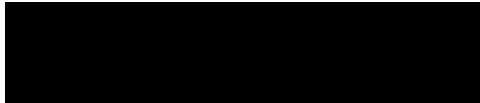


**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2013-073



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 February 20, 2013, and subsequently prepared the final decision as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 13, 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

The applicant asked the Board to correct his military record 1) by removing all documentation of his discharge from the Coast Guard due to a second alcohol incident, 2) by changing his reenlistment code from RE-4 (not eligible to reenlist) to RE-1 (eligible to reenlist), 3) by reinstating him on active duty, and 4) by awarding him back pay and allowances from the date of his discharge until reinstatement. As a result of his second alcohol incident, the applicant was discharged from the Coast Guard on March 31, 2011, with a general discharge under honorable conditions (subsequently upgraded to an honorable discharge), due to miscellaneous/general reasons, with the corresponding JND (miscellaneous/general reasons) separation code, and with a RE-4 (not eligible) reenlistment code.

BACKGROUND

The applicant received his first alcohol incident for driving under the influence of alcohol on August 5, 2009. He was counseled on the Coast Guard's alcohol policy and told that a second alcohol incident would result in his discharge from the Coast Guard. On August 18, 2009, he was punished at non-judicial punishment (NJP) for drunken operation of a vehicle and drunken disorderly conduct, violations of the Uniform Code of Military Justice (UCMJ) that occurred during the alcohol incident. On November 20, 2009, the applicant successfully completed

IMPACT training.¹ On February 8, 2010, the applicant's CO designated him to be a liberty risk in all ports, except for the cutter's homeport. In this status, the applicant was assigned a liberty buddy, a curfew, and he could not possess or consume alcohol. The liberty risk designation was subject to review upon the cutter's return from deployment. There is no indication in the record when the liberty restriction was removed.

On October 26, 2010, the applicant was at a party hosted by his ex-wife. A police officer was dispatched to the ex-wife's home due to a domestic disturbance. The officer arrived and saw the applicant sleeping in his car with the driver side door open and the motor off in the parking lot of his ex-wife's apartment complex. The officer woke the applicant and asked him why he was sleeping in his car. The officer stated that although the applicant appeared to be intoxicated, he was able to tell the officer that he had been visiting his ex-wife and that at the time he left, he was in no condition to drive, so he decided to sleep in his vehicle.

The officer asked the ex-wife if she would drive the applicant home. The ex-wife agreed to do so. The officer stated that later he saw the ex-wife in the parking lot of the apartment complex and she stated that the applicant had gotten out of her car when she stopped at an intersection because they had gotten into a verbal argument. The officer stated that he feared for the applicant's safety due to his inebriated state, so he and another officer searched unsuccessfully for the applicant.

The officer stated that that at approximately 2:30 a.m., the ex-wife called the police and stated that the applicant was back at her residence knocking on her door. The officer responded to the scene and met with the applicant. The applicant stated that he was mad at the way things turned out and he wanted to talk to his ex-wife. The officer stated that he told the applicant to wait until morning and another police officer took the applicant home.

On November 3, 2010, an administrative remarks page (page) 7 was issued to the applicant documenting his second alcohol incident based on the events of October 26, 2010. The page 7 stated as follows, in pertinent part:

On 26 October 2010, you attended a party hosted by your ex-wife. At that party, you were witnessed drinking heavily, getting into an argument with your ex-wife, and physically striking her. Witnesses at the party called the local police who in turn ordered you to go home. Since the event, your ex-wife has filed a restraining order and CGIS [Coast Guard Investigative Service] has initiated an investigation into your alleged actions of domestic violence. Based on the facts of the investigation thus far, I consider your violent behavior on 26 October to be the result of excessive alcohol consumption, and therefore an alcohol incident [in accordance with the Personnel Manual.]

#

¹ IMPACT course is an intense, interactive preventive educational program taught by Navy Drug and Alcohol Counselors. It is designed for members who have been screened and determined "No Diagnosis" but require early education.

