

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

---

Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2013-034**



---

**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 application upon receipt of the applicant's completed application on December 6, 2012, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).


This final decision, dated August 23, 2013, is signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST**

The applicant asked the Board to correct his military record by removing an October 16, 2012 administrative remarks page (page 7) documenting an alcohol incident that occurred on October 12 and 13, 2012. He also requested the removal of a Report of Offense and Disposition form (CG-4910) documenting his non-judicial punishment (NJP) for dereliction of duty (a violation of Article 92(3) of the Uniform Code of Military Justice (UCMJ)).

**APPLICANT'S ARGUMENTS**

The applicant argued that the incident described on the pertinent page 7 does not meet the criteria for an alcohol incident as defined in the Personnel Manual because it does not accuse him of providing alcohol to a minor nor accuse him of knowing that the members from his unit who were drinking at a civilian club on the night in question were underage. The applicant argued that the alcohol consumption in the presence of an underage person does not constitute an alcohol incident or contribute to the delinquency of those present.

The applicant argued that the charge and specification on the Report of Offense and Disposition form does not meet the criteria for "failure to obey a lawful order" under Article 92 of the UCMJ. The applicant argued that he was in compliance with the Aids to Navigation Team (ANT  Instruction M5401.0 and was not derelict in the performance of his duties.

The applicant stated that his major points of contention are (1) he was not on duty; (2) he was not aware of the ages of those present at the club; (3) he did not distribute to or purchase alcohol for minors; (4) he was not detained by civilian police but was given a courtesy ride home; (5) he was not given a breathalyzer or blood test to determine how much alcohol he had consumed; and (6) his acknowledgement of ANT [REDACTED] [REDACTED] Instruction M5401.0 expired on March 30, 2012.

### BACKGROUND

The page 7 documenting the alcohol incident was placed in the applicant's record on October 16, 2012 and stated the following:

On 15 October 2012 you received an alcohol incident when your abuse of alcohol was determined to be a significant and/or causative factor in your actions while on liberty in [REDACTED] [REDACTED] during the 12<sup>th</sup> and 13<sup>th</sup> of OCT 2012. On 13 October 2012 at 0358 Sector Command Center (SCC) received notification via [REDACTED] Command Center that you had been detained by the [REDACTED] Police Department while walking home. The officer involved stated that you appeared to be severely intoxicated. You were also in the presence of two under age, non-rated members at the time of the incident who were also intoxicated and on duty. Your actions contributed to the delinquency of two minors assigned to the unit. As the senior ranking member present, this behavior was unacceptable for a Petty Officer in the United States Coast Guard.

This is considered your first alcohol incident. Any further incidents will result in your being processed for separation as per Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10 (series).

A preliminary investigating officer (PIO) was assigned to investigate whether the applicant and three other individuals had violated Article 92 (disobeying an order) of the UCMJ. On October 30, 2012, the PIO, Ensign H submitted his investigative report (IR). The IR noted that the applicant and the three other individuals had each signed a statement that they had read and understood the ANT [REDACTED] [REDACTED] INSTRUCTION M5401.0. A portion of this instruction deals with alcohol consumption and states that "Duty personnel shall not consume alcohol while in an active duty period (one full week)." The IR found that the applicant was not in an active duty status on the night in question, but the other three members were in an active duty status. They were all drinking at the same tavern on the night in question. The IR states that the applicant stated that he was aware that the other three individuals were in the active duty status. The applicant was senior in rate to the other three individuals.

The IR states that in the early morning of October 13, 2102, the applicant and three other individuals left the tavern and began walking home. The IR stated that shortly after leaving the tavern, all four individuals were stopped by the [REDACTED] Police and were then transported to BM3 A's house. The applicant and two others went into BM3 A's house, but the fourth individual, SN M, was arrested for public intoxication, possessing a fake identification card, and resisting arrest.

The applicant gave a written statement for the IR. He stated that he was on liberty on October 12, 2012 and met a colleague from work at an establishment for a drink. He stated that later two other individuals from his unit arrived. He stated he purchased drinks for himself only. The four decided to walk home rather than drive and were stopped by the local police, who offered to give them a ride to his colleague's apartment. He stated that he was inside the apartment when he heard a verbal altercation between one of the other individuals (SN M) and the police. The altercation led to the other person's arrest. The applicant stated that is when he discovered the other person was underage and possessed a fake identification card.

