

**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. 2014-069**

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**FINAL DECISION**

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. After receiving the applicant's completed application on March 5, 2014, the Chair docketed the case and assigned it to ██████████ to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 3, 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, ██████████ serving on active duty, asked the Board to remove from her record a negative CG-3307 Administrative Remarks ("Page 7"),<sup>1</sup> dated November 7, 2008, documenting an "alcohol incident."<sup>2</sup> The applicant stated that in 2006 she received non-judicial punishment<sup>3</sup> (NJP) from the Officer in Charge (OIC) of her duty station in Ohio for a "situation involving alcohol." The applicant alleged that the OIC never determined that the situation was

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

<sup>2</sup> Article 20.A.2.d.1. of the Coast Guard Personnel Manual (COMDTINST M1000.6A) in effect in 2007 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."

<sup>3</sup> Military Justice Manual, COMDTINST M5810.1D, 1.A.6.a. Nonjudicial in Nature – Punishment imposed under Article 15, UCMJ is called "Nonjudicial Punishment" to distinguish it from punishment imposed by court-martial, which is "judicial punishment." Nonjudicial punishment may also be referred to as "NJP," "Captain's Mast," "Mast," or "Article 15 Punishment." A commanding officer's decision to impose NJP does not constitute a judicial finding of guilt and is not a "conviction." A member does not have a "criminal record" as a result of the imposition of NJP. This distinction preserves a member's record from the stigma of conviction while still giving a commanding officer a prompt and efficient tool to maintain good order and discipline at the unit. It is equally important to note that while NJPP is an administrative process, as opposed to a criminal process, in order to punish an individual under Article 15, UCMJ the mast authority must determine that the member committed an offense (or crime) as defined by the UCMJ.



an alcohol incident and did not record it as such in her record. The applicant stated that in 2008, two years after the “situation involving alcohol,” during an overseas screening at Training Center Petaluma in California, the court memorandum documenting the NJP was discovered in her record, and the Training Center personnel entered a Page 7 in her record documenting the 2006 incident as an alcohol incident. The applicant alleged that the 2008 determination that an alcohol incident had occurred was contrary to the decision made in 2006 by her OIC, who chose not to document an alcohol incident in her record. The applicant stated that due to the length of time between the alcohol situation and the Page 7 dated November 7, 2008, and the way in which the Page 7 was written, she is unable to request removal of the alcohol incident from her record. The applicant cites Article 2.B.10.b. of COMDTINST M1000.10 to support her allegation that she is unable to request the removal of the alcohol incident from her record. She also stated that:

Additionally, per COMDTSINST 1000.14B this 3307 should have been destroyed by PSC-PSD-MR upon receipt as it is an unauthorized 3307. This is due to the extensive modifications it took to capture the situation and due to the fact that it was signed by the Training Center Administration Officer and not the Commanding Officer as prescribed in PPCINST M1000.2B.

### SUMMARY OF THE MILITARY RECORD

The applicant enlisted in the Coast Guard on September 13, 2005. On November 8, 2005, the applicant received a Page 7 stating that she was “given the Substance Abuse Free Environment (SAFE) course by the MLCLANT Addiction Prevention Specialist (APS) assigned to TRACEN Cape May ... in compliance with Article 2-E-4-C, Coast Guard Health Promotions Manual, COMDINST M6200.1.” The applicant signed the Page 7 acknowledging that she both read and understood the statement.

On February 22, 2006, the applicant received NJP under Article 15 of the Uniform Code of Military Justice (UCMJ), for an incident that had occurred on January 26, 2006. The charge sheet states the following:

#### OFFENSE NARRATIVE:

ARTICLE 92: Failure to obey other lawful written order issued by BMC ..., OINC, CG Station ... Organization and Regulations Manual, Section 4, Part 4107, An order which it was her duty to obey, did onboard Wright Patterson AFB on 26 JAN 2006 Fail to do the same by wrongfully consum[ing] alcoholic beverages while being under the age of 21 years old, the legal drinking age in the State of Ohio.

ARTICLE 111: Drunken operation of vehicle. In that [applicant], USCG, did on 26 JAN 06, in the vicinity of the Wright AFB, OH, operate her personal motor vehicle while drunk. Her BAC was listed at a .094.

#### SENTENCE NARRATIVE:

Restricted to Station ... for 14 days, Forfeiture: Forfeit 3 days pay per month for one month, extra duties for 14 days. 7 days extra duties, 7 days extra duties and forfeiture of 1.5 days suspended for 6 months.

As a result of the NJP, the applicant lost her eligibility for a Good Conduct Medal. The record states that her new date of Good Conduct eligibility is February 23, 2009.<sup>4</sup>

There is no other documentation in the applicant's record referring to the incident that occurred on January 26, 2006, until November 7, 2008, when the applicant received a Page 7 regarding the incident. The applicant signed the Page 7 indicating that she acknowledged receiving it. It states the following:

7 NOV 08: During a review of your PDR it was discovered that you received Nonjudicial Punishment for an alcohol incident that occurred on 26 January 2006. This incident was not properly documented nor was evidence of the required screening.