Since this is your second documented alcohol incident, following your screening and treatment, you will be processed for separation . . .

On November 5, 2010, the applicant was screened and found to be alcohol abusive. In a page 7 documenting the results of the screening, the applicant was advised that he was scheduled to attend IMPACT treatment from November 8-12, 2010.

On November 15, 2010, a page 7 was placed in the applicant's record advising him that as a result of IMPACT treatment, he would be referred to in-patient treatment for alcohol abuse.

On December 31, 2010, a page 7 was placed in the applicant's record documenting the completion of his in-patient alcohol abuse counseling treatment.

After CGIS completed its investigation, on January 21, 2011, the applicant was punished at NJP for drunken disorderly conduct resulting from the incident. His punishment included restriction to the cutter for 30 days and extra duties for 30 days. There is a court memorandum documenting this NJP in the applicant's military record.

On January 21, 2011, the CO informed the applicant that the CO had initiated action to discharge the applicant from the Coast Guard by reason of unsuitability due to alcohol abuse and misconduct. The CO told the applicant that the reason for his discharge was the commission of a second alcohol incident, the circumstance of which led to his second NJP in the last eleven months. The CO stated that he was recommending an honorable discharge for the applicant, but ultimately that decision rested with the Commander, Coast Guard Personnel Center (PSC). The applicant was advised that he could submit a statement in his behalf.

On January 21, 2011, the applicant acknowledged the proposed discharge, objected to the discharge, and attached a statement. (The applicant's statement was forwarded to PSC with the recommendation for discharge. The applicant asked to be retained under the second chance program.)

On January 21, 2011, the CO recommended that PSC discharge the applicant from the Coast Guard because of his second alcohol incident, and that as a result of that second alcohol incident, the applicant received his second NJP in the last eleven months. The CO noted that previously on February 11, 2010, the applicant was punished at NJP for failure to obey an order by wearing earphones while on duty. The CO noted that the applicant was eligible for the second chance program, but recommended against it. The CO stated that given the extremely high quality of the enlisted forces, and the applicant's failure to capitalize on his previous "second chance," he recommended against considering the applicant for the second chance program again.

On March 2, 2011, PSC directed the applicant's discharge under honorable conditions (general discharge) no later than March 31, 2011, due to unsuitability, by reason of alcohol abuse, with a JND (discharged due to miscellaneous/general reasons) separation code, and an RE-4 reenlistment code.

The applicant was discharged under honorable conditions on March 31, 2011. However, on June 29, 2011, the Coast Guard upgraded the applicant's general discharge under honorable conditions to an honorable discharge, as recommended by his CO.

APPLICANT'S STATEMENT AND ARGUMENTS

The applicant gave a statement to the Board about the incident on the night in question. Much like the police officer's report, the applicant explained that he and his ex-spouse divorced in September 2010 and she began asking for reconciliation. He stated that he was invited over to his ex-wife's apartment to talk about reconciliation. He went to her apartment on the afternoon of the day in question and later they had friends over for dinner. He stated that he purchased and consumed alcohol. He stated there was joking and playing around when he accidentally spilled some of his drink on his ex-wife. The ex-wife became angry and to avoid further confrontation, he left the apartment. He stated that he decided to sleep in his car because he had been drinking and he already had a DUI. The applicant stated that someone called the police about a domestic disturbance and the police found him sleeping in his car. The police asked the ex-wife to drive the applicant home, but he left her car before she got him home.

The applicant stated that the police were called a second time to his ex-wife's residence. The applicant stated the police gave him a ride home because he was in no condition to drive. The applicant stated that the next morning he was awakened by the police and informed that he was being investigated by CGIS for domestic violence and an alcohol incident. The officer who reported to the scene on October 26, 2010, had notified the applicant's command about the events. The applicant stated that CGIS concluded that he did not strike his ex-wife and no charges were brought against him. He stated that a Coast Guard attorney had obtained a statement from his ex-wife admitting that she lied when she stated that the applicant struck her. The applicant stated that he learned subsequently that his ex-wife had filed a restraining order against him.