The police report documenting the incident<sup>1</sup> reflects that at approximately 0104 hours, an officer responded to a report that three subjects were yelling in the street. The police report indicates that all four of the individuals had unsteady gaits, slurred speech, and smelled of alcohol. The police report stated that all four individuals admitted to consuming alcohol that night. The officer drove the four to BM3 A's apartment and all went into the apartment except for SN M, who was arrested as discussed earlier. SN M was booked and the officer reported the incident to the Coast Guard.

The PIO recommended that the applicant plus the other three be taken to NJP for disobeying an order. The other three were charged with violating a lawful order by consuming alcohol while in an active duty period. The applicant was charged with "failure to obey a lawful order . . . that 'Duty personnel shall not consume alcohol while in an active duty period (one full week).' On 12 October 2012 [the applicant] observed three of his subordinates consuming alcoholic beverages while on duty. [The applicant] was willfully derelict in the performance of his duties by condoning alcohol consumption by his subordinates while they were on an active duty period. In addition, two of these subordinates were under the legal drinking age of 21."

On November 15, 2012, the applicant was punished at NJP for dereliction of duty in violation Article 92 of the UCMJ by condoning his subordinates' consumption of alcohol while they were on an active duty period, which was a violation of ANT [REDACTED] M5401.0 that prohibited the consumption of alcohol while on an active duty period. The specification also noted that two of the subordinates were under the age of 21. The applicant's punishment consisted of forfeiture of \$248 of pay for one month and 14 days restriction and 14 days extra duties, with 7 days restriction and 7 days extra duty suspended for 6 months.

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

On May 3, 2013, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended denying relief. The JAG stated that Article 1.A.2.d. of the Coast Guard Drug and Alcohol Abuse Program gives the commanding officers and OICs the authority to decide when the behavior of their subordinates rises to the level of an alcohol incident. The JAG stated that based on the police report and the preliminary investigation into the events of October 13, 2012, the applicant's OIC was well within his discretion to document an alcohol incident in the applicant's record. In this regard, the JAG stated that the applicant was

---

<sup>1</sup> It is not clear whether the police report was attached to the investigation or obtained later. However, the applicant submitted a copy with his BCMR application.

involved in an incident requiring the local police to respond to inebriated, loud Coast Guard members at 0100 in the morning, which was Service discrediting enough to warrant an alcohol incident. The JAG stated that the fact that the applicant did not buy alcohol for minors or did not know that two members were underage does not negate the service discrediting nature of the incident.

With regard to the applicant's claim to have the Report of Offense and Disposition (NJP documentation) dated November 13, 2012, removed from his record, the JAG did not recommend relief. The JAG noted that the elements for the offense of dereliction of duty, for which the applicant was punished under Article 92(3) of the UCMJ are as follows:

- (1) That the accused had certain duties:
- (2) That the accused knew or reasonably should have known of the duties: and
- (3) That the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties.

The JAG stated that the applicant is assigned to a small unit where half the team is on duty one week, the other half on duty the next. On 30 March 2012, the applicant signed a Statement of Understanding acknowledging that he read and understood the ANT [REDACTED] Instruction that among other things prohibits the consumption of alcohol by members when on an active duty period. The JAG further stated the following:

The applicant is a second class petty officer and was the senior member on the night of the incident. The applicant had a duty to obey the ANT regulations and had a duty to ensure other ANT members obeyed those regulations as well. Given the small size of the unit it is reasonable to assume that the applicant knew, or should have known that the other three Coast Guard members were on duty while they were consuming alcohol on October 12, 2012. The record shows that the applicant made no effort to stop his shipmates from drinking while on duty, which is a dereliction of his duty. All three elements of Article 92 were present and substantiated.

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

On June 6, 2013, the applicant responded to the views of the Coast Guard and disagreed with them. He stated that at the time of the incident the 13 to 15 members of his unit were constantly being re-assigned duty sections. The applicant stated that on the night in question he took responsibility for himself as others should have. He stated that he did not take it upon himself to make sure others were where they should have been at that time.