On 26 January 2006 the vehicle you were driving was stopped by Wright Air Force Base Police. You were given a breath test with an Alco Sensor which resulted in a BAC reading of 0.94. In addition to receiving a DUI it is noted that you were still under the legal drinking age at the time.

You were evaluated by TRACEN medical officer LT ..., PAC, MPAS, USCG on 5 November 2008. It has been determined that you do not meet the diagnostic criteria for Substance Abuse or Substance Dependence. Due to your DUI you are required to attend IMPACT training. No further action pending.

Your actions showed extremely poor judgment, brought discredit to the U.S. Coast Guard, and could [have] resulted in severe injury or loss of life. You [were] counseled on [policies] concerning alcohol use/abuse and the serious nature of this incident.

This is considered your first alcohol incident for documentation purposes. Since your actions brought discredit to the Coast Guard, you are not eligible to have this incident removed from your permanent record after three years or any time after that. Any further incidents will result in you being processed for separation as per chapter 20 of the Personnel Manual, CONDTINST M1000.6 (series).

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

On July 3, 2014, the Judge Advocate General (JAG) submitted an advisory opinion recommending that the Board grant relief in this case in accordance with the findings and analysis provided in a memorandum submitted by the Commanding Officer, Coast Guard Personnel Service Center (PSC).

In its memorandum, PSC stated that the applicant's OIC at the time of the incident in 2006 either determined that an alcohol incident had not occurred and therefore there was no need to document it as such, or the OIC did not document the alcohol incident in accordance with the Personnel Manual, COMDTINST M1000.6A, Article 20.B.2.g. PSC states that the Administrative Officer at Training Center Petaluma, who conducted the applicant's overseas screening, lacked the authority to make a determination on whether an alcohol incident had occurred since the incident occurred almost three years prior to the applicant moving to the new Command. PSC also noted that the Page 7 was signed by the Administrative Officer, and not by the Com-

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<sup>4</sup> There is an additional comment on this review that states that in accordance with "LTR 1000" dated August 24, 2006, from the Station OIC, the applicant's record was amended to correct the factor "recommended for advancement" from "recommended" to "not recommended" due to an administrative error during the disciplinary EER submission. This statement was signed by a YN1 at PSC (ADV) on August 25, 2006.



manding Officer or the OIC as defined in COMDTINST M1000.6A, Article 20.A.2.f. PSC stated that for these reasons, the applicant's request should be granted and the Page 7 should be removed from her record.

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

On July 24, 2014, the Chair of the BCMR sent the applicant a copy of the Coast Guard's views and invited her to respond within thirty days. The BCMR did not receive a response.

### **APPLICABLE LAW AND POLICY**

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 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 20.A.2.d.2. of the Personnel Manual specifically states that "the member must actually consume alcohol for an alcohol incident to have occurred."

Article 20.A.4.e.1. of the manual states that with regard to alleged DUI's, "Commanding Officers are responsible for conducting adequate inquiries into incidents of alleged DUI, and for taking remedial action, if necessary, in accordance with this article."

Article 20.A.4.e.2. of the manual states that "[t]hose personnel who are convicted in the civilian or military courts, receive non-judicial punishment, or have a civil revocation/suspension of driving privileges for DUI or other offenses meeting the definition of an alcohol incident, shall be referred for medical screening per 20.B. ..."

Article 20.A.4.e.3.c.1. of the manual states that with regard to enlisted members, "[a] special Enlisted Performance Evaluation to reflect a civil conviction, a military conviction, or the award of non-judicial punishment for occurrences of DUI is required by Section 10.B. Alcohol incidents must also be documented in the member's PDR per Article 20.B.2."

Article 20.B.2.e. of the manual states that "[a]ny member who has been involved in an alcohol incident or otherwise shown signs of alcohol abuse shall be screened in accordance with the procedures outlined in the Coast Guard Health Promotion Manual, COMDTINST M6200.1 (series)." This article further states that "[t]he results of this alcohol screening shall be recorded and acknowledged on a CG-3307 entry or letter, as appropriate, in the member's PDR with a copy to Commander (CGPC-epm) or (CGPC-opm), as appropriate, and (CGPC-adm-3). 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 20.B.2.g. of the manual explains the process to be followed when the alcohol incident is a "first alcohol incident." The article states that [t]he first time a member is involved in

an alcohol incident, except those described in Article 20.B.2.f., the commanding officer shall ensure this counseling is conducted; for enlisted members recorded on a CG-3307 entry in the member's PDR; acknowledged by the member; and a copy sent to Commander (CGPC-epm) and (CGPC-adm-3).” This entry is in addition to that required by Article 20.B.2.e. Article 20.B.2.g. also states that “[t]he member shall be counseled on Coast Guard policy on alcohol abuse contained in this article.”

