

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-078

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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 27, 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, who was on active duty when he applied to the Board, asked the Board to remove from his record a negative CG-3307 Administrative Remarks ("Page 7"),¹ dated January 15, 2013, documenting an "alcohol incident"² and all other documentation associated with the alcohol incident, which include two Page 7s dated March 6 and 12, 2013, documenting his referral for alcohol screening. On September 8, 2012, the applicant was arrested and charged with Breach of Peace. The applicant alleged that the charges were later dismissed by the State and so the Page 7 documenting the alcohol incident is erroneous and unjust. He alleged that the Page 7 is also erroneous and unjust due to the length of time—more than four months—that it took his command to make the determination that the applicant had incurred his first alcohol incident. The applicant alleged that this delay violated his administrative due process in large part because he "constantly asked the command what or if any punishment was going to occur with no answer." The applicant also stated the following:

¹ 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.

² Article 1.A.2.d. of the Coast Guard Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10 (series), 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."

When I received the alcohol incident I asked the command why I was receiving it with a response of the command giving me the benefit of the doubt that I had not consumed alcohol. Ultimately the commanding officer called the arresting officer and based that decision solely on what the arresting officer had stated. The Page 7 is dated for signature as January 15th 2013 however I had not officially signed the document until the following month. This process could have adversely affected my career because had I self referred I would have received an alcohol incident regardless for violating my aftercare plan of abstaining from alcohol since being diagnosed alcohol dependent from 2008. The amount of time to make a decision to me seems negligent and should not reflect badly in my service record for the purpose of "due process" that I deserve. Most alcohol incidents are documented either immediately or within 45 days it occurred. The aftercare plan page seven is dated another month from signing the alcohol incident. The Health Promotion manual states I must see a CDAR within 72 hours from acknowledging my alcohol incident. My character of self-referring myself shows that I have no reason to deny consuming alcohol when I was arrested which did not occur. I have not been able to find out how much time the command needs to take on this but a 4-6 month period seems extensive and I believe this administrative action is irrelevant and detrimental to my career. I was not administered a breathalyzer test or a blood test to determine my BAC.

SUMMARY OF THE MILITARY RECORD

The applicant enlisted on active duty in the Coast Guard on May 30, 2000, and signed a Page 7 acknowledging having received an explanation of the Coast Guard's alcohol policies on the same date. He earned the [REDACTED] rating, and advanced to first class petty officer (E-6).

On April 23, 2008, the applicant self-referred and was diagnosed as alcohol dependent. At that time, the applicant completed a treatment program where he was prescribed an aftercare plan that required "indefinite abstinence from alcohol."

First Alcohol Incident

On January 15, 2013, the applicant received a Page 7 regarding an alcohol incident that occurred on September 8, 2012. The Page 7 specifically states the following:

I have determined that you had an alcohol incident on 08 SEP 12 when your abuse of alcohol was a significant or causative factor in behavior leading to your arrest for breach of peace At 0452 that date, the ... Police Dept responded to your residence for a report of a domestic disturbance. The responding officer reported a strong smell of alcohol on your breath, slurred speech, and impaired coordination. Based on his observations and investigation, the responding officer placed you under arrest for breach of peace.

The applicant was also notified that since he had been previously diagnosed as alcohol dependent after a self-referral, this incident constituted a relapse during the aftercare phase of his earlier treatment plan. He was also informed that the unit Command Drug and Alcohol Representative (CDAR) would arrange an appointment with a provider who would reinstate a new aftercare program for the applicant. Also, pursuant to Coast Guard policy, the applicant was informed that this incident would be considered his first documented alcohol incident and that any further incidents would result in his being processed for separation in accordance with Article 1 of the Military Separations Manual, COMDTINST M1000.4. The applicant signed and

acknowledged the Page 7 on February 19, 2013. This is the alcohol incident that the applicant has challenged in his application.

Second Alcohol Incident

Three days before filing his application with the Board, the applicant received a second alcohol Incident. The Page 7, dated February 25, 2014, states that the applicant received an alcohol incident when “[his] abuse of alcohol was determined to be a significant and/or causative factor in behavior leading to [his] arrest for domestic violence charges.” The Page 7 provides the following additional details pertaining to the applicant’s second alcohol incident:

On that date, the ... Police Dept responded to your residence after a 911 hangup. Based on their interviews, the responding officers placed you under arrest for the misdemeanors disorderly conduct and strangulation. These charges are currently pending disposition in civil court. The police report indicates you were under the influence of alcohol when officers arrived at your home. This command called one of the arresting officers to confirm his observations and he reiterated that you were, in fact, under the influence of alcohol at the time of your arrest.

The applicant was also notified that this second alcohol incident constituted a relapse during the aftercare phase of his treatment plan. Since this was the applicant’s second documented alcohol incident, he was notified that he would be processed for separation per Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10. The applicant refused to sign the Page 7.

