DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2013-002

[redacted]

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 October 4, 2012, and subsequently prepared the final decision as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 28, 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 correct his record by removing an administrative remarks page (page 7) dated January 22, 2004, documenting his commission of an alcohol incident on October 21, 2003. The page 7 states the following in pertinent part:

> You have been referred to the unit CDAR this date concerning an incident involving your intemperate use of alcoholic beverages. On [October 21, 2003] according to the [civilian] Police Department, you were assaulted and robbed, which resulted in your hospitalization. While you were hospitalized you were diagnosed to be ETOH intoxicated at the time of the incident. In accordance with Chapter 20-B-2-b of reference (a), it has been determined by this command that your consumption of alcohol contributed to your injuries.

The applicant submitted a sworn statement in which he alleged that the events as described on the page 7 do not satisfy the definition of an alcohol incident as defined in Chapter 20 of the Personnel Manual that was in effect at the time the applicant received his alcohol incident. In this regard, the applicant stated that there is insufficient direct or circumstantial evidence to support a finding that alcohol was a significant or contributing factor to the events that occurred in October 2003. The applicant noted the lack of eyewitnesses to the event and the command's reliance on his recollection of events as reported to his supervisor, the medical personnel, and the civilian police department for making the finding that he was involved in an

alcohol incident. The applicant stated that due to head trauma from the assault, he suffered a loss of memory and cannot state exactly what happened that night.

The applicant stated that as best he can remember, he went to the pub with a shipmate who has since left the service. After arriving at the bar in the afternoon, he and the shipmate went their separate ways. He stated that he had a few drinks and played pool, but did not feel impaired. The applicant stated that later he began playing poker with a group of strangers in the bar and eventually began winning. At some point, the other poker players bought him a drink that he believed to be whiskey mixed with Bacardi 151. The applicant stated that up to this point, he had had six mixed drinks over the course of a 4-hour period. He stated that shortly after consuming the mixed drink purchased for him by the poker players, he developed a slight headache. So, he walked outside by himself to smoke and to make a phone call, leaving his keys and visor on the bar. He stated that he does not remember his judgment or motor skills being substantially impaired at that point. The applicant stated that the last thing he remembered before "coming to" at the hospital was standing on the sidewalk at dusk preparing to light a cigarette. He stated that he was released from the hospital the following evening with multiple contusions and lacerations to the face and a broken left orbital socket. He stated that the following day, the police asked him to come to the station and to identify anyone he could remember from that night. He said that the police told him that he had been assaulted and robbed outside the bar and that the police had a couple of leads. The applicant stated that due to the head trauma, he could not and still cannot remember anything that happened after he went outside the bar.

The applicant stated that the medical staff told him that he had been robbed. The applicant argued that no one other than the unidentified assailant knows what happened. Therefore, the robbers could have been the strangers with whom he was playing poker or the robber could have been an unknown stranger. The applicant believes that he was blindsided since he had no defensive wounds on his hands and arms.

The applicant alleged that his command appears to have made the finding that he was intoxicated due to alcohol based on the medical report. The applicant stated that he does not dispute that he was drinking or the general commonsense conclusion that drunkenness can increase risk of injury. He argued that the medical report offered no basis for the diagnosis that he was intoxicated due to alcohol or a description of his degree of intoxication. The applicant asserted that the mere finding of intoxication is insufficient to support any conclusions regarding his degree of impairment let alone whether his possible impairment was significant enough to contribute to whatever occurred. The applicant summarized his argument as follows:

> [I]t was erroneous and unjust for my command to conclude that alcohol was a significant or causative factor of my becoming the victim of an apparent assault and robbery. I believe that I was a victim of circumstance, and this could have happened to anyone who was in the wrong place at the wrong time—irrespective of whether alcohol was involved.

The applicant argued that it would have been more appropriate to classify the event as an "alcohol-related situation," which is defined as any situation in which alcohol was involved or

present but not considered a causative factor for a member's undesirable behavior or performance.

