

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-218

██████████
██████████

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 after receiving the applicant's completed application on August 29, 2012, and assigned it to staff member ██████████ to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 14, 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 was honorably discharged with more than 18 years of service on August 31, 2012, after receiving a third documented "alcohol incident." He asked the Board to correct his record by expunging his discharge, reinstating him on active duty, and ordering the Coast Guard to conduct an Administrative Discharge Board (ADB) to determine if he should be separated pursuant to Coast Guard regulations and policies. The applicant alleged that he was improperly discharged without an ADB after he was incorrectly diagnosed as alcohol dependent and then falsely charged with a third alcohol incident after he was accused of violating his post-rehabilitation aftercare plan by drinking alcohol. The applicant alleged that his discharge was improper because

- his conduct in May 2012 did not meet the definition of "alcohol incident" in the Coast Guard's Drug and Alcohol Abuse Program Manual (DAAPM), but his command documented it as an alcohol incident to avoid having to convene a second ADB for him;
- his diagnosis as alcohol dependent is questionable because in 1996 and 1997, he was screened and diagnosed simply with alcohol abuse, and although in 2005 he was diagnosed as alcohol dependent, in 2007, he was diagnosed with "alcohol abuse relapse"; and
- he was improperly denied a second ADB before he was discharged even though he had more than 18 years of active duty.

APPLICABLE LAW REGULATIONS

Alcohol Abuse Regulations

Article 1.A.2.b. of the DAAPM, COMDTINST M1000.10, states that “alcohol abuse” is a “general term for the misuse of alcohol which interferes with the user’s health, safety, job performance, family life, or other required social adaptation. ‘Alcohol abuse’ also applies to a medical diagnosis made by a physician, physician assistant, clinical psychologist, or a DoD or civilian equivalent Counseling and Assistance Center (CAAC) counselor.”

Article 1.A.2.c. states that “alcohol dependence” is a “chronic disease, sometimes referred to as alcoholism, characterized by repetitive, compulsive ingestion of alcohol which interferes with the user’s health, safety, job performance, family life, or other required social adaptation. This disease process may involve increasing tolerance for alcohol. An alcohol-dependent person may experience withdrawal symptoms when he or she stops drinking. The term alcohol dependence also applies to a medical diagnosis made by a physician, physician assistant, or clinical psychologist.”

Article 1.A.2.d.(1) defines an “alcohol incident” as follows:

Any 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.

Article 2.B.7. states the following regarding first alcohol incidents:

The first time a member is involved in an alcohol incident, except those described in Article 2.B.6. of this Manual, the commanding officer shall ensure this counseling is conducted; for enlisted members recorded on an Administrative Remarks, Form CG-3307, entry in the member’s PDR; acknowledged by the member; and a copy sent to Commander (CG PSC-EPM) and (CG PSC-PSD-MR). ... This entry is in addition to that required by Article 2.B.5. of this Manual.

a. Coast Guard Policy. The member shall be counseled on Coast Guard policy on alcohol abuse contained in this Article.

b. Impact of Future Alcohol Incidents. ... Enlisted members will be advised an additional incident normally will result in discharge and, a statement shall be made that the member has been involved in his or her first alcohol incident and a subsequent incident normally will result in separation action.

Article 2.B.8.b. states the following about second alcohol incidents:

Enlisted members involved in a second alcohol incident will normally be processed for separation in accordance within Article 1.B.15. of reference (c), Military Separations, COMDTINST M1000.4 (series).

(1) Request for Retention. Commanding officers retain the authority to request retention of those enlisted members who they believe warrant such exception. ... The command recommendation for retention will be submitted as a cover letter to the required discharge package.

(2) Enlisted Members Entitled to an Administrative Discharge Board. 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 (CG PSC-EPM). ...

Article 2.B.9. states the following about third alcohol incidents:

Enlisted members involved in a third alcohol incident shall be processed for separation from the Service under Article 1.B.15. of reference (c), Military Separations, COMDTINST M1000.4 (series). Cases requiring Administrative Discharge Boards because ... the member has served eight or more years, will be processed under Articles 1.B.22 and 1.B.23. of reference (c), Military Separations, COMDTINST M1000.4 (series).

Article 2.B.11.a. states that members found “violating an alcohol rehabilitation aftercare plan normally are processed for separation.”

Article 2.B.11.b. states the following about member who self-refer for treatment:

Members that self-refer for an alcohol screening that are identified as alcohol dependent, as defined in the Diagnostic and Statistical Manual of Mental Disorders ((303.9) DSM IV), must attend and successfully complete an appropriate treatment program for chemical dependency. Because self-referred members are not identified as the result of an alcohol incident they are granted consideration for self-referring should a relapse occur during the aftercare phase of their treatment plan. The relapse will be documented as their first alcohol incident and a new aftercare program will be reinstated effective the date the relapse was identified. Should the self-referred member fail to complete the second aftercare plan they will be processed for separation per reference (c), Military Separations, COMDTINST M1000.4 (series).

