

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2012-160**

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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 upon receipt of the application on June 9, 2012, and subsequently prepared the final decision as required by 33 C.F.R. § 52.61(c).

This final decision, dated March 15, 2013, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST AND ALLEGATIONS**

The applicant asked the Board to remove an administrative remarks page (page 7) dated August 31, 2011 (disputed page 7), documenting his second alcohol incident from his record. The Coast Guard Personnel Manual requires that a member involved in a second alcohol incident be separated from the Service. Because the applicant had more than eight years of service he was entitled to an administrative separation board (ASB) before he could be discharged. The ASB met on January 10-12, 2012 and issued a summarized report on February 22, 2012, recommending that the applicant be retained in the Coast Guard. On May 24, 2012, the final review authority for the ASB, who was the Chief of the Personnel Services Division of the Personnel Service Center, disapproved the ASB recommendation that the applicant be retained and directed that the applicant be discharged from the Coast Guard.

The applicant alleged in his BCMR application that based upon the summarized ASB report, the Coast Guard committed an error by placing the August 31, 2011 incident into his record as an alcohol incident. In this regard, the applicant stated that “[a]fter an extensive retention board given by Sector, ██████████ it was found that there was not enough evidence to support an alcohol incident that all statements given regarding the incident were inconsistent and non-conclusive. I was placed on report by my commanding officer [CO] who admitted, under oath, that he was legally intoxicated while making his decisions.”

## BACKGROUND

On June 16, 2010, the applicant received his first documented alcohol incident for appearing to be heavily intoxicated at a bar with junior members. The page 7 documenting this incident noted that the applicant was counseled on Coast Guard policies concerning alcohol use and abuse as well as the serious nature of this incident. The applicant was advised to abstain from alcohol pending the completion of his alcohol screening and assessment.

On August 20, 2010, the applicant was punished at captain's mast for making inappropriate and unwanted sexual advances towards an FN by licking her face and for being drunk and disorderly on June 16, 2010. He was punished with 30 days of restriction and forfeiture of pay for one month.

On September 15, 2010, the applicant was relieved of his duties [REDACTED].

On August 30, 2011, according to the disputed page 7, the applicant was at a bar and became intoxicated and as a result got into a verbal and physical confrontation with a subordinate petty officer in which his commanding officer (CO) had to intervene. This incident was documented on the disputed page 7 and placed into the applicant's record as his second alcohol incident. The page 7 also advised the applicant that since this was his second alcohol incident he would be processed for separation from the Coast Guard. The particulars of the page 7 are as follows:

On 30AUG11, you were involved in an alcohol incident. On this date you and several members of the Deck Department went to [REDACTED] [REDACTED] [REDACTED]. At approximately 2000, I [the CO] overheard you ordering FS2 [A] to leave the bar. Confused by your order, the FS2 asked why he was being ordered to leave, and how he was supposed to return to the cutter. You did not explain yourself, but simply repeated the order. I then personally witnessed you place hands on the FS2 in an aggressive manner, perhaps to shove him. I stepped between you and the FS2 and ordered you outside. Upon talking to you outside I realized that you were extremely intoxicated and ordered you to return to the cutter in a cab with me. During this time I witnessed you staggering and nearly falling due to your intoxication not to mention that you fell asleep in the cab because of your condition. This behavior was totally unacceptable. You were drunk and disorderly in front of junior members of this unit, many of whom you supervise. These actions have compromised your ability to effectively lead onboard this unit and are prejudicial to good order and discipline . . . Your abuse of alcohol was a significant and causative factor in this incident.

On November 21, 2011, the applicant was punished at captain's mast for simple assault and for being drunk and disorderly on August 30, 2011. His punishment included restriction and forfeitures of pay.

On September 6, 2011, the CO of the Military Personnel Sector ██████████ convened an ASB to recommend whether the applicant should be discharged from the Coast Guard, and if so, the characterization of discharge he should receive.

On January 10-12, 2012, the ASB met and recommended that the applicant be retained, but if he were to be discharged, he should receive an honorable discharge. According to the ASB report, the ASB made the following pertinent findings of fact, opinions and recommendations.

*ASB's Pertinent Findings of Facts*

- The applicant testified that he consumed at least 5 beers and a couple of shots at ██████████ ██████████ on August 30, 2011.
- The applicant's CO, LT M, and LTJG W, FS2 A, and EM3 D testified that the applicant had engaged in joking about homosexuality and body parts exclusively directed toward FS2 A and EM3 D on August 30, 2011. LT M stated that the derogatory homosexual remarks directed at FS2 A and EM3 D lasted for about 10 to 15 minutes. However, LTJG W testified that the derogatory homosexual remarks directed at FS2 A and EM3 D lasted about one minute.
- LT M testified initially that it was unknown if any contact was made between the applicant and FS2 A on August 30, 2011.
- LT M testified on rebuttal that prior to witnessing the applicant touch FS2 A, he had consumed three to four drinks and a shot during a duration of approximately of 1½ hours duration.
- The applicant admitted at captain's mast that he touched FS2 A. LTJG W and EM3 D testified that they did not witness the applicant touch FS2 A.

