

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2013-130**



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**FINAL DECISION**

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the completed application on June 4, 2013, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 27, 2014, 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, a second class petty officer in pay grade E-5, asked the Board to correct his record to show that he was not reduced in rate from E-6 to E-5 on June 13, 2013. He explained that following the May 2012 servicewide examination (SWE) for advancement, he placed 13<sup>th</sup> on the BM1 advancement eligibility list. On June 17, 2012, however, he was arrested on suspicion of driving under the influence (DUI). He immediately notified the Officer of the Day on duty at his unit, a boat station, and he met with his commanding officer (CO) and executive petty officer (XPO) the next day. The CO told him he was not going to take action against him and was going to let the civil court handle the matter. The CO did not award him nonjudicial punishment (NJP) or give him a poor performance evaluation and remove his name from the BM1 advancement list, as required by Coast Guard policy.

Because his command did not remove his name from the BM1 advancement list, the applicant advanced to BM1 on January 1, 2013. In March 2013, Coast Guard Investigative Services began an investigation of the command climate at his unit, which led to the removal of the CO and XPO. The investigation also brought to light the applicant's arrest for DUI. In response, on April 11, 2013, the Sector Command issued him a Page 7 documenting the DUI as an "alcohol incident"<sup>1</sup> and required him to undergo screening for alcohol dependency, which should have

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<sup>1</sup> Article 1.A.2.d.1. of COMDTINST M1000.10 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

happened following his arrest in June 2012. Then the Sector Command also prepared the required performance evaluation with a mark of “not recommended for advancement” and back-dated the evaluation to June 2012. The Sector Command also recommended that he be demoted due to an erroneous advancement, and on June 13, 2013, the Personnel Service Center demoted him to BM2 “due to erroneous advancement at no fault of my own.”

The applicant stated that because of the timing of these actions, he was unable to compete for advancement to BM1/E-6 in the May 2013 SWE and could not take the examination again until November 2013. Therefore, the earliest he can get advanced to BM1 is June 2014. He alleged that would have been eligible to compete for advancement in May 2013 had his command followed proper procedures and removed him from the advancement list in June 2012. His new CO requested a make-up SWE for him, but the request was denied. Therefore, he is being penalized because of his prior CO’s “poor decisions and deceitful actions,” even though he properly reported his arrest to the command.

The applicant stated that he now has a debt for overpayments totaling more than \$1,000.00, at no fault of his own. The applicant alleged that it was erroneous and unjust for his advancement to BM1 in January 2013 to be taken away from him in June 2013 based on an incident that had occurred in June 2012. He stated that ultimately he was not convicted of DUI, and the charges against him were dismissed.

### SUMMARY OF THE RECORD

In May 2012, the applicant, then a [REDACTED]/E-5, competed for advancement by taking the SWE and placed [REDACTED] on an advancement list of 318 candidates for advancement to [REDACTED]

According to a police report dated on June 17, 2012, an officer received a radio call of a possible hit and run in a parking lot that day and saw a vehicle matching the one described leaving the area. When he stopped the vehicle, the applicant was driving and his father was a passenger. The officer told the applicant why he had stopped him, and the applicant paused for a few seconds and then said, “Yes sir.” A radio call confirmed that the applicant’s license plate matched the one provided by the witness. At this point, the officer had not detected any alcohol, and the applicant was wearing sunglasses, so the officer had the applicant drive the vehicle back to the parking lot where the accident had occurred. At the scene of the accident, the officer asked the applicant to exit his vehicle to discuss it. “When he stepped out, I noted that he was unsteady on his feet for a moment and had to use his left hand to stead against the left side of his vehicle when he walked around to the back. When he reached the rear of his vehicle, he sat against the trunk.” The officer then read the applicant his rights since he was about to question him about the reported hit and run, but the applicant “stepped very close to my face and said he was a federal officer and he knows all about that. At this time, I noticed an odor of alcoholic beverage on his breath, but I backed away from him as I was uncomfortable standing so close.” When the officer asked the applicant about the accident, the applicant paused and then said he could not recall hitting another vehicle when he left the parking lot. When another officer arrived, the first

officer asked him to conduct a DUI investigation while he contacted the owner of the other vehicle. The vehicle owner arrived and stated that he “believed the damage to his bumper was new, however he did not want to make a police report about it because it was so small.”

