident. 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.[5] 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."[6]

3. The applicant argued that the Page 7 should be removed because his conduct on the night of August 31/September 1, 2009, 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 alleged, he drank alcohol only moderately on the evening of August 31, 2009; his vomiting was caused by dehydration or a food allergy, not by excessive alcohol consumption; he did not drink within 8 hours of muster, which was at 7:15 a.m.; and his conduct did not bring discredit upon the Uniformed Services.

4. Given the following evidence, which was available to the CO of the XXXXX on September 1, 2009, the Board finds that he did not err or commit an injustice in deciding that the applicant had incurred an alcohol incident:

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[5] 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)).

[6] *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 applicant shared a few pitchers of beer with two friends in the evening on August 31, 2009.
- The applicant vomited profusely on and around his bed and nightstand that night without being aware of it.
- The applicant dressed and left his room on the morning of September 1, 2009, without noticing the vomit.
- The applicant's bedroom smelled of an alcoholic beverage.
- The doctor who examined the applicant noted that the incident was secondary to alcohol consumption or a food allergy.
- The applicant had ingested only beer and popcorn the evening before.
- The applicant's BAC measured 0.03 the next morning.

5. In support of his allegations, the applicant has submitted statements from the two members with whom he socialized in the evening, and they state that they did not see him drink an excessive amount of alcohol; that he did not appear intoxicated; and that he left the lounge where they were drinking by or before 10:30 p.m. He also submitted a statement from his wife, who wrote that her husband was not intoxicated when they spoke on the phone that night. However, a member need not be intoxicated to incur an alcohol incident. As noted in Finding 3, the regulation requires only that the consumption of alcohol be a significant or causative factor in the member's behavior.

6. The applicant alleged that the doctor found that his vomiting was caused not by alcohol consumption but by either dehydration or a food allergy. He noted that he had gone running the evening before and skipped dinner. However, the applicant's allegation about the doctor's finding is contradicted by the doctor's own notes, which show that he believed that the vomiting was secondary to alcohol consumption or a food allergy. The record shows that the applicant consumed only beer and popcorn during the evening before he vomited, and there is no evidence that he is allergic to either beer or popcorn.

7. The record shows that the breathalyzer used to measure the applicant's BAC was calibrated just before the test was conducted but that no one asked the applicant if he had had anything in his mouth during the 15 minutes leading up to the test. The record also shows that he was under observation from the time he was pulled out of class until the breathalyzer was conducted except for a period of about 4 minutes while he waited for the doctor in the examining room, and there is no evidence that anyone noticed him having anything in his mouth. The applicant alleged that the breathalyzer result must be considered unreliable because, while he was alone in an examining room waiting for the doctor, he placed tobacco in his mouth and left it there until shortly before he entered the administrative building to take the breathalyzer test. He submitted evidence showing that breathalyzer test results are sometimes considered unreliable if the evaluee has had tobacco in his mouth prior to the test. However, there is no evidence to support the applicant's allegation that he put tobacco in his mouth while waiting for the doctor, which the Board finds to be a very unlikely action, and he did not make this allegation until several days after the incident. Moreover, although the applicant alleged that he put the tobacco in his mouth while waiting for the doctor because he was nervous about possibly incurring his second alcohol incident, he also claimed that he was "shocked and in disbelief" a few minutes

later upon learning the results of the breathalyzer test. The Board is not persuaded that the applicant had tobacco in his mouth during the 15 minutes prior to the breathalyzer test. The preponderance of the evidence does not show that the results of the breathalyzer test are unreliable.

8. The applicant argued that his behavior did not constitute an alcohol incident because he did not drink alcohol within 8 hours of when class began at 7:15 a.m., which is prohibited by the training center's rules, and because his behavior did not bring discredit upon the Uniformed Services. As stated in Finding 3, one criteria of an alcohol incident is that the member's behavior "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 investigation shows that the applicant's conduct was known not only to the staff of the training center but to several members of the Coast Guard. The CO concluded and wrote on the Page 7 that the applicant's behavior had brought discredit upon the Service, and the applicant has not proved his determination is erroneous or unjust.[7] Moreover, the applicant's behavior resulted in his disenrollment from the training course, which was his officially assigned duty.

9. Accordingly, the applicant's request should be denied because he has not proved by a preponderance of the evidence that the Page 7 in his record documenting his second alcohol incident is erroneous or unjust.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

[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 xxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.