Article 2.B.12. states that members diagnosed as alcohol dependent are required to abstain from alcohol and

[w]hen 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 reference (a), Coast Guard Health Promotion Manual, COMDTINST M6200.1 (series). This counseling, referral, aftercare program, and other pertinent information shall be recorded and acknowledged on an Administrative Remarks, Form 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 (CG PSC-OPM) or (CG PSC-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.

Discharge Regulations

Article 1.B.15.b.(5) of the Military Separations Manual, COMDTINST M1000.4, authorizes the discharge of members for unsuitability due to alcohol abuse and refers the reader to the DAAPM. Article 1.B.15.d. states that before a member may be discharged for unsuitability, his or her CO must advise the member in writing of the specific reason for the discharge, afford the member an opportunity to submit a written statement regarding the discharge, and, if a less than honorable discharge is contemplated, afford the member an opportunity to consult a lawyer.

Article 1.B.15.i. of the Military Separations Manual states that “[a] member with more than eight years’ military service under consideration for discharge for unsuitability is entitled to an administrative discharge board. ... (See Article 1.B.22. of this Manual.)”

Article 1.B.22.a. states that an ADB “is a body appointed to provide findings of fact, opinions, and recommendations to assist the discharge authority in making informed decisions. In all cases, the board 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.e.(4) states that upon reviewing the recommendation of an ADB, Commander, PSC may “[a]pprove a discharge, but suspend its execution for a specified probationary period. (See Article 1.B.24. of this Manual.)” Article 1.B.24.a. provides the following regarding the suspension of execution of a discharge:

Before a member’s enlistment or period of obligated service expires, Commander (CG PSC) may suspend executing an approved discharge for a specified period if the circumstances in a case indicate a reasonable prospect for rehabilitation. During this period of suspension, the member will be afforded an opportunity to demonstrate proper behavior and efficient performance of assigned duties for an extended period under varying conditions.

(1) When the member satisfactorily completes the probationary period, the approved discharge will be canceled automatically.

(2) The member’s further misbehavior, substandard performance of duty, or demonstrated inability to conform to the demands of a military environment during the probationary period may establish the basis for one of these actions:

(a) Punitive or new administrative action may be initiated despite the suspension of executing the approved discharge.

(b) Suspension of the approved discharge vacated, and the approved discharge executed, ...

Article 1.B.24.b. states that when probation is authorized, “Commander (CG PSC)’s action will include instructions about the terms of the probation and specify the type of discharge to be executed if the member does not fulfill the terms of the probation.”

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on June 8, 1994. Upon enlisting, he acknowledged on a Page 7¹ having received a full explanation of the Coast Guard’s drug and alcohol policies.

Two Page 7s dated December 16, 1994, reveal that the applicant reported for duty 40 minutes late because he had been out drinking the night before. He was counseled “concerning

¹ A Page 7 (“Administrative Remarks” form CG-3307) is used to document counseling of a member about positive or negative performance or other significant information provided to the member. Page 7s are normally signed by the counselor and, to acknowledge receipt, by the member as well.

consequences of the intemperate use of beverage alcohol,” but the command chose not to award him an “alcohol incident” because the applicant had self-reported. He was also counseled about the treatment programs available and the Coast Guard’s alcohol policies. However, other Page 7s show that the applicant was repeatedly late for duty in 1995.

A Page 7 dated June 20, 1996, states that screening had shown that the applicant met the criteria for “alcohol abuse” and that he would attend Level II outpatient treatment. In the meantime, he was to abstain from drinking alcohol, meet weekly with the Command Drug and Alcohol Representative (CDAR), and attend meetings of Alcoholics Anonymous (AA).

A Page 7 dated May 19, 1997, states that the applicant had completed outpatient treatment for alcohol abuse. His aftercare plan included a three-month period of abstinence, attendance at AA meetings, and weekly meetings with the CDAR.

First Official Alcohol Incident

A Page 7 dated July 19, 2005, states that the applicant had been diagnosed as alcohol dependent and would attend intensive outpatient treatment. He was directed to abstain and attend AA meetings until that time. The Page 7 also notes that the applicant had been advised about the Coast Guard’s policies for alcohol dependence and alcohol incidents.