The applicant also argued that the page 7 should be removed because it was signed by the executive officer (XO) and not by his commanding officer (CO). He stated that CO's are given broad discretion to determine what constitutes an alcohol incident, and in light of that broad discretion, alcohol incident determinations should not be delegated. He argued that the regulation limits the authority to make alcohol incident determinations to COs. The applicant stated that there is no apparent evidence in the record that his CO personally made the determination that he was involved in an alcohol incident. Therefore, he objects to the finding on that basis.

Further, the applicant stated that he objected to the alcohol incident determination because there was no evidence whatsoever that he brought discredit upon the uniformed service or violated the UCMJ or other laws. The applicant stated that he missed one workday following the assault and he missed a subsequent deployment because of medical treatment for the injury, but he argued that he never lost the ability to perform his duties. He argued that his absence from work resulted from the need for treatment of the injuries he sustained in the assault.

The applicant submitted medical document of aftercare instructions from the hospital that treated him on October 21, 2003. The report shows that the applicant was diagnosed with "Orbital Floor Fracture, Closed," "closed Injury Head, Unspecified Consciousness State," and "ETOH Intoxication." The record shows that the applicant was treated with several medications.

The applicant also submitted a statement from the civilian police department involved in this case. It indicates that the police report on the applicant's situation was destroyed pursuant to law. The letter states that only the following notation was found in their records: "10/20/2003-VICTIM-211 Robbery-located @ [street address, city state]."

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 deny relief to the applicant. The JAG argued that the applicant failed to substantiate an error or injustice regarding the evidence supporting the alcohol incident or investigation. The JAG noted that the applicant admitted that he consumed six mixed drinks and one "strong" drink, whisky mixed with Barcardi 151. The JAG stated that the applicant reasoned in his statement that this "strong" drink may have been offered by the strangers he was playing poker with to make the applicant an easy target because the applicant was winning. The JAG stated that after the applicant consumed the seventh drink, he exited the bar and became a victim of a robbery. The JAG argued that the applicant could have refused the seventh drink and avoided becoming "an easy target."

The JAG stated that because commands have broad latitude in curbing intemperate alcohol use, the applicant's behavior of continuing to drink seven alcoholic beverages in fairly short succession could, and was in fact determined, to be an alcohol incident. The incident resulted in the applicant being unable to deploy with his cutter and therefore, he was not able to

perform his assigned electronic technician duties on the cutter. The JAG argued that the Coast Guard complied will all applicable policy provisions regarding the applicant's alcohol incident investigation and documentation.

The JAG argued that the applicant failed to substantiate an error or injustice regarding the delegation of authority to the XO to complete the page 7. The JAG stated that the applicant bears the burden of proving error or injustice by a preponderance of the evidence, and he failed to meet that burden because he provided no evidence that the XO was not authorized to sign the page 7. The JAG stated that Chapter 20.B.2.g. of the Personnel Manual merely requires that members be counseled on Coast Guard policy on alcohol abuse and that subsequent alcohol incidents could, and normally will, result in discharge. The JAG argued that there is no requirement in the regulation stating that COs must actually conduct the counseling. The JAG stated that COMDTINST M5000.3B, Chapter 4-1-5 defines the relationship between the CO and XO. This provision states that COs shall normally issue all orders pertaining to the administration of personnel through the XO. The JAG stated in this case, the XO ensured the counseling was conducted in accordance with policy.