The applicant stated that approximately three months after the alcohol incident he was taken to NJP in January 2011 while the cutter was at sea. The applicant stated that he was denied an attorney to represent him at the NJP, although he requested one. He stated that the CO dismissed the domestic violence charge, but did not dismiss his alcohol incident because he had consumed alcohol that evening. The applicant stated that he was awarded 45 days extra duties and 45 day restriction and he was recommended for discharge.

The applicant alleged that the circumstances of the alleged second alcohol incident did not satisfy the requirements of Article 20.A.2.d. of the Personnel Manual. The applicant stated that according to this provision, an alcohol incident is one that must either result in the member's loss of abilities to perform assigned duties, bring discredit upon the uniformed services, or otherwise be a violation of the law.² The applicant stated that none of these requirements were

² 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, brings discredit upon the uniformed services, or is a violation of [law]. The member need not be

present in his situation. He stated that he was never charged with a violation of any law, that there was no evidence that the incident affected his ability carry out his assigned tasks, and that there was nothing to suggest that that he brought discredit upon the Uniformed Service on the night/morning in question.

The applicant also argued that he was denied due process during his January 2011 NJP because he was not allowed to have an attorney. He was allowed to have a mast representative. He contended that it was unjust for the command to wait until the cutter was at sea to hold the NJP, which effectively denied him the opportunity to call independent witnesses. The applicant asserted that if he had been afforded adequate legal representation and the opportunity to call independent witnesses, it is unlikely that he would have been found guilty of any offense or of committing a second alcohol incident.

The applicant argued that his command did not provide him with the proper support and leadership that was necessary for him to succeed under the second chance program. He was placed in the second chance program after his first alcohol incident, but according to the applicant, his command failed to live up to its part of the bargain because it did not provide the applicant with leadership, mentoring, training, and other support services and resources for him to succeed.

VIEWS OF THE COAST GUARD

On August 1, 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 alcohol incident documentation or the investigation. The JAG stated that commanding officers (COs) have a great deal of discretion when deciding what behavior qualifies as an alcohol incident. The JAG argued that the police report in this case contains multiple incidents of alcohol-related behavior, any one of which could be considered service discrediting. In this regard, the JAG stated that the local police responded to two separate complaints about the applicant, and between those complaints, the police spent time searching for the applicant out of fear for his safety. All of which was due to the applicant's alcohol-related, service discrediting behavior.

Regarding the applicant's argument that he was doing what a good Coast Guard member should do by sleeping in his car rather than driving, the JAG stated that a good Coast Guard member would not have put himself into that position to start with; a good Coast Guard member would have abstained from drinking alcohol because they would be driving, arranged for a designated driver, or called a taxi. The JAG stated that the applicant's CO acted in accordance with Coast Guard policy when he found that the applicant was involved in a second alcohol incident.

With regard to the applicant's claim that he was denied due process at his NJP, the JAG stated that the Manual for Courts-Martial gives the CO discretion as to when to hold NJP. In this case, the NJP was held while the cutter was underway, rather than in port. With regard to the

found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident."

applicant's suggestion that he could not call independent witnesses because his NJP occurred at sea, the JAG stated that it is unclear what witnesses the applicant could have called to dispute the police report. The JAG argued that the facts of the alcohol-related behavior, as documented in the police report and supported by the applicant's own statement were more than sufficient for the CO to have reached the conclusion that there was an alcohol incident.

