

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-018



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. After receiving the completed application on December 5, 2013, the Chair docketed the case and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated August 22, 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 [REDACTED]/E-5) on active duty, asked the Board to remove from his record a Page 7 (CG-3307) dated March 28, 2011, that documents an "alcohol incident"¹ on March 19, 2011, and to restore him in rate from [REDACTED]/E-5 to [REDACTED]/E-6. He stated that the Page 7 and reduction in rate were unjust because the charges against him were dropped in a State court on June 7, 2011. The applicant alleged that if his commanding officer (CO) had waited until after his court appearance, he would not have received an alcohol incident and would not have been reduced in rate at mast. He alleged that as a result of his CO's precipitous action, he has received catastrophic punishment that is ending his career. The applicant argued that even if the Page 7 is not removed, his E-6 rate should be restored based on his performance and conduct since the alcohol incident, pursuant to Coast Guard policies for restoration in rate (RIR). He stated that he has asked to have his rate restored many times to no avail. The applicant submitted numerous documents concerning his RIR requests and performance evaluations in support of his application.

¹ U.S. Coast Guard, COMDTINST M1000.10, 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, 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." Under Article 2.B.8., members are normally processed for separation if they incur two alcohol incidents.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard Reserve as a [REDACTED]/E-5 on April 23, 2003, having previously served on active duty in the Marine Corps from 1994 through 2002. On July 12, 2005, he enlisted on active duty in the Coast Guard. On December 20, 2005 the applicant was punished at mast for misusing his Government travel card on five occasions. He was awarded 15 days of extra duty and a reduction in rate to [REDACTED], which was suspended for six months. His commanding officer (CO) advised him on a Page 7 that the reduction in rate would go into effect if he committed any misconduct within six months. The reduction in rate did not go into effect.

Upon reporting aboard a new unit on July 5, 2009, the applicant signed Page 7s acknowledging that he had been counseled about Government travel card policies and the Coast Guard's alcohol policies. The applicant received good semi-annual evaluations in 2009 and 2010 and advanced to [REDACTED]E-6 on October 1, 2010. However, on November 29, 2010, he was punished at mast for misusing his Government travel card on sixteen occasions since September 10, 2010. His non-judicial punishment (NJP) included a forfeiture of \$1,743.00 in pay for two months and a reduction in rate to [REDACTED], which was suspended for six months on condition of good behavior. The applicant also received a disciplinary evaluation, dated December 15, 2010, with some low marks, an unsatisfactory conduct mark, and a recommendation against advancement.

At another mast on March 28, 2011, the suspension of the NJP was vacated and so the applicant was reduced in rate to [REDACTED]. A Page 7 in his record dated March 28, 2011, states that on March 18, 2011, he had incurred an alcohol incident because his consumption of alcohol "was determined to be a significant and/or causative factor in your arrest by the ... Police Department ... for public intoxication, failure to obey a lawful order, trespassing, resisting arrest and second degree assault on a Police Officer." He was advised to abstain from alcohol and referred for alcohol screening and completed an outpatient rehabilitation program on May 27, 2011. The Page 7 also advised him that he would be processed for separation if he incurred another alcohol incident. On another disciplinary evaluation, dated March 28, 2011, he again received some low marks, an unsatisfactory conduct mark, and a recommendation against advancement.

In a State court on June 7, 2011, the judge awarded the applicant "probation before judgment" on a charge of second degree assault, and the State declined to prosecute (nolle prosequi) the charges of trespassing, public intoxication, resisting arrest, failure to obey a reasonable and lawful order, and assault on a police officer.

On June 16, 2011, the applicant submitted a request to his CO to set aside his NJP and restore his rate based on his performance of duty since January 2011 and his seventeen years of service. The applicant stated that he had continued to perform at a very high level despite his reduction in rate and listed many accomplishments. He also noted that his reduction in rate had caused his family significant financial hardship and that his wife had had to get a job instead of staying home to care for their three children.

Following a meeting with his CO on June 30, 2011, the applicant submitted monthly updates about his performance and accomplishments. On November 16, 2011, he submitted another memorandum requesting the restoration of his rate. He stated that he had been rehabili-

tated and had met and exceeded all of his command's expectations during the prior eight months and listed many accomplishments.

On December 19, 2011, the Chief of the Enlisted Personnel Management Division (EPM) of the Personnel Service Center advised the applicant's CO by email that he would not restore the applicant to E-6. He stated that the applicant was not "deserving of special advancement" in accordance with Article 3.A.27.b. of M1000.2 because his reduction in rate at mast in 2010 for misusing his travel card had been suspended, and the suspension had only been vacated and the NJP enforced because of an alcohol incident. In addition, he noted that the applicant had previously been punished at mast in 2005 for misusing his travel card. He advised the applicant to re-compete for advancement but noted that his CO could resubmit the request to restore the applicant's rate up to 36 months following the date of the reduction in rate.