The JAG attached a memorandum from the Commander, Personnel Service Center (PSC) as a part of the advisory opinion. PSC's comments are very similar to those of the JAG and those comments are not restated in this decision.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 15, 2013, the BCMR received the applicant's sworn response to the views of the Coast Guard. The applicant wanted to clarify the impression in his statement, as offered by the Coast Guard, that he knowingly drank a seventh drink of whisky and Barcardi 151. The applicant stated that when the other poker players bought the drink for him he did not know of the content of the drink at that time. He stated that after he began drinking the drink, the players began laughing and in hindsight he suspected that the drink was spiked. He stated that his oversight of these facts led the Coast Guard to infer erroneously in its advisory opinion that he knowingly drank the alcoholic drink with full knowledge of its strength and contents. The applicant stated that the Coast Guard's reliance on his recollection of events in making its findings of an alcohol incident punctuates his position that there was a lack of evidence to make a finding that he was involved in an alcohol incident. The applicant noted that due to the head trauma he sustained, he has no recollection of what actually happened to him. He stated that while there is adequate circumstantial evidence to support the finding that he was a victim of an assault and robbery, it is conjecture to conclude that alcohol was a significant or causative factor.

The applicant restated his allegation that the determination that the events of October 21, 2003 constituted an alcohol incident was made without any direct or circumstantial evidence that his consumption of alcohol was a significant or causative factor to his assault and robbery. The applicant disagreed with the advisory opinion that he should bear the burden of disproving a finding that is inherently flawed. Regardless, the applicant stated that his assault occurred during a year in which the city in which the assault occurred experienced a higher than average crime index. The applicant stated that the city reported 190 assaults and 135 robberies. With regard to the advisory opinion's statement that COs have broad latitude in making a finding of an alcohol

incident, the applicant stated that does not mean that "broad latitude" should be construed to confer a grant of authority to draw factual conclusions from thin air. The applicant stated that the advisory opinion and his command presumed that by consuming alcohol he made himself an "easy target." The applicant stated that while this presumption is not unreasonable, it is but one of many equally plausible scenarios. The applicant stated that "[b]ased on a preponderance standard, it is not sufficient for the Coast Guard's findings to be merely reasonable—rather, the findings must be based on facts which prove that his command's version of events is more likely than any other reasonable explanation." The applicant further stated:

> I submit to the Board that, based on the facts available then, as well as now, and taking into consideration the relatively high violent crime rate in Alameda, it is just as likely, if not more likely, that I was the victim of a random mugging where alcohol played no part. It is also equally plausible to conclude that I was blindsided by one of the poker players and never had an opportunity to react to the assault. Because the facts available do not prove the command's guess as to what happened to me is any more likely than any other reasonable alternative explanation where alcohol is not a significant or causative factor, this Board should declare that finding erroneous by a preponderance standard.

In response to the advisory opinion's statement that the XO could properly counsel the applicant about his alcohol incident and sign the page 7, the applicant stated that his XO made no reference to the CO having personally determined that the applicant was involved in an alcohol incident. The applicant stated that he was unaware of any evidence that the CO personally made that finding in his case. The applicant stated that had he known in 2004 that the CO was required to make the finding of an alcohol incident, he would not have signed the page 7 without the assurance that the CO had personally reviewed the facts and made the determination himself. The applicant concluded with the following:

> I do not challenge the [XO's] authority to issue or sign the [page 7], or to counsel me. Rather, the issue is the lack of evidence in the administrative record to show that the [CO] personally found that the events of [October 21, 2013] constituted an alcohol incident. The pro forma "By Direction" annotation by the Executive Officer's signature is standard in Coast Guard Correspondence and is not evidence that the [CO] actually directed the [XO] to issue the [page 7]. The fact that Coast Guard regulations state that commanding officers "shall normally issue all orders relative to the duties of the command and the administration of personnel through the [XO]" does not relieve [COs] of the mandate to personally make findings of an alcohol incident, regardless of who signs the documentation. Having raised this issue, the Coast Guard's advisory opinion should not have cited policy—which is not in dispute—but instead should have supplemented the administrative records with statements from either officer to affirm whether my [CO] did indeed make the finding. By asserting policy as opposed to fact, the advisory opinion has failed to rebut his apparent error.

APPLICABLE LAW

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 [law]. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident."