*ASB's Pertinent Opinions*

- The applicant's first alcohol incident (June 16, 2010) was supported by a preponderance of the evidence.
- The witness testimony regarding the applicant's second alcohol incident (August 31, 2011) was inconsistent and non-conclusive. The Board noted particular inconsistencies between the initial and rebuttal testimony of the CO. The ASB opined that there were various accounts of the derogatory comments directed at subordinate members by the applicant, and that there were various witness accounts of physical contact between the applicant and the FS2.
- The ASB could not find "a 'preponderance of the evidence' to support the second documented alcohol incident as a basis for separation."

- The ASB was of the opinion that the applicant should have exercised better judgment and abstained from consuming alcohol after the first documented alcohol incident. The ASB stated that at a minimum, the applicant should have completely avoided the consumption of alcohol in the presence of junior Coast Guard members.

On February 28, 2012, the convening authority (CA) for the ASB disagreed with that board's findings and opinions regarding the witnesses' statements. Also the CA did not agree that the applicant should be retained in the Coast Guard. The CA wrote that "[the applicant] is not fit to continue serving in the United States Coast Guard due to his disregard for the Service's Core Values and his inability to control his behavior and adequately address his poor relationship with alcohol." He stated that the ASB members failed to recognize the negative impact the applicant's actions had on the Crew's morale and esprit d' corps.

On February 29, 2012, the Acting Commanding Officer, Coast Guard Sector [REDACTED] [REDACTED] concurred with the CA's recommendation not to retain the applicant in the Coast Guard. The CO noted that the applicant's alcohol incidents demonstrated poor judgment, a lack of adherence to Coast Guard core values, and an inability to comply with the requirements of the Coast Guard Drug and Alcohol Abuse Program.

On March 28, 2012, the District One legal officer reviewed the ASB and determined that its proceedings were legally sufficient. The legal review also determined that while the ASB's recommendation for retention was allowed by Coast Guard policy, it was based on a misapplication of written policy, and therefore was deficient. The legal review report stated that the ASB judged the propriety of the Respondent's (applicant's) second alcohol incident rather than whether there were two properly documented alcohol incidents in the Respondent's personnel record, which could form a basis to separate the member. Further, the legal review report stated the following:

The [applicant] has two documented alcohol incidents on separate [page 7s] in his Servicing Personnel Officer Personnel Data Record. The first incident is dated 16 June 2010 and signed by the Respondent and his Officer in Charge. The second incident is dated 31 August 2011 and signed by the Respondent and his [CO]. Neither [page 7] was appealed by the [applicant] through a Personnel Record Review Board, let alone a Request Mast as allowed pursuant to Article 9-2-3 of the United States Coast Guard Regulation . . . Thus, both alcohol incidents documented on separate [page 7s] are valid military records and may form a basis for separation pursuant to the Coast Guard Drug and Alcohol Abuse Program . . . As the determination of the propriety and sufficiency of the evidence supporting the second alcohol incident is outside the purview of an [ASB], this board's findings—and opinions and recommendations proceeding from them – are clearly in error.

The legal review advised that the final review authority could disapprove the findings of fact, opinions, or recommendations and may amend, expand, modify or take final action other

than that recommended without returning the record, if evidence of record supports the action taken and the reason for that action are stated in the record.

On May 24, 2012, the final reviewing authority for the ASB approved the record, findings of fact, opinions, and recommendations were approved except the recommendation to retain the applicant. The final reviewing authority disapproved the ASB's recommendation to retain the applicant in the Coast Guard and ordered him to be separated from the Coast Guard in accordance with Article 1.B.15 of the Military Separations Manual with an honorable discharge for unsuitability due to alcohol abuse. The final review authority recommended that the applicant be assigned an RE-4 reenlistment code.

On June 12, 2012, the Commander of the Coast Guard Personnel Service Center directed that the applicant be discharge effective June 19, 2012.

### **VIEWS OF THE COAST GUARD**

On November 20, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief to the applicant. The JAG adopted the facts and analysis provided by PSC as the Coast Guard's advisory opinion.

PSC stated that the actions of the applicant on August 30, 2011, fully support his CO's decision that the applicant had engaged in his second alcohol incident, and the page 7 documenting that incident should remain in his record. PSC also noted that although the applicant claimed that his CO was drinking the night of the incident, there is no evidence to suggest that he was intoxicated as to not be able to comprehend the actions that evening.

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

On December 23, 2012, the BCMR mailed a copy of the views of the Coast Guard to the applicant's then-military attorney. On January 14, 2013, that mailing was returned to the BCMR. On January 23, 2013, The BCMR learned of the applicant's new address and a copy of the Coast Guard views was mailed to the applicant at that address. The BCMR did not receive a response to the views of the Coast Guard from the applicant.