A Page 7 dated July 21, 2005, documents the applicant’s first alcohol incident based on “the numerous times that your abuse of alcohol was determined to be a significant and/or causative factor, while on duty or in a liberty status.” The Page 7 describes three occasions on which the applicant missed duty because he was hung over as well as incidents during which he

- consumed alcohol and began discharging a weapon in his back yard, which brought the local police;
- drove a vehicle under the influence of alcohol;
- was thrown out of a bar due to his disruptive behavior; and
- became so intoxicated that he could not remember what he had done by the next morning.

The Page 7 states that the applicant was counseled again on the Coast Guard’s alcohol policies and advised that any future alcohol incident would result in his being processed for discharge.

On August 23, 2005, the CO of a Naval Hospital advised the applicant’s CO that the applicant had completed treatment, was alcohol dependent, and should participate in AA meetings and an aftercare program. He stated that “[i]f this individual should engage in any further alcohol or drug related incidents which come to the command’s attention, the individual can be considered a candidate for administrative separation.” A Page 7 dated August 25, 2005, states that the applicant’s mandatory aftercare plan included “abstinence from alcohol indefinitely,” as well as attendance at AA meetings and meetings with the CDAR. The Page 7 stated that “[f]ailure to comply with this aftercare plan, or involvement in any alcohol related incident, may result in your separation from the Coast Guard.”

Two lengthy Page 7s dated October 13, 2005, and February 17, 2006, document counseling of the applicant regarding his “continued failure to use proper judgment” since returning from alcohol treatment. They describe numerous incidents of misconduct and poor performance, including the applicant’s failure to hold two subordinates accountable for alcohol incidents on their performance evaluations. On April 28, 2006, the applicant was relieved for cause as the Executive Petty Officer of a cutter “due to unsatisfactory performance and loss of confidence.” He was transferred to a new unit.

Second Official Alcohol Incident

A Coast Guard police report dated April 28, 2007, states that the applicant’s wife called the police because “he had been drinking all day and started an argument with her.” She asked the police to “de-escalate the situation.” When the police arrived, the applicant became uncooperative and was detained in handcuffs and taken to a Coast Guard office, where he was ordered to stay overnight. As a result, all of the applicant’s boat coxswain and boarding team member qualifications were revoked. The command noted that the applicant had failed to inform them that he was alcohol dependent and so he did not get the support that might have helped him stay sober through the stresses his family had experienced since his daughter was diagnosed with a life-threatening bleed in her brain in October 2006.

A Page 7 dated May 2, 2007, documents the events of April 28, 2007, as the applicant’s second alcohol incident. The Page 7 notes that since the applicant was diagnosed as alcohol dependent on July 15, 2005, he had been under orders to abstain from alcohol indefinitely. The Page 7 imposed another aftercare plan, which included indefinite abstinence, attendance at 90 AA meetings in 90 days, weekly meetings with the CDAR, and a psychological evaluation for anger management. The CO noted that he would convene an investigation before deciding whether to recommend the applicant for retention but that the rules required him to initiate discharge processing through an ADB.

A medical record dated May 8, 2007, shows that the applicant was seen by a psychologist for a referral for anger management. The applicant told the psychologist that his command was referring him because he had recently incurred his second alcohol incident. The applicant stated that he had begun drinking alcohol again about four months previously. The psychologist referred the applicant for anger management with a primary diagnosis of “alcohol abuse relapse.”

A report of an investigation, dated May 11, 2007, states that interviews with the applicant, his spouse, and other members revealed that the applicant had been drinking alcohol for the previous 3 to 4 months, contrary to his aftercare plan, and had become intoxicated and involved in an altercation in a bar during a deployment. The report noted that the family was under significant personal and financial stress due to the daughter’s illness, a parent’s cancer, and the pending death of a close cousin.

On May 11, 2007, the applicant’s CO notified him that he was initiating discharge proceedings because he had incurred his second alcohol incident. The CO advised him that he had a right to object to the discharge, to submit a statement, to consult an attorney, and to appear before an ADB with legal representation. The applicant acknowledged the notification and did

not waive his right to an ADB. He submitted a statement admitting that he had not been abstinent for several months and asking to be retained so that he could support his family and his daughter would have health insurance.

A Page 7 dated June 12, 2007 states that screening had shown that the applicant is alcohol dependent, and he would be referred for Level III inpatient treatment. The applicant was instructed to comply with his prior aftercare program in the interim, including indefinite abstinence, weekly CDAR meetings, and daily AA meetings.

On June 18, 2007, the applicant's CO submitted a request to retain the applicant on active duty based on his positive job performance and his daughter's life-threatening illness. He noted that the applicant was to begin Level III inpatient treatment for alcohol dependency.