Article 20.A.2.d.2. states that the member must actually consume alcohol for an alcohol incident to have occurred. Simply being present where alcohol is consumed does not constitute an alcohol incident.

Article 2.B.2.b. states that the definition of an alcohol incident gives commands broad latitude in curbing intemperate alcohol use. "A key factor to keep in mind is that **the member must actually consume alcohol for an alcohol incident to have occurred**."

Article 20.B.2.g. states that the first time an enlisted member is involved in an alcohol incident, the CO shall ensure that the member is counseled on a page 7 about the Coast Guard's policy on alcohol abuse as contained in Chapter 20 of the Personnel Manual.

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 requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant asked the Board to correct his record by removing a page 7 documenting an alcohol incident on October 21. 2003. He argued that there is insufficient direct or circumstantial evidence to support a finding that alcohol was a significant or contributing factor to the events that occurred in October 2003. The question before the Board is whether the CO's determination that the applicant was involved in an alcohol incident on October 21, 2003 was erroneous.

4. 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 [law]. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident."

Article 20.A.2.d.2. states that the member must actually consume alcohol for an alcohol incident to have occurred. Simply being present where alcohol is consumed does not constitute an alcohol incident.

5. 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. 33 C.F.R. § 52.24(b). For the reasons discussed, below the Board finds that the applicant has failed to prove by a preponderance of the evidence that the CO's alcohol incident determination was erroneous. The page 7 documenting the alcohol incident stated the following, in pertinent part:

> On October 21, 2003 according to the [city] Police Department, you were assaulted and robbed, which resulted in your hospitalization. While you were hospitalized you were diagnosed to be ETOH intoxicated at the time of the incident. . . . [I]t has been determined by this command that your consumption of alcohol contributed to your injuries.

6. As stated, the applicant argued there was insufficient evidence for the CO to have determined that the applicant was involved in an alcohol incident on October 21, 2003. In this regard, the applicant asserted that there was insufficient direct or circumstantial evidence as to what occurred on the night in question. The applicant argued that there were no eye witnesses to the event and that the CO made the alcohol incident determination based upon the applicant's reporting of the event, even though the applicant suffered memory loss as a result of the head trauma during the assault.

7. The regulation does not require to CO to meet any particular standards in reaching an alcohol incident determination. Article 20.B.2.b. of the Personnel Manual clearly states that COs are given broad latitude in curbing the intemperate alcohol use. Reinforcing this point, Article 20.A.2.d.1. defines an alcohol incident as "[a]ny behavior, in which alcohol is determined by the commanding officer, to be a significant or causative factor that results in the member's loss of ability to perform assigned duties . . ." The Board notes that this event occurred more than eight years ago and the CO could very well have had more information about what happened than is currently in the record before the Board. That aside, the regulation requires the CO to ensure that a member is counseled on a page 7 about the Coast Guard's alcohol policy after an alcohol incident determination; the regulation does not require the CO to place foundational documents on which he might have relied in making the alcohol incident determination in the military record.

As the applicant stated, the record before the Board contains no eye witness statements. However, the Board disagrees that there is insufficient information in the record as it currently stands to support the CO's determination that the applicant was involved in an alcohol incident on the evening in question. Based upon the page 7, the applicant's statement, and the medical document of aftercare instructions, the known facts are (1) that the applicant went to a bar on the evening in question; (2) that he consumed alcohol; (3) that he had at least 7 drinks; (4) that after

the seventh drink, he developed a headache and went outside the bar and that he was possibly assaulted and robbed at some subsequent point; (5) that he required hospitalization for his injuries and missed one day of work; (6) that he was diagnosed with an orbital floor fracture, closed head injury, alcohol intoxication; and (7) that he subsequently missed a deployment due to treatment for the orbital injury. The Board finds that these facts are sufficient to support the CO's determination that the applicant was involved in an alcohol incident because his consumption of alcohol was a contributing factor to the injuries sustained that required medical treatment resulting in the applicant's absence from work.