The officer who investigated the applicant for DUI also submitted a report. He wrote, “There was a strong odor of an alcoholic beverage on [the applicant’s] breath, his eyes were bloodshot, watery, dilated and he had a b[l]ank, and dazed expression on his face.” When the applicant spoke and exhaled, the officer smelled a strong odor of alcohol. The officer administered a horizontal gaze nystagmus (HGN) test on the applicant and all six indicators showed impairment as did a vertical test. The officer had to repeat the instructions for the test several times because the applicant kept moving his head. “There was an obvious approximate two inch orbital sway during the test.” In addition, the applicant’s speech was slurred and fast and he repeatedly yelled to his father something about his cell phone even though his father was standing only 10 feet away. Upon inquiry, the applicant stated that he was on his way home from a baseball game and had drunk three 10-ounce light beers during the game. The applicant stated, “What do you think about my wife coming to pick me up, obviously I’m a lightweight and I had too much to drink” and then refused to perform any field sobriety tests despite repeated requests. The officer placed the applicant under arrest for DUI based on his overall observations and the totality of the circumstances. Another officer asked the applicant to take a breath test, and the applicant refused to do so.

An order from a county traffic court dated October 30, 2012, states that the applicant had refused to submit to a blood alcohol level test, was convicted of reckless driving, and was “ordered by the sentencing judge to attend the DUI program, ... DUI evaluation and educational classes for a completion certificate.” The order states that the applicant’s driver’s license had been suspended but that if he completed the DUI program, he could receive “a temporary ‘necessary driving’ driver’s license for the full period of the suspension.” The order also noted that failure to complete the DUI program could result in a “contempt of court action” and “additional penalties, including jail time.”

The applicant’s record contains no documentation prepared by his unit command at the time of his arrest. On January 1, 2013, the applicant advanced to [REDACTED] E-6.

On April 11, 2013, the Sector command entered a Page 7 in the applicant’s record [REDACTED] document his arrest for DUI as an alcohol incident. The Page 7 notes that any further such incidents would result in the applicant being processed for separation in accordance with Coast Guard policy.

A report of a Sector investigation into the applicant’s arrest and his command’s handling of the matter, dated May 14, 2013, states that the applicant had incurred an alcohol incident when he was arrested for DUI based on his conduct and the definition of an alcohol incident. The investigator also noted that the applicant had provided varying statements about the accident by claiming to the police officer that he had no recall of hitting the other vehicle, claiming to his command that he had “squared up with” the owner before leaving the parking lot, and claiming to the investigator that he and his father had assessed the damage, found no damage, and so left the parking lot without speaking to the owner. Therefore, he also concluded that the applicant could also be charged with making a false official statement and fleeing the scene of an accident.

Moreover, the investigator found, the applicant's command failed to notify either the Sector command or Coast Guard Investigative Service (CGIS) about the applicant's arrest, as required. The CO did nothing to document the incident or ensure that the applicant was timely counseled or screened for alcohol abuse or dependency. The necessary documentation, counseling, screening, and disciplinary performance evaluation did not occur until April and May 2013. Had the command conducted matters properly in June 2013, the applicant's name would have been removed from the advancement eligibility list and he would not have advanced to E-6 on January 1, 2013. The investigator recommended that the applicant's advancement be reversed and that the Chief of Logistics recommend remission of the overpayment.

The investigator's notes show that in a May 8, 2013, interview with the applicant's unit CO, a chief warrant officer, the CO told the investigator that the applicant timely reported his arrest to the command. The applicant told the command he had "squared up with" the owner of the other vehicle before leaving the parking lot. The CO doubted the DUI because the applicant claimed he was not drunk, the officer had had the applicant drive his own car back to the parking lot, and the applicant's attorney claimed that the charge "would not hold up in court." The CO stated that he simply forgot to notify the Sector and did not know that he was required to notify CGIS, as required whenever a member is arrested. He also stated that he believed that if the DUI charge was dropped, there would be no need to document an alcohol incident. The CO did not have the police officers' narrative reports when he made his decisions, which he based on an unreadable carbon copy of the citation and the applicant's own claims, and claimed that he did not know he could get the reports through CGIS. The CO denied that the unit's Command Drug and Alcohol Representative (CDAR) had "approached him several times stating that something needed to be documented" and denied having told the CDAR "to hold off processing" the case. The CO denied having intended to "sweep under the rug" the applicant's arrest for DUI.

On May 16, 2013, the Sector CO adopted the investigator's recommendation. On May 17, 2013, he asked the Personnel Service Center to reverse the applicant's advancement to E-6 on January 1, 2013. In addition, he stated that he believed the advancement to be "erroneous versus fraudulent" and so asked that any debt for the overpayment be waived. He also noted that the applicant was "inadvertently disadvantaged" because he would have been able to compete for advancement to E-6 in the May 2013 SWE had his alcohol incident been timely processed.

On June 7, 2013, PSC canceled the applicant's January 1<sup>st</sup> advancement to [REDACTED] E-6. PSC noted that the applicant "shall be counseled on the conditions and procedures to request a waiver of indebtedness" for the overpayment he received as a result of the erroneous advancement.

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

On October 30, 2013, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. The JAG noted that, although the Board should deny relief in this case because the Coast Guard has committed no error or injustice in returning the applicant to his correct rank, the applicant is eligible to seek a waiver of the debt through the Coast Guard.