Article 20.B.2.g.3. of the Personnel Manual further explains that “[i]f the incident involves underage consumption, the CG-3307 shall also state the circumstances of the incident and whether the consumption affected the member's ability to perform assigned duties or brought discredit upon the Uniformed Services (See Article 20.B.2.j.).”

Article 20.B.2.j. of the manual states that “[u]nderage drinking is considered an alcohol incident. Should an incident occur, the CDAR shall counsel the member and initiate an alcohol screening as detailed in the Health Promotions Manual, COMDTINST M6200.1 (series). If this is not the member's first incident, discharge proceedings shall commence as described in Article 20.B.2.g. and 20.B.2.h.” This provision further explains that “[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 (CGPC) 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.”

## 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 10 U.S.C. § 1552.
2. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice. Also, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service and begins upon the date of discharge from active duty.<sup>5</sup>
3. The applicant, who is currently on active duty, states that the date of discovery for the alleged error or injustice was January 28, 2014. Because the applicant has remained on active duty since 2005, the three-year limitations period is tolled. Therefore, the application is timely.
4. The applicant alleged that the inclusion of the Page 7 dated November 7, 2008, documenting an incident that occurred at another command in 2006 as an “alcohol incident” is erroneous and unjust because her prior OIC did not make the determination. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed

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<sup>5</sup> *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994).

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>6</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>7</sup>

5. Under 10 U.S.C. § 1552, the Board is authorized to "correct an error or remove an injustice" in any Coast Guard military record. "Error" means a mistake of a significant fact or law and includes a violation by the Coast Guard of its own regulations.<sup>8</sup> For the purposes of the BCMRs, "injustice" is sometimes defined as "treatment by the military authorities that shocks the sense of justice but is not technically illegal."<sup>9</sup> The Board has authority to determine whether an injustice exists on a "case-by-case basis."<sup>10</sup> Indeed, "when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate,"<sup>11</sup> and "[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious."<sup>12</sup>

6. Article 20.B.2.g. of the Personnel Manual states that once a clear determination has been made that a member has incurred an alcohol incident, if it is the member's first alcohol incident, the commanding officer shall ensure that the member is counseled and that the counseling is recorded on a Page 7 in the member's PDR. Under Article 20.A.2.f., an OIC has the same authority as a commanding officer to make this determination. Given the definition of an alcohol incident in Article 20.A.2.d.1., in 2006, the applicant's OIC should have documented the applicant's underage drinking and DUI as an alcohol incident but did not do so. At that time, the applicant should have received a Page 7 documenting the alcohol incident and the subsequent required alcohol screening. While the OIC failed to follow Coast Guard policy in 2006, the Administrative Officer of the Training Center in 2008 lacked the authority to correct this oversight by the OIC and make the determination that the applicant had incurred an alcohol incident. Coast Guard policy does not allow for the retroactive application of the policy regarding alcohol incidents once a member has transferred to a new command.

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<sup>6</sup> 33 C.F.R. § 52.24(b); see Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

<sup>7</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>8</sup> See *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) ("Error" means legal or factual error.); *Ft. Stewart Schools v. Federal Labor Relations Authority*, 495 U.S. 641, 654 (1990) ("It is a familiar rule of administrative law that an agency must abide by its own regulations.").

<sup>9</sup> *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); but see 41 Op. Att'y Gen. 94 (1952), 1952 WL 2907 (finding that "[t]he words 'error' and 'injustice' as used in this section do not have a limited or technical meaning and, to be made the basis for remedial action, the 'error' or 'injustice' need not have been caused by the service involved.").

<sup>10</sup> Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

<sup>11</sup> *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)).

<sup>12</sup> *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).



7. The applicant has proven by a preponderance of the evidence that the Page 7 dated November 7, 2008, was erroneously entered in her record and therefore should be removed from it. In addition to the NJP, the applicant should have received a Page 7 documenting the alcohol incident and should have been properly counseled in accordance with the Personnel Manual. Also, the Administrative Officer at Training Center Petaluma, who reviewed the applicant's record as part of the applicant's overseas screening, lacked the authority to determine that the applicant's conduct constituted an alcohol incident. It must be noted that while the OIC failed to properly record the alcohol incident on a Page 7 at the time of the incident in 2006, this in no way has any effect on the NJP the applicant received, and the documentation of the NJP the applicant was awarded for this conduct will remain in her record.

8. Accordingly, the Board finds that the applicant's request for correction of her military records should be granted.

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

**ORDER**

The application of [REDACTED], USCG, for correction of her military record is granted. The Coast Guard shall remove from her record the alcohol incident documented on a Page 7 dated November 7, 2008.

October 3, 2010