8. Moreover, the CO is entitled to the presumption that he carried out his duties correctly, lawfully, and in good faith. *See Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992). The applicant must rebut this presumption with cogent and clear evidence to the contrary. *See Muse v. United States*, 21 Cl. Ct. 592, 602 (1990) (*cited in Decision of the Acting General Counsel*, BCMR No. 2000-037). The applicant submitted his own sworn statement, a medical document that indicates he was intoxicated, and a one-line entry from a police log listing him as a robbery victim. This evidence is insufficient to rebut the presumption and to prove the CO's alcohol incident determination was erroneous. The applicant alleged but presented no evidence, except for his own allegation, that the CO relied on only the applicant's report of events in making the alcohol incident determination; nor did the applicant present evidence to prove that the CO failed to carefully evaluate the applicant's competency and credibility prior to making his determination. The regulation gives the CO broad authority to determine what constitutes an alcohol incident. While the applicant claims that anyone can be assaulted and robbed whether or not the individual consumed alcohol, he did not prove that his injuries were not, at least in part, the result of his impaired judgment due to his alcohol consumption. Although the applicant alleged that his judgment was not impaired while inside or outside the bar, he failed to prove this contention by a preponderance of the evidence. In fact, he did not produce any evidence to support his allegation, except for his own statement. If he had not waited over 8 years to bring this claim, he could possibly have gotten statements regarding his actions from the medical staff, from the bartender, or from other patrons in the bar at that time.

9. The applicant asserted that he was not intoxicated on that evening and the medical report stating that he was intoxicated is suspect because it does not describe what method the medical team used to reach the alcohol intoxication diagnosis. The regulation governing alcohol incidents requires only that the applicant consume alcohol for the CO to find an alcohol incident; it does not require intoxication. The applicant admits in his statement that he consumed alcohol. Although the medical report diagnosed the applicant with alcohol intoxication, the CO determined that alcohol consumption (not intoxication) contributed to the applicant's injuries.

10. The applicant next argued that the page 7 should be removed because it was signed by the XO and there is no evidence in the record that the CO ever personally determined that the applicant was involved in an alcohol incident. As the Coast Guard argued, the page 7 counsels the applicant about alcohol abuse after the alcohol incident determination has been made. Further, as the advisory opinion stated, the regulation does not state that only the CO can perform the counseling, but rather the CO must ensure that counseling is conducted. The applicant conceded in his response to the advisory opinion that the XO could provide the counseling regarding alcohol abuse, but he questioned whether the CO personally made the

alcohol incident determination. The Board finds that the CO and the XO are entitled to the presumption of regularity and the applicant failed to rebut that presumption with clear and cogent evidence. The applicant's assertion that the CO might not have made that determination, even if stated under penalty of perjury, is speculation and insufficient to rebut the presumption that the CO and XO carried out their duties lawfully, correctly, and in good faith. The Board notes that the comment "it has been determined by this command, that your consumption of alcohol contributed to your injuries" on the page 7 is evidence that the CO made that determination.

11. The determination of whether an alcohol incident occurred was the responsibility of the applicant's CO. The applicant, who has the burden of proving the CO's determination is erroneous, offered his opinion of what he believed happened and various other theories of how his assault occurred. The applicant submitted insufficient evidence to corroborate his view of events. The medical document of aftercare instructions given to the applicant upon his release from the hospital speaks only to his diagnosis and medical treatment and nothing about what happened on the night in question, except that the applicant was intoxicated. The letter from the police department logging the applicant as a victim of robbery does not speak to the events of that night; nor does it prove that no alcohol incident occurred. Under the Board's rules, the applicant has the burden of proving error or injustice by a preponderance of the evidence and he has not submitted sufficient evidence to meet that burden. The applicant's challenge to the CO's determination in a sworn or unsworn statement does not make that determination erroneous.

12. 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.

[redacted]