In making this recommendation, the JAG adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC). PSC stated that although the applicant's advancement to E-6 on January 1, 2013, was not deemed to be fraudulent because the applicant had reported his arrest to his command, it was properly reversed because it was erroneous. PSC stated that the applicant's command should have promptly reported his arrest for DUI to the Sector and CGIS, documented the event as an alcohol incident, had him screened for alcohol abuse or dependency, and prepared a disciplinary performance evaluation, which would have resulted in the removal of his name from the advancement list. When the Sector command investigated and discovered that the unit command had failed to comply with regulations, the Sector completed the required procedures and the applicant's advancement was canceled.

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

On November 1, 2013, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

### **APPLICABLE REGULATIONS**

The Coast Guard Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10, includes the following regulations:

Article 1.A.2.d. 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, 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.C.1. states that a member's driving privileges on Coast Guard property may be suspended or restricted when a member is charged with DUI. Article 1.C.4. states that a member's driving privilege on Coast Guard property will be automatically [REDACTED] suspended for a year if the member refuses to undergo a lawfully requested BAC test "irrespective of the ultimate disposition of the underlying intoxicated driving offense." In addition, the member must be [REDACTED] in writing of the suspension and a copy of the notification must be placed in the member's record.

Article 1.C.5. states that when a member is arrested for DUI, the member's CO must "conduct adequate inquiries ... for taking remedial action"; refer the member for medical screening; report the member's civil arrest in accordance with COMDTINST M1600.2; document the suspension of driving privileges in accordance with Article 1.C.4.; prepare a disciplinary performance evaluation in accordance with COMDTINST M1000.2; and document any alcohol incident in accordance with Article 2.B.

Article 2.B.7. states that when a member incurs an alcohol incident, the CO "shall ensure" that the member is counseled about the Coast Guard's policies and document the alcohol incident and counseling on a Page 7 in the applicant's record. Article 2.B.8.b. states that enlisted members are normally processed for separation following a second alcohol incident.

Article 5.E.2.c. of COMDTINST M1000.2, states that a performance evaluation must be prepared, regardless of the amount of time since the last evaluation, whenever the member is convicted by court-martial, awarded NJP, convicted in a civil court of an offense comparable to one in the Uniform Code of Military Justice, reduced in rate, involved in an alcohol incident, or relieved of duties for cause. Article 5.H.2. states that the performance evaluation of someone convicted by court-martial, awarded NJP, or involved in an alcohol incident must include an unsatisfactory conduct mark. Article 3.A.13.b. states that a member may not be advanced if during the prior 12 months the member has received an unsatisfactory conduct mark, court-martial, civil conviction, or NJP, and the member's CO must notify PSC so that the member's name can be removed from the advancement eligibility list.

Article 3.A.30.e. of COMDTINST M1000.2 states the following about the erroneous advancement of an enlisted member:

If an enlisted member is advanced in error due to no fault of his or her own and solely as a result of administrative error, the member shall be reduced to the correct rate as of the date the erroneous advancement is noted. ... The member shall be required to repay any overpayments caused by this erroneous advancement, however, the member may apply for a remission of the indebtedness or a waiver of collection of the erroneous payment per Sections 11-G and 11-F (respectfully [sic]) of ... Coast Guard Pay Manual, COMDTINST M7220.29 (series), and chapter 9 of ... Personnel Pay and Procedures Manual, PPCINST M1000.2 (series), if the following conditions are met:

- (1) The advancement must have been due to an administrative error,
- (2) The advancement must have been executed by a competent authority,
- (3) The member must have performed the duties of the higher grade to which erroneously promoted, and
- (4) The member must who that he/she could not reasonably have been expected to know that he/she was being overpaid.

Section 11.F. of the Pay Manual states that a member may apply for a waiver of a debt, which is "a written request from a member or former member for the cancellation of an indebtedness to the U. S. Government which resulted from erroneous payments of pay and allowances made to or on behalf of the member or former member." To be valid, the overpayments "must be of such a nature that they would normally go unnoticed or undetected by the member" and collection of the debt must "be against equity and good conscience and not in the best interests of the United States. Generally, this criteria [sic] will be met by a finding that the erroneous payment occurred through administrative error and that there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member or any other person having an interest in obtaining waiver of the claim."

Section 11.G.4. of the Pay Manual states that the Commandant may remit a debt under the following circumstances:

Injustice. Remission or cancellation of the indebtedness may be granted in order to correct obvious wrongs or misrepresentations on the part of the Government which are caused by individuals acting in an official capacity. When an enlisted person has received an overpayment in good faith, without fault or knowledge, but because of error on the part of the Government, enforced collection of the resultant indebtedness may amount to an injustice. However, error on the part of the Government will not, of itself, be a basis for granting remission or cancellation.