The applicant stated that on the night in question he was walking home. He stated that the police report stated that 3 of 4 members were yelling in the street, but that he was cooperative and helpful. The applicant argued that he did not bring disgrace upon the Coast Guard.

The applicant disagreed that he condoned the consumption of alcohol by the other members of the unit. In this regard, the applicant stated the following:

When the two underage members from the unit (that I did not know well) entered the bar and provided identification, I assumed they were of legal age to consume alcohol and did not see a reason to stop them. As previously stated, when the incident occurred, I was on liberty and did not feel that I was willfully derelict. The [JAG] also stated that I signed and agreed to the ANT [REDACTED] Instruction. The document I had signed had expired after my first six months of service at ANT [REDACTED]. The changes that may have been made to the document had not been communicated because the unit did not require an updated document. I stand by my actions and feel that I personally did nothing to bring discredit upon the United States Coast Guard or was willfully derelict in my duties . . .

### **APPLICABLE REGULATIONS**

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

Article 1.A.2.d(1) 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."

Article 1.A.2.d. 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. The member may be counseled on appropriate behavior or may be held jointly responsible for any damage or untoward behavior associated with the group. Purchasing alcohol for use by minors is not an alcohol incident, but does represent a serious breach of discipline and subjects the member to civil or military UCMJ penalties.

Article 2.B.4. defines an alcohol-related situation as any situation in which alcohol was involved or present but was not considered a causative factor for a member's undesirable behavior or performance. A member does not have to consume alcohol to meet this criterion.

Article 2.B.5. states that any member involved in an alcohol incident or otherwise show signs of alcohol abuse shall be screened in accordance with the procedures outlined in the Coast Guard Health Promotion Manual. The results of the alcohol screening shall be recorded and acknowledged on an administrative remarks (page 7) entry. The entry shall describe the facts of the incident or risk factors, the results of alcohol screening, the position and organization of the individual conducting the screening, and a statement of the treatment recommended, if any.

Article 2.B.7. states that the first time a member is involved in an alcohol incident the CO shall ensure that the member is counseled on a page 7 about the Coast Guard policy on alcohol abuse and advised that an additional incident normally will result in discharge from the Coast Guard.

## 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 asked the Board to remove a page 7 documenting an alcohol incident on October 13, 2012 from his record. He argued that the description of events on the night in question does not meet the criteria for an alcohol incident.

Article 1.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 1.A.2.d. 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. The member may be counseled on appropriate behavior or may be held jointly responsible for any damage or untoward behavior associated with the group. Purchasing alcohol for use by minors is not an alcohol incident, but does represent a serious breach of discipline and subjects the member to civil or military (UCMJ) penalties.

4. 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 OIC's alcohol incident determination was erroneous. The page 7 documenting the alcohol incident stated the following, in pertinent part:

On 13 October 2012 at 0358 Sector Command Center (SCC) received notification via [REDACTED] Command Center that you had been detained by the [REDACTED] Police Department while walking home. The officer involved stated that you appeared to be severely intoxicated. You were also in the presence of two under age, non-rated members at the time of the incident who were also intoxicated and on duty. Your actions contributed to the delinquency of two minors assigned to the unit. As the senior ranking member present, this behavior was unacceptable for a Petty Officer in the United States Coast Guard.

5. The Board agrees with the applicant that he was in a liberty status and not an active duty period when he consumed alcohol at a local bar on the night in question. The Board would

also agree that the consumption of alcohol in the presence of underage persons does not *per se* constitute an alcohol incident. The record is unclear whether the applicant actually knew that two of the individuals drinking in the bar that night were under the age of 21 until they were stopped and questioned by the police. However, other evidence in the record provides a sufficient basis to support the OIC's finding that the applicant was involved in an alcohol incident. In this regard, the page 7 states that the police told the applicant's unit that the applicant appeared to be severely intoxicated. In addition, according to the police report, a call came in to the police that there were three individuals yelling in the street. When the police arrived, they found that there were actually four individuals walking, including the applicant. According to the police report, all four individuals had unsteady gaits, slurred speech, and smelled of alcohol. The police report states that the police officer had them sit on the curb to wait for his back up and to check their identifications, after which they were given a courtesy ride home. The Board finds that these facts are sufficient to support the OIC's determination that the applicant was involved in an alcohol incident because his consumption of alcohol was a contributing factor for the police being called for yelling in the street, for walking with an unsteady gait, for having slurred speech, and for needing a courtesy ride home, all of which brought discredit upon the Coast Guard. In addition the applicant's judgment was probably impaired because he knew, according to the IR, that the other three individuals were in an active duty period, but failed to insist that they stop consuming alcohol.