On October 12, 2012, the applicant's supervisor asked EPM in an email about the status of another request to restore the applicant's rate to E-6. The supervisor stated that he had been told by a detailer that there were stipulations the applicant had to meet before his rate would be restored and asked what the stipulations were. EPM replied that the applicant had been given stipulations for regain his rate and had been instructed to re-compete for advancement. EPM stated that the command should not have re-submitted the RIR request for him.

On his regular, semi-annual performance evaluations dated October 31, 2011, April 30, 2012, October 31, 2012, and April 30, 2013, the applicant received very good marks, including several top marks of 7 out of 7 supported by laudatory comments about the quality of his work and his stamina, and he was recommended for advancement. The applicant prepared evaluation support forms listing numerous accomplishments during these periods.

Page 7s dated September 3 and 11, 2013, in the applicant's record state that he incurred a second alcohol incident for public drunkenness on August 2, 2013, when he was found inebriated and laying in the street outside a bar. He resisted assistance and medical care but was transported to a hospital because of his condition, and his blood alcohol content measured 0.334. As a result of this second alcohol incident, the applicant was punished at mast and processed for separation through an Administrative Separation Board. His commanding officer noted in the memorandum recommending discharge that although the applicant was "an extremely hard worker and subject matter expert who has already made significant contributions both to his own unit and other local cutters in his short time on board" the unit, "his history of misconduct outside the workplace makes him a liability to the unit and to the Service."

VIEWS OF THE COAST GUARD

On April 25, 2014, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. He noted that no conviction is required for an alcohol incident to have occurred and alleged that the fact that the consumption of alcohol was a significant or causative factor in the applicant's being arrested "is more than sufficient to establish an alcohol incident." He also adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC stated that the applicant was originally awarded the reduction in rate at mast on November 29, 2010, after he had misused his Government travel card. PSC stated that this NJP was suspended on condition of good behavior and the suspension [REDACTED] only vacated because the applicant committed additional misconduct by incurring an alcohol incident on March 18, 2011. PSC stated that the fact that the applicant was not convicted by the State based on his conduct on March 18, 2011, does not mean that he did not incur an alcohol incident. PSC stated that the applicant incurred an alcohol incident because his arrest on [REDACTED] multiple charges brought discredit upon the Service and alcohol was a significant or causative factor in his arrest. PSC stated that the outcome of the civil proceedings in State court “has no bearing” on his commanding officer’s determination and decision to vacate the suspension of his prior punishment. Therefore, PSC recommended denying relief.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On M [REDACTED] 2014, 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.

[REDACTED] APPLICABLE LAW AND POLICY

Alcohol Policies

Article 1.A.2.d.1. of COMDTINST M1000.10, the Coast Guard Drug and Alcohol Abuse Program Manual, defines an “alco [REDACTED] 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 2.B.7. of COMDTINST M1000.10 states that “[t]he first time a member is involved in an alcohol incident, except those described in Article 2.B.6. of this Manual, the commanding officer shall ensure this counseling is conducted [and documented on a Page 7]. ... This entry is in addition to that required by Article 2.B.5.” This article further states that the member shall be counseled on Coast Guard policy regarding alcohol abuse and warned that a second alcohol incident will result in their being processed for separation from the Coast Guard.

Article 2.B.8.b. of COMDTINST M1000.10 states, “Enlisted members involved in a second alcohol incident will normally be processed for separation.” Under Article 2.B.8.b.(1), the member’s CO may request to retain a member after a second alcohol incident in exceptional circumstances. Members must be discharged following a third alcohol incident. Art. 2.B.9.

Non-Judicial Punishment

Article 1.E.7. of the Military Justice Manual states that a CO who imposes NJP authority to remit or set aside the punishment. NJP is remitted when a CO decides not to carry out NJP that has not yet been executed. NJP that is set aside “is the equivalent of the member never hav-

ing been punished” at all, and the authority “should be exercised only within a reasonable time after the punishment has been executed (four months absent unusual circumstances).”

Restoration of Rate

Article 3.A.14.b.(7) of COMDTINST M1000.2 states the following about restoring a member’s rate following NJP:

(a) Article 15, Uniform Code of Military Justice (UCMJ). Article 15, UCMJ, and paragraph 134, Manual for Courts Martial (MCM) and the Military Justice Manual, COMDTINST M5810.1 (series), provide commanding officers with authority to set aside, remit, mitigate, or suspend within four months of its imposition, a punishment of reduction in rate imposed under Article 15, UCMJ, without reference to the Commandant....