- b. Hardship. Hardship in this sense may exist when collection of indebtedness would cause a financial hardship on an enlisted member or the member's family.
- c. Partial Remission or Cancellation. Partial remission or cancellation of indebtedness may be appropriate whenever collection of the entire balance due would amount to an injustice or cause a hardship.

## 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 submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed within three years of the of the applicant's discovery of the alleged error.<sup>2</sup>

2. The applicant alleged that his advancement to E-6 on January 1, 2013, was unjustly canceled due to no fault of his own. When considering allegations of error and injustice, the Board begins its analysis 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.<sup>3</sup> Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."<sup>4</sup>

3. The record shows that after the applicant was arrested for DUI on June 17, 2013, he reported the matter to his unit command, but his command failed to follow the required reporting and documentation steps pursuant to COMDTINSTs M1000.10, M1000.2, and M1600.2 and so imposed none of the usual consequences on the applicant for his misconduct. Therefore, the Board finds that the unit CO exceeded the scope of his authority and discretion in this matter. The preponderance of the evidence shows that the applicant's misconduct clearly met the definition of an alcohol incident in Article 1.A.2.d. of COMDTINST M1000.10 because, after drinking alcohol, he struck another vehicle with his own, left the parking lot without reporting the accident, drove his vehicle with good reason to believe that he was under the influence of alcohol, refused to take a breath test, and lied and spoke inappropriately to the police. This conduct would be likely to bring discredit on the Uniformed Services, and his reckless and/or drunken driving, leaving the scene of the accident, and falsely claiming to the police that he could not recall having hit the other vehicle constituted violations of Articles 92, 107, and 134 of the Uniform Code of Military Justice. Therefore, the parent Sector command's decision in May 2013 to document the applicant's alcohol incident and to take the actions that should have been taken in June 2012 was neither erroneous nor unjust.<sup>5</sup> In particular, the Board finds that his advancement on January 1, 2013, was erroneous; would not have occurred if his unit command

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<sup>2</sup> 10 U.S.C. § 1552(b).

<sup>3</sup> 33 C.F.R. § 52.24(b).

<sup>4</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

<sup>5</sup> See *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577 (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (finding that for purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is treatment by military authorities that "shocks the sense of justice").

had properly documented his alcohol incident with an unsatisfactory conduct mark on a performance evaluation in June 2012; and was correctly canceled by PSC in accordance with Article 3.A.30.e. of COMDTINST M1000.2 in June 2013.

4. The applicant alleged that because of his erroneous advancement, he now has a debt of approximately \$1,000 because he was erroneously paid as an E-6 from January to June 2013. The JAG pointed out that the applicant has not exercised the administrative remedy of requesting a waiver for the debt even though he was advised to do so. Under Sections 11.F. and 11.G. of the Coast Guard Pay Manual, the applicant may request a waiver and/or remission of his indebtedness but apparently has yet to do so. An applicant must exhaust such administrative remedies before applying to this Board.<sup>6</sup> Therefore, the Board will not now decide this issue and will dismiss it without prejudice. The applicant should apply to the Coast Guard for waiver and remission of his debt and may reapply to this Board if the Coast Guard denies his request.

5. The applicant pointed out that because of the delay of the documentation of his alcohol incident, he was unable to take the SWE for advancement to E-6 in May 2013, and so he will presumably advance later to E-6 than he would have if his unit command had timely documented his alcohol incident. However, the applicant did not expressly ask the Board to back date his date of advancement, and so the Coast Guard did not address this issue in the advisory opinion. Nor did the applicant respond to the advisory opinion, inform the Board of his status on an advancement list, or advise the Board of the date he believes he would have advanced had he been able to participate in the May 2013 SWE. Therefore, the Board finds that this issue has not been properly brought before the Board and is not ripe for decision. However, the applicant may submit an application requesting the backdating of his date of advancement to bring this issue properly before the Board if he believes the date of his advancement has been erroneously or unjustly delayed.

6. Accordingly, the applicant's request to have the cancelation of his advancement on January 1, 2013, reversed should be denied because he has not proved by a preponderance of the evidence that the Coast Guard committed an error or injustice in canceling the erroneous advancement. The applicant may reapply to this Board, however, if the Coast Guard denies his request to waive or remit his debt for the overpayment or if he believes that his date of advancement to E-6 has been erroneously or unjustly delayed.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

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<sup>6</sup> 33 C.F.R. § 52.13(b) ("No application shall be considered by the Board until the applicant has exhausted all effective administrative remedies afforded under existing law or regulations, and such legal remedies as the Board may determine are practical, appropriate, and available to the applicant.").



**ORDER**

The application of [REDACTED], USCG, for correction of his military record is denied, but he may reapply to the Board on the issues of his debt and date of advancement as explained above.

February 27, 2014