A Page 7 dated June 27, 2007, notes that new alcohol screening had confirmed the applicant's diagnosis of alcohol dependent and that he would receive Level III inpatient treatment. The Page 7 directed him to abstain from alcohol indefinitely, attend CDAR meetings weekly, and attend AA meetings daily until his treatment began. It also stated that failure to comply with the directions or involvement in any alcohol incident would result in his separation from the Coast Guard.

On June 27, 2007, Commander, Personnel Command advised the applicant's CO that his request to retain the applicant on active duty was denied and that an ADB should be convened to consider his case since he had served more than eight years on active duty.

A report of an investigation states that on July 13, 2007, the CDAR smelled alcohol on the applicant's breath but gave him his paperwork to begin Level III treatment the next day and told him to go home and shower. The CDAR discussed the matter with another chief petty officer and they decided not to report the applicant's lack of abstinence because it would prevent him from starting treatment. The CDAR waited to report the matter to the Executive Officer until after the applicant departed the command for treatment. The report also states that a few days before the incident on July 13th, the CDAR had been called to the clinic to check on the status of the applicant because he smelled of alcohol.

A Naval Hospital report dated August 17, 2007, states that the applicant's diagnosis upon both admission and discharge was alcohol dependence. The report states that the applicant's prognosis was "fair" provided he adhered to his aftercare plan. On a Page 7 dated August 17, 2007, the applicant's CO advised him that his aftercare plan consisted of abstaining from alcohol indefinitely, meeting weekly with the CDAR, and attending AA meetings at least twice a week. "Failure to comply with the aftercare plan or involvement in any alcohol incident may result in your separation from the Coast Guard."

Administrative Discharge Board (ADB)

On July 24, 2007, the applicant was assigned counsel to represent him before the ADB. On October 15, 2007, the applicant appeared before an ADB, which was tasked with determining whether the applicant was eligible for discharge due to a second alcohol incident and, if so, whether he should be retained on active duty pursuant to an exception to policy and, if not, what characterization of service (honorable, general, etc.) he should receive. The ADB found that the applicant had incurred a second alcohol incident and so was eligible for discharge. The ADB noted that since being diagnosed as alcohol dependent following his first alcohol incident, the applicant had drunk alcohol on three occasions with “detrimental effects” and that although his overall record was good, it did not warrant an exception to the policy. However, because the applicant’s CO recommended retention and because the applicant had a severely ill child who needed the benefits of the applicant’s Coast Guard health insurance, the majority of the ADB recommended his retention. The dissenting member concluded that the applicant was not “dedicated to a career of absolute sobriety” and recommended that the applicant not be retained based on his abuse of alcohol and several instances of misconduct and poor judgment documented in the applicant’s record.

On April 17, 2008, the applicant’s CO forwarded the ADB’s report to Commander, Personnel Command and recommended that the applicant be retained. He stated that the applicant had been following his aftercare program since he completed Level III inpatient treatment on August 17, 2008.

On May 30, 2008, Commander, Coast Guard Personnel Command (CGPC) disapproved the recommendation of the ADB and ordered that the applicant be honorably discharged “for unsuitability due to alcohol abuse.” However, he suspended the execution of the discharge “on probation” until the end of the applicant’s then current enlistment on April 25, 2009, in accordance with Article 12.B.34. of the Personnel Manual. The conditions of the probation were that the applicant could not “commit any offense under the Uniform Code of Military Justice, have discreditable involvement with civil authorities, be involved in another alcohol incident, refuse or fail to adhere to his required alcohol treatment program as prescribed by a [Page 7] dated 25 August 2005, nor shall his performance be such that he receive an adverse service record entry during this period.” If the applicant met those conditions, the discharge would be remitted at the end of his reenlistment so that he could reenlist; if he failed to meet them, the discharge would be executed. Commander, Personnel Command also stated the following: “Likewise, if [the applicant] is involved in another alcohol incident for the remainder of his Coast Guard career, he will be processed for separation ... with no further right to appear before another [ADB].” He gave the applicant the option of accepting these terms or being discharged. On June 2, 2008, the applicant accepted the terms so that he could remain on active duty.

Probation

On February 2, 2009, an investigator reported that on the morning of January 29, 2009, a lieutenant commander reported to a chief warrant officer that the applicant had reported for duty with the smell of alcohol on his breath. The chief warrant officer also noticed the smell of alcohol on the applicant’s breath, but the applicant denied having drunk alcohol. The applicant’s

superiors asked him to take a breathalyzer test. He agreed to take it and the result was 0.012. An officer who had last drunk alcohol at 10:00 p.m. the night before also took the test and the result was 0.000. The investigator interviewed several petty officers who had socialized with the applicant on January 23, 24, and/or 26. The petty officers stated that the applicant had drunk either regular or “non-alcoholic” beer on those dates. The applicant claimed that he was sober and that in social situations he had been drinking only “non-alcoholic” beer or soda. One petty officer stated that he saw the applicant buy a 12-pack at a store and drink it with other some other petty officers, but the investigator did not interview those other petty officers. The investigator opined that the applicant’s conduct did not amount to an alcohol incident but that he had disobeyed orders by drinking alcohol and should be processed for discharge.