6. Article 2.B.2.b. of the Personnel Manual clearly states that COs are given broad latitude in curbing intemperate alcohol use. Reinforcing this point, Article 1.A.2.d.1. defines an alcohol incident as "[a]ny behavior, in which alcohol is determined by the commanding officer, to be a significant or causative factor that results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice (UCMJ), Federal, State, or local laws." Article 2.B.7. of the regulation requires the CO/OIC 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/OIC to place foundational documents on which he might have relied in making the alcohol incident determination in the military record.

7. Moreover, the OIC 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 has not submitted sufficient evidence to rebut the presumption that his OIC carried out his duties lawfully, correctly, and in good faith.

8. The applicant also requested the removal of the Report of Offense and Disposition form documenting his NJP for dereliction of duty (a violation of Article 92(3) of the UCMJ). He alleged that he did not disobey ANT Instruction M5401.0 not to consume alcohol while in a duty status. He has shown that he was in a liberty status on the night in question and was not prohibited from drinking alcohol. However, the charge for which the applicant was punished

was dereliction of duty, a violation of Article 92(3).<sup>2</sup> The elements of this offense are the following: that the applicant had certain duties; that the applicant knew or reasonably should have known of the duties; and that the applicant was willfully derelict in the performance of those duties. The consumption of alcohol by those in an active duty period is a violation of ATN [REDACTED] M5401.0 and the applicant had knowledge of this regulation. The question is whether the applicant knew or reasonably should have known that the three members drinking with him on the night in question were in an active duty period for that week and therefore were prohibited by regulation from consuming alcohol, and if so, was he derelict in his duties by not stopping or attempting to stop them from consuming alcohol.

9. The Board finds that the applicant knew or should have known that the other three individuals were in a duty status and should not have been drinking alcohol. In this regard, the Board notes that the applicant's unit was small consisting of approximately 13 to 15 individuals who were divided into two duty groups. Since the applicant was on liberty the night in question, his duty group was not assigned duty for that week. In fact, the IR states that the applicant knew the other three individuals were in an active duty period at the time he observed them drinking alcohol at the bar. The applicant was also aware of the no alcohol policy while in a duty status because on March 30, 2012 he signed a statement that he had read and understood all of the regulations in the ANT [REDACTED] M5401.0. Article 2.C.2. of the Enlisted Accessions, Evaluations, and Advancements Manual states that "[a]mong enlisted member present and regularly assigned to the same activity, or among the enlisted members present in any gathering, the member with the longest period of continuous service in the highest pay grade shall take the highest precedence and be considered the senior member, regardless of rating." Accordingly, at pay grade E-5, the applicant was the senior military member in the group on the night in question. The Board finds that the applicant was derelict in the performance of his duties by not intervening and directing the junior personnel who were in an active duty period to stop consuming alcohol, which was prohibited because of their active duty period status.

10. The applicant argues that the regulation no longer applied to him because his acknowledgement of the ANT regulation signed on March 30, 2012 had expired. The bottom of the document signed by the applicant states that personnel are "to review and sign every 6 months." However, the language on the certification sheet does not say that the regulation is not applicable after 6 months if the member does not re-review and re-sign, but that personnel should review and sign it every 6 months. The applicant did not provide a reasonable explanation why he believes the regulation was not in effect in October 2012. If the duty sections were still operative in October 2012 then logically so was the prohibition against using alcohol while on an active period.

11. Accordingly, the Board finds that the applicant has not submitted sufficient evidence to prove by a preponderance of the evidence that the Coast Guard committed an error or injustice in this case. Therefore, the application should be denied.

---

<sup>2</sup> Article 92 of the UCMJ consists of three different violations; disobeying a lawful general order or regulation (Article 92(1)); having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey and fails to obey the order (92(2)); or is derelict in the performance of his duties (92(3)).



**ORDER**

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