The JAG argued that the applicant did not submit any evidence to support his allegation that that he was not given adequate support to succeed in the second chance program after his first alcohol incident. The JAG stated that since there is no evidence to support this contention, Coast Guard members are presumed to have acted properly.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

In September 2013, the Board received the applicant's reply to the views of the Coast Guard. He restated the arguments and facts of his initial application. In addition, the applicant stated that while COs have broad discretion in situations like his, it is also true that the Board can, on equitable grounds, overturn the decision of the CO and allow for the applicant to rejoin the Coast Guard by updating his reenlistment code. The applicant stated that since his discharge, he has completed alcohol counseling and has not had any alcohol since that successful treatment. He argued that even if the Board considers the CO's decision to be fair and just at the time, the applicant has demonstrated that he is a responsible and much more mature individual.

The applicant stated that he was never given any type of counseling or support after his initial DUI, which could have prevented the second incident that led to his discharge. He stated that once he was given counseling and treatment, he responded appropriately and maturely. He stated that for this reason alone, the Board should reverse the decision of the CO and reinstate him on active duty or at a minimum upgrade his reenlistment code.

APPLICABLE LAW

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, 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 20.B.2.h. states that enlisted members involved in a second alcohol incident will normally be processed for separation.

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 correct his record by removing all documentation of his discharge due to a second alcohol incident. He argued that the events on the night of October 26, 2010 did not rise to the level of an alcohol incident as described by Article 20.A.2.d. of the Personnel Manual. In this regard, he asserted that he did not lose his ability to perform assigned duties, bring discredit upon the uniformed services, or violate the law.

3. 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.

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

On 26 October 2010, you attended a party hosted by your ex-wife. At that party, you were witnessed drinking heavily, getting into an argument with your ex-wife, and physically striking her. Witnesses at the party called the local police who in turn ordered you to go home. Since the event, your ex-wife has filed a restraining order and CGIS has initiated an investigation into your alleged actions of domestic violence. Based on the facts of the investigation thus far, I consider your violent behavior on 26 October the result of excessive alcohol consumption, and therefore an alcohol incident [in accordance with the Personnel Manual.]

5. Evidence in the record provides a sufficient basis to support the CO's determination that the applicant was involved in an alcohol incident on October 26, 2010. In this regard, the page 7 states that the applicant was drinking heavily at his ex-wife's party and got into an argument with her and allegedly struck her. The police were called and when they reported to the scene they found the applicant asleep in driver's seat of his car with the door open. The police stated that he appeared to be intoxicated. Out of concern for the applicant's safety, the police asked the ex-wife to drive the applicant home. The applicant exited his ex-wife's vehicle before she arrived at his home, causing the police to search for him due to his intoxicated state.

The applicant did not go home, but returned to his ex-wife's home at 2:30 a.m. knocking on her door, which caused the ex-wife to place a second call to the police. The police then drove the applicant home for his own safety. 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 his unacceptable behavior on the night/morning in question. To be specific, the applicant's unacceptable behavior brought discredit upon the Coast Guard³ by publicly consuming too much alcohol and arguing with his ex-wife at a party requiring police intervention, by returning to his ex-wife's apartment a second time requiring police intervention, and by causing the police to spend time searching for him due to his intoxicated state and to report the evening events to the applicant's command. In addition, the CO stated that CGIS was called to investigate because the applicant's ex-wife filed for a restraining order against the applicant after the after the event. Accordingly, the Board finds there is sufficient evidence in the record to support the CO's determination that the applicant was involved in an alcohol incident on October 26, 2010 because his consumption of alcohol contributed to his unacceptable behavior on the night/morning in question.

6. With regard to the NJP related to this incident, the applicant argued that he was not found guilty of striking his ex-wife at NJP. However, he was punished for engaging in drunken disorderly conduct, which supports the CO's determination that he was involved in an alcohol incident. His punishment included restriction to the cutter for 30 days and extra duties for 30 days.