A Page 7 dated February 9, 2009, states that the applicant’s CO had found that the preponderance of the evidence showed that the applicant “did indeed consume alcohol.” The CO noted that the applicant had previously been advised on both the Page 7 dated August 25, 2005, and by the terms of his probation that if he incurred another alcohol incident or failed to adhere to his aftercare program, he would be discharged. The CO stated that the applicant’s use of alcohol vacated the suspension of his discharge and that his failure to adhere to his aftercare program “is also grounds for administrative discharge.” Therefore, the CO advised, he was going to initiate the applicant’s discharge for alcohol abuse.

On February 9, 2009, the applicant’s CO notified the applicant in writing that he was initiating discharge proceedings due to the applicant’s consumption of alcohol during a deployment for security operations in support of a sporting event even though he had been diagnosed as alcohol dependent in 2007 and ordered to abstain. The CO advised the applicant that he had a right to submit a statement and to consult a lawyer.

On February 9, 2009, the applicant acknowledged the CO’s notification and the opportunity to consult a lawyer and objected to the proposed discharge. On February 10, 2009, he submitted a statement on his own behalf. The applicant stated that he had been sober, drank only “non-alcoholic” beer, and likely received a 0.012 result on the breathalyzer due to his daily use of Listerine mouthwash. He claimed that the investigation did not prove that he had drunk alcohol and that the CO had drawn erroneous conclusions based on ambiguous evidence. He stated that after more than a year of sobriety, he knew his limitations, knew when to seek a support group or sponsor or to stay home, and took pride in his health.

On February 9, 2009, the applicant’s CO recommended that the applicant be discharged for alcohol abuse due to his use of alcohol during a probationary period. The CO stated that based upon the preponderance of the evidence, he is convinced that the applicant consumed alcohol while deployed to another State from January 20 to 31, 2009. The CO stated that the evidence showed that the applicant had consumed alcohol while socializing with shipmates on at least four evenings, purchased alcohol for his shipmates, and had to be removed from the watch rotation when he arrived at work with alcohol on his breath. The CO stated that he was convinced that the applicant drank regular alcohol but that even the applicant’s claim that he drank only “non-alcoholic” beer, such as O’Doul’s, is an admission because “non-alcoholic” beer actually contains about 0.5% alcohol. The CO stated that the substitution of a beer for a beverage with less alcohol violated the applicant’s order to abstain from alcohol indefinitely.

On February 18, 2009, the applicant sent an addendum to his statement to Commander, Personnel Command. He complained that because the report of the investigation was not included in the discharge package forwarded to the Personnel Command, the Commander did not see the applicant's own statement for the investigation or other important evidence. The applicant denied having admitted that he drank alcohol and also complained that the claim that he should not drink even "non-alcoholic" beer was baseless.

On February 19, 2009, the applicant sent a second addendum to Commander, Personnel Command. He claimed that he had been sober since July 2007 and attended AA meetings every week. He alleged that the breathalyzer result of 0.012 was likely a result of his use of Listerine mouthwash.

On March 15, 2009, a Rear Admiral stated that he disagreed with the CO's recommendation that the applicant be discharged. He stated that the investigation was "ambiguous and not supported by facts. Furthermore, it is unclear if the consumption of 'non-alcohol' beverages constitutes a violation of abstaining from the consumption of alcohol." He stated that the applicant should be counseled again on a Page 7 and allowed to reenlist.

A Page 7 dated April 7, 2009, documents the applicant's "absolute requirement to abstain from the consumption of any alcoholic beverages. As a member who has been diagnosed as alcohol dependent, you are required to abstain from alcohol indefinitely. Regardless of your previous confusion over the potential alcohol content of 'non-alcoholic beer,' these substances do contain alcohol (i.e., ethanol), and your requirement to abstain from consuming alcohol extends to 'non-alcoholic beer.' Any alcohol consumption during the remainder of your tenure with the Coast Guard will result in separation by reason of unsuitability per the provisions of [the Personnel Manual] without further Board processing. Additionally, you are reminded that you are on probation until 25 April 2009, as per the Action of the Final Reviewing Authority dated 30 May 2008, following your second alcohol incident."