(b) Commander (CG PSC-EPM) Action. Article 3.A.27. of this Manual provides guidance in recommending personnel for restoration in rate not covered above. If the restoration is approved by Commander (CG PSC-EPM), the effective date of the restoration and eligibility date for subsequent advancement will be contained in the approval letter.

Article 3.A.27.b. states the following about restoring a member’s rate that was reduced as punishment:

(1) Advancement after Reduction. Members who have been reduced in rate, except those who fall within the provisions of Articles 15(d) and 15(e) of the Uniform Code of Military Justice, are subject to the normal advancement system, unless they are considered by their commanding officers to be deserving of special advancement.

(2) Recommendation for Restoration/Advancement. Commanding officers who consider enlisted members to be deserving of restoration to a formerly held rate, or deserving of advancement, but to a rate lower than formerly held, may recommend such restoration or advancement by letter to Commander (CG PSC-EPM). In making such a recommendation, the present commanding officer shall set forth in detail a full justification of the action recommended based on at least 5, but not more than 36, months observation of performance of duty by the member concerned since reduction in rate. The observation time need not be totally at the present unit, but must take place within the same period of enlistment. ...

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 applicant’s reduction in rate at mast and incurrance of the second alcohol incident.

2. The applicant asked the Board to remove from his record the Page 7 dated March 28, 2011, documenting his first alcohol incident and to restore him in rate to BM1/E-6. He alleged that the alcohol incident and his reduction in rate are erroneous and unjust. 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.² 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.”³

3. The Board finds no grounds for removing the applicant’s first alcohol incident from his record. The fact that the State declined to prosecute most of the offenses and that he was awarded only probation for the assault charge does not prove that his CO erred in finding that he had incurred an alcohol incident as defined in Article 1.A.2.d.1. in COMDTINST M1000.10. The definition of an alcohol incident does not require the member to have been convicted of any charge. The Board finds that the applicant has not proven by a preponderance of the evidence that his CO erred or committed injustice in finding that his consumption of alcohol was a significant or causative factor in his arrest on multiple charges, including public intoxication and resisting arrest, on March 18, 2011, and that his conduct brought discredit upon the Coast Guard. Therefore, the applicant’s request for the removal of his first alcohol incident should be denied.

4. The applicant alleged that the Coast Guard’s refusal to restore his rate is erroneous and unjust. The record shows that the reduction in rate was originally awarded at mast on November 29, 2010, when the applicant was punished for misusing his travel card after having already been punished for misusing it in 2005. His CO suspended the reduction in rate on condition of good behavior for six months, but the applicant incurred an alcohol incident on March 18, 2011, and so the suspension was vacated and the reduction in rate enforced at another mast on March 28, 2011. After this first alcohol incident, the record indicates that the applicant committed no further misconduct, worked very hard, and performed well for almost seventeen months, until August 2, 2013. His CO apparently refused to set aside his reduction in rate within four months of the March 2011 mast, as permitted under Article 1.E.7. of the Military Justice Manual, but later supported the applicant’s request to have his rate restored after the applicant submitted monthly documentation showing his hard work and achievements for several months. Once more than four months had passed, however, the authority to restore the applicant’s rate if he was “deserving of special advancement” lay with EPM.⁴ The record shows that EPM found that he was not “deserving of special advancement,” refused to restore his rate, and advised him to compete for his re-advancement based on his successive masts for misconduct.

5. In light of the applicant’s misconduct in 2010 and 2011, the Board finds that he has not proven by a preponderance of the evidence that the Coast Guard committed an error or injustice by not restoring his rate even though he performed very well for almost seventeen months after his reduction in rate. In this regard, the Board notes that his NJP on November 29, 2010, was awarded for misconduct—misusing his travel card—that the Coast Guard had already had to punish him for in 2005 and that, even though his CO suspended his reduction in rate for six months, the applicant failed to take advantage of that grace period and incurred an alcohol incident on March 18, 2011.

² 33 C.F.R. § 52.24(b).

³ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁴ U.S. Coast Guard, COMDTINST M1000.2, Articles 3.A.14.b.(7) and 3.A.27.b.

6. Accordingly, the applicant's requests should be denied because he has not proven by a preponderance of the evidence that either his alcohol incident in March 2011 or his reduction in rate to GM2 is erroneous or unjust.⁵

(ORDER AND SIGNATURES ON NEXT PAGE)

⁵ *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (defining "injustice" as used in 10 U.S.C. § 1552(a) as "treatment by the military authorities that shocks the sense of justice, but is not technically illegal.").

ORDER

The application of [REDACTED], USCG, for correction of his military record is denied.

August 22, 2014