7. The applicant argued that he was denied due process during his NJP in January 2011 because he was not allowed to have an attorney represent him at NJP and that he was denied the opportunity to call independent witnesses because the NJP occurred at sea. Article 1.C.1. of the Military Justice Manual states that a mast is not an adversarial proceeding and a member has no right to be represented by an attorney at NJP. Further, Article 1.C.2.b. states that a member attached to or embarked in a vessel, like the applicant, has no right to refuse NJP and demand court-martial, and therefore no right to consult with a military or civilian attorney regarding the option of demanding court-martial instead of NJP (members assigned to shore commands have this option). This provision further states that a CO, at his or her sole discretion, and if it does not unduly delay proceeding, may permit a member to consult with an attorney prior to NJP. The applicant does not argue that he was denied the opportunity to consult with an attorney prior to the NJP but that he was denied the right to have an attorney represent him at NJP, to which he was not entitled. Therefore, the Coast Guard did not commit an error by not permitting the applicant to have attorney representation at NJP. The regulation does not require the appointment of an attorney, but it does permit each member facing NJP to have a mast representative.⁴ The applicant admits he was told he could have a mast representative to assist him at NJP.

³ Paragraph 60.c.(3), part IV, Manual for Courts-Martial states that discredit means to injure the reputation of and embodies conduct that has a tendency to bring the service into disrepute or which tends to lower it in public esteem.

⁴ According to Article 1.C.3.c. a mast representative serves primarily to assist the member in preparing for and presenting his or her side of the matter and to speak for the member, if the member desires. Mast representatives may question witnesses, submit questions to be asked of witnesses, present evidence, and make statements inviting the CO's attention to those matters he or she feels are important or essential to an appropriate disposition of the matter. The mast representative may also make a plea for leniency and solicit and submit statements regarding the reputation of the member at the unit, as well as other matters in extenuation or mitigation.

8. The applicant has not shown that he suffered an injustice because allegedly he did not have the opportunity to call independent witnesses at the NJP. In this regard, the applicant has not provided any evidence that if the NJP had occurred while the cutter was in port he had any independent witnesses to present. Nor has he offered any evidence of what any such independent witnesses might have said in his behalf.

9. The applicant suggested that the CO deliberately waited for approximately three months until the cutter was at sea to hold mast. The incident occurred on October 26, 2010, but the record indicates that the CO waited until CGIS completed the investigation and the applicant completed alcohol abuse treatments prior to holding NJP. The CO's decision was reasonable not to impose NJP until after the completion of the CGIS investigation and the applicant's treatment for alcohol abuse. The applicant has not provided any evidence that the CO violated any regulation by holding NJP on the applicant while the cutter was at sea or holding it three months after the incident occurred.

10. The applicant asked to have his reenlistment code upgraded to RE-1, as alternative relief. Upon discharge, the applicant's DD 214 indicates that he was discharged due to "miscellaneous/general reasons," with the corresponding JND separation code. According to the Designator Program Designator (SPD) Handbook, an RE-1 or RE-4 reenlistment code is authorized for the JND separation code. An RE-1 is not appropriate in this case because it means that a member is recommended for reenlistment and this applicant was not. In fact, he was discharged prior to the completion of his enlistment due to a second alcohol incident. The RE-4 is appropriate because not only was the applicant discharged because of two alcohol incidents, but according to the military record he also had three NJPs while in the Coast Guard.

11. The military record does not support the applicant's contention that his command failed to provide him with support and guidance when he was in the second chance program after his first alcohol incident. The record shows that the command counseled the applicant about Coast Guard alcohol policy, placed him in IMPACT training, and sought to keep him from further incidents while on deployment by assigning him a curfew, a liberty buddy, and ordering him not consume alcohol.

12. The applicant urged the Board to amend his record for equitable reasons, but offered no evidence as bases for taking such action, other than his own statement that he has completed alcohol-related treatment. Having reviewed the record in this case, the Board is not persuaded that equitable relief is appropriate.

13. 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 by discharging him on the basis of having two alcohol incidents. Nor has he proven that he should have his RE-4 reenlistment code upgraded to RE-1.

ORDER

The application of former  for correction of his military record is denied.

December 13, 2013

Date