Third Alcohol Incident & Discharge

On a Page 7 dated April 12, 2012, the applicant's CO advised him that during a review of his record, the command had discovered that he had been diagnosed as alcohol dependent, which he had failed to disclose to the command. The CO stated that because the applicant had disobeyed the order to abstain from alcohol, he was incurring his third alcohol incident and would be processed for discharge.

A Page 7 dated May 25, 2012, states that the applicant incurred his third alcohol incident on April 10, 2012, by violating the conditions of his probation established on May 30, 2008. The Page 7 states that the applicant would be discharged and was not entitled to an ADB in accordance with the terms of his probation. The applicant refused to sign the Page 7.

On a Page 7 dated May 25, 2012, the CO advised the applicant that his third alcohol incident violated the conditions of the applicant's retention on active duty set out by Commander, Personnel Command on May 30, 2008. The CO stated advised the applicant that because he had

violated the conditions of his probation, the CO would initiate the applicant's discharge with not entitlement to another ADB.

On May 25, 2012, the applicant's CO formally notified him in writing of his intent to initiate the applicant's discharge for "failure to follow your aftercare program while diagnosed as alcohol dependent." The CO noted that he was withdrawing his letter dated April 16, 2012, because he had discovered the May 30, 2008, probation letter resulting from the applicant's prior ADB in the applicant's record. The CO advised the applicant that he had a right to submit a statement on his own behalf but was not entitled to an ADB due to the stipulations in the May 30, 2008, letter.

The applicant initially refused to sign the form to acknowledge the discharge notification. However, he later signed it on May 30, 2012, and submitted a statement objecting to the proposed discharge. The applicant admitted that he had drunk alcohol again but denied having committed any misconduct or anything that might bring discredit on the Armed Forces and therefore warrant a third alcohol incident. The applicant stated that he relapsed after a member of the command cadre offered to share a bottle of rum with everyone shortly after their cutter arrived in a Caribbean port. He stated that the Coast Guard has long had a big problem with alcohol generally, that not much was being done about it, and that he was being unjustly targeted. He stated that the Coast Guard needs to provide more education and support about alcoholism and asked to be retained so that he could help educate other members.

On May 31, 2012, the Executive Officer (XO) of the cutter provided a narrative to accompany the CO's discharge recommendation. He stated that the applicant had been a marginal performer since reporting aboard in July 2011. The applicant had not yet qualified as a deck watch officer and was "not on pace to qualify within the first 12 months." This marginal performance caused the XO to review the applicant's military record and notice the documentation of his prior alcohol incidents and the orders to abstain from alcohol indefinitely. However, the applicant had never advised the command of his status, and the XO had witnessed the applicant drinking alcohol regularly and to the point of inebriation on several occasions since he reported aboard the cutter. The XO noted that on January 19, 2012, the applicant was involved in an altercation with a civilian and although the police considered the applicant a victim, they also reported that he "had the distinct odor of an alcoholic beverage upon his breath, spoke with slurred speech, and was slow to respond to questions numerous times."

On June 1, 2012, the CO submitted to the Personnel Service Center (PSC) a recommendation that the applicant be discharged "by reason of unsuitability (alcohol abuse) due to failure to follow an aftercare program while diagnosed as alcohol dependent." The CO noted that the applicant was not entitled to another ADB due to the stipulations in the letter of Commander, Personnel Command dated May 30, 2008.

On July 23, 2012, the applicant's attorney sent a letter to Commander, PSC objecting to the proposed discharge. The attorney claimed that there was no third alcohol incident pursuant to the definition of that term in Article 1.A.2.d. of the Drug and Alcohol Abuse Program Manual (DAAPM) because there were no adverse consequences when the applicant drank alcohol; that the applicant's diagnosis as alcohol dependent was uncertain given the varying diagnoses and his

long periods at sea without experiencing symptoms of withdrawal; that under Article 2.B.11. of the DAAPM, the applicant's discharge was not mandatory; and that the circumstances of his drinking on April 10, 2012, were not "so egregious as to warrant separation." He also claimed that the applicant's performance had been exemplary and noted that the applicant was within two years of being eligible for retirement. The attorney also argued that the applicant was entitled to another ADB because he had more than eight years of service.

On July 25, 2012, the Personnel Service Center issued orders for the applicant to receive an honorable discharge on August 30, 2012, pursuant to Article 1-B-15 of the Military Separations Manual, because of his alcohol abuse. The orders state that his DD 214 should show separation code HPD and "Alcohol Rehabilitation Failure" as his narrative reason for separation.

The applicant received an honorable discharge for alcohol rehabilitation failure on August 30, 2012. He received \$46,302.22 in half separation pay.²

VIEWS OF THE COAST GUARD

On March 14, 2013, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant the applicant's request.

