

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2013-138



FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the applicant's completed application on July 1, 2013, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 14, 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 first class petty officer on active duty, asked the Board to remove from his record an Administrative Remarks form (CG-3307 or "Page 7")¹ dated December 20, 2001, documenting his "first alcohol incident,"² which had occurred on December 14, 2001. The applicant alleged that the Page 7, which documents his citation for underage drinking, should be removed from his record in accordance with Article 2.B.10.b. of the Coast Guard's Alcohol and Drug Abuse Program Manual, COMDTINST M1000.10.

The applicant stated that he submitted a request to the Enlisted Personnel Management Branch (EPM) of the Personnel Service Center (PSC) to have the Page 7 removed, but his request was unjustly denied. He submitted a copy of a one-sentence memorandum from EPM stating that his request to have the Page 7 removed had been disapproved "due to the fact that this incident brought discredit to the service." The applicant alleged that this claim is erroneous because he was cited solely for drinking while underage. He also claimed the following:

¹ An Administrative Remarks record entry, form CG-3307, is better known as a "Page 7" and is used to document a member's notification of important information, achievements, or positive or negative aspects of a member's performance in the member's military record.

² 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 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 2.B.7. states that an alcohol incident must be documented in the member's record on a Page 7.

I did not engage in any other conduct that brought discredit on the Coast Guard. Underage drinking is prohibited and I should not have done it, but it does not by itself bring discredit on the Coast Guard. The fact that police issued me a summons for being a minor in possession of alcohol does not change the nature of my conduct to become service discrediting.

In support of his allegations, the applicant submitted a copy of the disputed Page 7, which states the following in pertinent part:

On 14 DEC 01 you were cited by the ... Police Dept. for Minor in Possession. On 20 DEC 01 you were found guilty on this charge.

On the night of 14 DEC 01 you attended a party at the house of a shipmate and consumed alcohol. You were aware that consumption of alcohol by persons under the age of 21 in the State of Washington is illegal. Your decision to use alcohol as a minor questions your potential to assume the responsibilities of a petty officer and will not be tolerated. ...

The applicant also submitted a copy of Article 2.B.10.b. of COMDTINST M1000.10, which states the following:

Removal of Alcohol Incident from Record. A member who receives an alcohol incident solely for underage drinking and did not use or abuse alcohol to such an extent that he or she was unable to perform prescribed duties or brought discredit upon the Uniformed Services may, after 3 years, predicated on positive performance, request via the chain of command that Commander (CG PSC) remove the alcohol incident from his or her record. Removal requires that the member has had no further alcohol incidents in that 3-year period.

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 grant relief in this case. In so doing, he adopted the findings and analysis in a memorandum on the case prepared by PSC. PSC summarized the facts of the case and recommended that the Board grant relief because there is no evidence that the applicant committed conduct that would tend to embarrass the Service. Therefore, PSC concluded, the conditions for removal under Article 2.B.10.b. of COMDTINST M1000.10 have been met.

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 thirty days. No response was received.

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.³

2. The applicant alleged that the Page 7 dated December 20, 2001, in his record is unjust and should be removed pursuant to Article 2.B.10.b. of COMDTINST M1000.10 because the sole basis for the alcohol incident was underage drinking. When considering allegations of error and injustice, the Board begins its analysis in every case by presuming that the disputed Page 7 is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.⁴ Absent evidence to the contrary, the Board presumes that a member's military records have been prepared "correctly, lawfully, and in good faith."⁵

3. Article 2.B.10.b. of the COMDTINST M1000.10 states that following three years of positive performance, a member's Page 7 documenting an alcohol incident based solely on underage drinking and not involving use or abuse of alcohol to such an extent that the member was unable to perform prescribed duties or brought discredit upon the Uniformed Services may be removed from the member's record. Upon the applicant's request, EPM originally refused to remove the Page 7, claiming that the applicant's conduct had brought discredit upon the Service, but PSC now denies that claim and agrees with the applicant that there was no conduct that brought discredit to the Service.

4. Contrary to the applicant's and PSC's claims, the Board finds that illegal conduct, such as underage drinking, does tend to bring discredit upon the Service, but the Board's inquiry does not end there. If the discredit brought upon the Service by the mere fact of a member's underage drinking were sufficient by itself to deny a request to remove a Page 7 pursuant to Article 2.B.10.b., no Page 7 would ever be removed pursuant to that regulation, which would be rendered meaningless. Regulations should not be interpreted in a way that renders them meaningless.⁶ The Board finds that Article 2.B.10.b. must be interpreted so that the applicant's Page 7 may be removed as long as there is no evidence that he was rendered unable to perform his duties or that he committed conduct that would tend to bring discredit to the Service in excess of that brought upon the Service by the mere fact of his underage drinking. For example, a member who, after drinking alcohol while underage, also committed disorderly conduct, drove while intoxicated (DWI), resisted arrest, failed to obey orders, or disrespected a superior officer could be considered to have brought discredit to the Service in excess of that brought by his underage drinking alone and so would not be entitled to the removal of his Page 7 and "alcohol incident" pursuant to Article 2.B.10.b. The Board is persuaded that Article 2.B.10.b. must be interpreted as requiring at least some misconduct in addition to the underage drinking or some exacerbating factor that would tend to increase the discredit to the Service before the removal of a Page 7 pur-

³ The application was received more than three years after the disputed Page 7 was entered in the applicant's record, but under *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994), section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940 "tolls the BCMR's [3-year] limitations period during a servicemember's period of active duty."

⁴ 33 C.F.R. § 52.24(b).

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁶ See *Glover v. West*, 185 F.3d 1328, 1332 (Fed. Cir. 1999) (holding that an interpretation of a regulation that renders a regulatory provision meaningless is "contrary to the canons of statutory interpretation").

suant to Article 2.B.10.b. of COMDTINST M1000.10 can be denied based on a claim that the member's alcohol incident discredited the Service.

5. In this case, the Board finds insufficient evidence that the applicant committed any conduct that would tend to bring discredit upon the Service aside from his underage drinking. The Page 7 indicates that the police came to a party he was attending and issued him the citation there, but there is no evidence that his own behavior caused the police to be called. The Page 7 also shows that the witnesses to his underage drinking included himself, one or more shipmates and partygoers, the police and, presumably, other municipal officials who processed his citation. The number or type of witnesses to a member's underage drinking could certainly be an exacerbating factor that would increase the discredit brought to the Service by a member's underage drinking. However, the Board finds insufficient evidence in the record to conclude that the number or type of witnesses to the applicant's underage drinking was unusually large or discrediting to the Service.

6. Therefore, the applicant has proved by a preponderance of the evidence that the Page 7 dated December 20, 2001, documenting his underage drinking on December 14, 2001, is unjust and should be removed from his record in accordance with Article 2.B.10.b. of COMDTINST M1000.10.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of [REDACTED] USCG, for correction of his military record is granted. The Coast Guard shall remove from his record the Page 7 dated December 20, 2001, documenting his alcohol incident for underage drinking on December 14, 2001.

February 14, 2014