### **APPLICABLE LAW**

#### ***Coast Guard Drug and Alcohol Abuse Program Manual***

Article 2.B.8.b defines "alcohol incident" as "[a]ny behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor, that results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice (UCMJ), Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident." This provision further states, "The member must actually consume alcohol for an alcohol incident to have occurred."

Article 2.B.8.b. states that enlisted members involved in a second alcohol incident will normally be processed for separation in accordance with Article 1.B.15 of the Military Separations Manual.

### *Military Separations Manual*

Article 1.B.15.b. allows the Coast Guard to discharge a member due to unsuitability for alcohol abuse.

Article 1.B.15.i. states that a member with more than eight years of military service under consideration for discharge for unsuitability is entitled to an administrative discharge board (ADB).

Article 1.B.22.a. of the Separations Manual states that an ADB, also known as an ASB, is a body appointed to provide findings of fact, opinions, and recommendations *to assist the discharge authority in making informed decisions*. This provision further states that the ADB identifies any bases for discharge, recommends either retention in the service or discharge, and recommends the type of discharge certificate to be issued in the event the final action of the discharge authority is to direct separation of the member.

Article 1.B.22.d. of the Separations Manual states that PSC may disapprove findings and opinions if they were made based on incomplete evidence, contrary to the evidence the ADB considered or to law or regulation, a misunderstanding or misapplication of written policy, or otherwise clearly in error.

Article 1.B.23.a.(3) of the Separations Manual states that “even if an ASB recommends retention, the discharge authority may direct separation if the circumstance of a particular case warrant. In this event, the discharge must be effected under honorable conditions and the member thus separated will be awarded an honorable discharge certificate, if specified in the authority for discharge.”

## **FINDINGS AND CONCLUSIONS**

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant was subject to discharge from the Coast Guard because he had received two documented alcohol incidents. The first incident occurred on June 16, 2010, and the second occurred on August 31, 2011. Article 2.B.8.b. of the Coast Guard Drug and Alcohol Abuse Program Manual states that enlisted members involved in a second alcohol incident will normally be processed for separation. After the second alcohol incident, the applicant's CO began proceedings to separate the applicant from the Coast Guard. The applicant was entitled to

an ASB before he could be discharged because he had more than 8 years to total service. Article 1.B.15.i. of the Military Separations Manual. The applicant's ASB occurred on January 10-12, 2012, for which he was assigned military counsel. The ASB issued its summarized report on February 22, 2012.

3. The applicant asked the Board to correct his record by removing the August 31, 2011, page 7 documenting his second alcohol incident. He alleged that the Coast Guard committed an error by placing the August 31, 2011, incident into his record as an alcohol incident. As proof of the alleged error, the applicant relied on the findings and opinions of the ASB, which he summarized as follows: "[a]fter an extensive retention board given by Sector, [REDACTED] it was found that there was not enough evidence to support an alcohol incident that all statements given regarding the incident were inconsistent and non-conclusive." However, according to the ASB report, the ASB did not state that the applicant did not engage in a second alcohol incident, but rather that "the [ASB] could not determine a 'preponderance of evidence' to support the second documented alcohol incident as a basis for separation." The ASB noted what it described as inconsistent and non-conclusive witness statements. However, the ASB never stated that the applicant's August 31, 2011, incident was not an alcohol incident just that it could not decide if it was. Further, the ASB opined that the applicant should have exercised better judgment and abstained from consuming alcohol after the first documented alcohol incident. The ASB stated that at a minimum, the applicant should have completely avoided the consumption of alcohol in the presence of junior Coast Guard members.

4. However, determining whether the August 31, 2011, incident was an alcohol incident was the responsibility of the applicant's CO and not the ASB. Article 2.B.8.b of the Coast Guard Drug and Alcohol Abuse Program Manual defines "alcohol incident" as "[a]ny behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor, that results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice (UCMJ), Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident." The applicant's CO made the determination that the applicant had an alcohol incident on August 31, 2011, and documented such on a page 7 in the applicant's record that both he and the applicant signed.

5. The applicant appears to be challenging the accuracy of the CO's determination that he had an alcohol incident on August 31, 2011, which is an allegation that can be before the BCMR. However, under the Board's rules, the applicant has the burden of proving error or injustice by a preponderance of the evidence. In this case the Board is unable to independently weigh the evidence regarding the applicant's involvement in the August 31, 2011, incident because the applicant failed to provide the witnesses' ASB statements and other ASB exhibits or the investigation, if any, into the incident. Nor did the applicant present any evidence, except for his own statement, that his CO was intoxicated at the time he determined that the applicant had committed an alcohol incident. The ASB report without the witnesses' statements and the other exhibits and the absence of any other evidence relevant to this matter does not provide the Board with sufficient evidence or information on which to reach a determination whether the August 31, 2011, page 7 documenting the applicant's second alcohol incident is erroneous. Therefore,

the applicant has failed to prove by a preponderance of the evidence that the August 31, 2011, page 7 documenting his second alcohol incident is erroneous.

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

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



**ORDER**

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