The JAG stated that the primary issue in this case is whether failing to comply with an aftercare program by drinking alcohol meets the definition of an "alcohol incident." In a memorandum attached to the JAG's opinion, PSC recommended denying relief because it found that the applicant incurred a third alcohol incident when he failed to comply with his aftercare plan. However, the JAG argued that failing to comply with an aftercare program by drinking alcohol is not a documentable "alcohol incident." The JAG argued that "Coast Guard policy distinguishes an 'alcohol incident' from failure to comply with an aftercare program." The JAG did not explain this argument but quoted the definition of an alcohol incident (see footnote on page 1) and Article 2.B.12. of the DAAPM. Because Article 2.B.12. does not mention documenting an alcohol incident, the JAG concluded that the third alcohol incident was invalid and so the applicant should have received another ADB because he only waived his right to an ADB if he incurred another alcohol incident. The JAG also argued that the XO's statement dated May 31, 2012, shows that the applicant's lack of abstinence did not warrant an alcohol incident.

The JAG submitted as evidence, but did not adopt, a memorandum on the case prepared by the Personnel Service Center (PSC). PSC stated that the applicant's violation of his aftercare plan constituted an "alcohol incident" since he had been ordered to abstain from alcohol indefinitely. Therefore, because he incurred another alcohol incident, he could be discharged without another ADB in accordance with the terms of the May 30, 2008, decision of Command, Personnel Command and the applicant's acceptance of those terms.

² Chapter 10.I.2.n. of the Pay Manual states that members discharged for unsuitability are not entitled to separation pay. However, COMDTINST 1910.1 states that members being discharged for alcohol rehabilitation failure may receive half separation pay, computed as follows: $1/2 (10\% \times (12 \times (\text{basic pay}) \times (\text{years of active duty}))) = \text{total separation pay}$.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 5, 2013, the Board received the applicant's response to the views of the Coast Guard. He stated that he agrees with the JAG's recommendation and noted that he had argued before he was discharged that his failure to follow his aftercare plan did not constitute an alcohol incident. Therefore, he should be reinstated on active duty.

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 over this matter under 10 U.S.C. § 1552. The application was timely filed within three years of the applicant's discharge.³

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.⁴

3. The applicant alleged that his separation for alcohol abuse was erroneous and unjust because he was wrongly diagnosed as alcohol dependent, wrongly awarded a third alcohol incident, and wrongly denied another ADB. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed documents in an applicant's military record are correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the documents are erroneous or unjust.⁵ Absent specific evidence to the contrary, the Board presumes that Coast Guard officers and other Government officials have carried out their duties "correctly, lawfully, and in good faith."⁶

4. The applicant alleged that he was erroneously diagnosed as alcohol dependent. He pointed out that alcohol screening in the 1990s indicated that he just abused alcohol and that a medical record dated May 8, 2007, shows that the applicant was seen by a psychologist for a referral for anger management therapy and the referral diagnosis was "alcohol abuse relapse," instead of alcohol dependent. However, the record shows that the applicant was diagnosed as alcohol dependent numerous times beginning in 2005 and, in particular, upon his release from a month of inpatient treatment in August 2007. The Board finds that the preponderance of the evidence shows that the applicant was correctly diagnosed as alcohol dependent.

³ 10 U.S.C. § 1552(b).

⁴ See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that "whether to grant such a hearing is a decision entirely within the discretion of the Board"); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) ("The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process."); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

⁵ 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).

5. The applicant alleged that he was erroneously discharged because he never incurred a third “alcohol incident” pursuant to the definition of that term in Article 1.A.2.d.(1) of the DAAPM, COMDTINST M1000.10. The record shows that his commanding officer based his third alcohol incident on the fact that he had been drinking alcohol for several months, sometimes to the point of inebriation, despite numerous lawful orders to abstain from alcohol indefinitely. Disobeying a lawful order is a violation of Article 92 of the UCMJ. Violations of the UCMJ, in which alcohol is a significant or causative factor, do meet the definition of an “alcohol incident” under Article 1.A.2.d.(1): “Any 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 Uniformed 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.” (Emphasis added.) Therefore, the Board finds that the applicant’s commanding officer did not err when he found that the applicant had incurred a third alcohol incident and was subject to separation. The Board notes that the applicant is not the first alcohol dependent member to have incurred an alcohol incident by disobeying an abstinence order. In BCMR Docket No. 2008-065, both the JAG and PSC argued that disobeying an abstinence order constitutes an alcohol incident. The Board agreed, finding that “[b]ecause 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. [of the Personnel Manual then in effect].”

6. In this case, PSC stated that the applicant’s failure to abstain constituted an alcohol incident, but the JAG argued that disobeying an abstinence order does not meet the definition of an alcohol incident because Article 2.B.12. of the DAAPM does not expressly require commanding officers to issue a finding of an alcohol incident when an alcohol dependent member consumes alcohol after successfully completing an aftercare program. In so arguing, however, the JAG overlooks the fact that not all recovering alcoholics in the Coast Guard—all of the members to whom Article 2.B.12. applies—are necessarily under orders to abstain from alcohol indefinitely. The member may have gone through treatment before enlisting on active duty or while in the Reserve,⁷ in which case failing the aftercare program provided by the private treatment center would not constitute disobedience of a lawful order; nor would it if the member’s prior command failed to institute the correct aftercare program by ordering the member to abstain indefinitely. Therefore, Article 2.B.12. applies to all alcohol dependent members whether or not they have violated a lawful order by drinking alcohol.

7. Because Article 2.B.12. of the DAAPM applies to all alcohol dependent members, whether or not their failure to abstain violates a lawful order, the fact that Article 2.B.12. does not expressly require a commanding officer to document an alcohol incident whenever an alcohol dependent member violates an aftercare program does not prove that the applicant’s commanding officer committed an error or injustice or violated his discretion⁸ in finding that the applicant incurred another alcohol incident by disobeying his abstinence orders. Certainly,

⁷ DAAPM, Article 1.D.5.a. (“Reservists are subject to the UCMJ only while performing inactive or active duty.”)

⁸ DAAPM, Article 2.B.2. (“The definition of an alcohol incident (See Article 1.A.2.d. of this Manual.) gives commands broad latitude in curbing intemperate alcohol use. A key fact to keep in mind is that the member must actually consume alcohol for an alcohol incident to have occurred.”).

nothing in Article 2.B.12. prohibits documentation of an alcohol incident for failing to obey abstinence orders. In fact, documenting a failure to abstain as an alcohol incident is required when a member fails to abstain after self-referring for alcohol rehabilitation treatment.⁹ Therefore, the Board finds that, contrary to the JAG's claim, the definition of "alcohol incident" in Article 1.A.2.d.(1) of the DAAPM clearly encompasses violations of abstinence orders.

8. On May 31, 2012, the XO of the applicant's unit stated that the applicant had failed to inform the command that he was alcohol dependent and under orders to abstain indefinitely when he reported aboard in July 2011. Therefore, even though the applicant had frequently been seen drinking alcohol since reporting aboard, sometimes to the point of inebriation, no alcohol incident had been documented. Taken in context, the XO's statement does not mean, as the JAG argued, that the applicant's ongoing lack of abstinence did not constitute an alcohol incident; it means that the command had not previously documented an alcohol incident despite his lack of abstinence because they were unaware of the indefinite abstinence orders and so were unaware that his drinking violated the UCMJ. Therefore, the Board finds that the preponderance of the evidence shows that the applicant's CO committed no error or injustice in finding that the applicant incurred a third alcohol incident in 2012 by violating numerous lawful orders to abstain from drinking alcohol indefinitely, contrary to Article 92 of the UCMJ.

9. A Coast Guard enlisted member who incurs a second or third alcohol incident must be processed for separation under Article 1.B.15. of the Military Separations Manual, COMDTINST M1000.4.¹⁰ An enlisted member with more than eight years of service is entitled to a hearing before an ADB,¹¹ which makes a recommendation regarding retention or discharge to Commander, PSC.¹² The applicant received an ADB following his second alcohol incident in 2007 and, pursuant to the decision of Commander, CGPC,¹³ dated May 30, 2008, was allowed to remain on active duty only because he waived his right to another ADB if he incurred another alcohol incident during the remainder of his military career. The record shows that on June 2, 2008, the applicant accepted these terms to avoid being discharged. Therefore, the Board finds that the preponderance of the evidence shows that he voluntarily and knowingly waived his right to another ADB if he incurred another alcohol incident during the remainder of his military career. In addition, the applicant was reminded of these terms on Page 7s dated February 9, 2009, and April 7, 2009, which he signed in acknowledgement.

10. Accordingly, the Board finds that the applicant has failed to prove by a preponderance of the evidence that his discharge for alcohol rehabilitation failure without a second ADB was erroneous or unjust because the record clearly shows that he incurred a third "alcohol incident" and had waived his right to another ADB in that circumstance.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁹ DAAPM, Article 2.B.11.b.

¹⁰ DAAPM, Articles 2.B.8.b. and 2.B.9.

¹¹ *Id.*; Military Separations Manual, Article 1.B.15.i.

¹² Military Separations Manual, Article 1.B.22.e.(4).

¹³ The Coast Guard Personnel Command (CGPC) was renamed the Personnel Service Center (PSC) in 2010.

ORDER

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