Third Alcohol Incident

While his BCMR application was pending, the applicant received a third alcohol incident, documented on a Page 7 dated June 5, 2014. The Page 7 states that the applicant’s “abuse of alcohol was determined to be a significant and/or causative factor in behavior leading to [his] arrest on 24MAY14 for driving under the influence” The Page 7 further states that at that time, the charges were currently pending disposition in civil court.

The applicant was also notified that this was to be considered his third documented alcohol incident. The Page 7 further states that the applicant was being processed for separation from the Coast Guard per Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10. The applicant signed and acknowledged the Page 7 on June 10, 2014.

Following the third alcohol incident, the applicant received a general discharge “under honorable conditions” from the Coast Guard on August 11, 2014. The narrative reason for separation on the applicant’s DD-214 states that the separation was for “miscellaneous/general reasons.” The applicant was also given a reentry code of RE-4 (not eligible for reenlistment).

VIEWS OF THE COAST GUARD

On July 11, 2014, the Judge Advocate General (JAG) submitted an advisory opinion recommending that the Board deny relief in this case in accordance with the findings and analy-

sis provided in a memorandum submitted by the Commanding Officer, Coast Guard Personnel Service Center (PSC).

In its memorandum, PSC stated that the applicant requests removal of documentation of his alcohol incident dated September 8, 2012 based on his allegation that the command would not reveal their intentions to him and that the command waited approximately four months before officially determining that the incident on September 8, 2012, was the applicant's first alcohol incident. The applicant stated that during this time all charges pertaining to the alcohol incident were dropped. However, pursuant to Coast Guard policy, PSC alleged, the applicant's commanding officer (CO) determined that alcohol was a "significant and or causative factor" in behavior that brought discredit upon the Coast Guard. PSC noted that a member who has received an alcohol incident does not have to have been found guilty in a civilian court for this to be deemed an alcohol incident.

The JAG also noted the following in his opinion:

I note, as does PSC ..., that pursuant to Coast Guard policy, a member need not be found guilty in a civilian court for an alcohol incident to have occurred. The [municipal] police statement indicating that the applicant had a strong smell of alcohol on his breath, slurred speech, and impaired coordination is sufficient to establish that by the preponderance of the evidence the applicant consumed alcohol. The fact alcohol was a significant or causative factor in the applicant being arrested is in itself service discrediting, and is more than sufficient to establish an alcohol incident.

Therefore, the JAG argued, applicant's alcohol incident documentation is within Coast Guard policy and should not be removed.

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 him to respond within thirty days. The BCMR did not receive a response.

APPLICABLE LAW AND POLICY

Article 1.A.2.d. of the Coast Guard Drug and Alcohol Abuse Program Manual, COMDT-INST M1000.10 (series), 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." The article also states that for an alcohol incident to have occurred, the member must have actually consumed alcohol.

Article 2.B.5.a. of the manual provides guidance with regard to alcohol screenings and 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 reference (a), Coast Guard Health Promotion Manual, COMDTINST M6200.1 (series), Ch 2, or in Article

1.D. of this Manual for inactive duty reservists. The results of this alcohol screening shall be recorded and acknowledged on an Administrative Remarks, Form CG-3307, entry or letter, as appropriate, in the member's PDR." Article 2.B.5.b. states that with regard to members who self-refer for alcohol abuse, "[u]nless there is an associated alcohol incident, the member may request removal of the screening letter and treatment plan from his or her Personnel Data Record after successfully completing the prescribed aftercare. A permanent record of the screening and treatment will be kept only in the member's Health Record in accordance with reference (a), Coast Guard Health Promotion Manual, COMDTINST M6200.1 (series)."

Article 2.B.7.c. of the manual explains the impact of future alcohol incidents when a member has received a first alcohol incident. The article states that "[e]nlisted members will be advised an additional incident normally will result in discharge and, a statement shall be made that the member has been involved in his or her first alcohol incident and a subsequent incident normally will result in separation action."

Article 2.B.8. of the manual states that when an enlisted member is involved in a second alcohol incident, the enlisted member will normally be processed for separation in accordance within Article 1.B.15. of the Military Separations Manual, COMDTINST M1000.4 (series).

Article 2.B.9. of the manual states that "[e]nlisted members involved in a third alcohol incident shall be processed for separation from the Service under Article 1.B.15 of reference (c), Military Separations, COMDTINST M1000.4 (series)."

Article 2.B.11. of the manual states that "[m]embers refusing to undergo the treatment the commanding officer and competent medical authority deem necessary, failing to complete this treatment, or violating an alcohol rehabilitation aftercare plan normally are processed for separation." In addition,

[m]embers that self-refer for an alcohol screening that are identified as alcohol dependent, as defined in the Diagnostic and Statistical Manual of Mental Disorders ((303.9) DSM IV), must attend and successfully complete an appropriate treatment program for chemical dependency. Because self-referred members are not identified as the result of an alcohol incident they are granted consideration for self-referring should a relapse occur during the aftercare phase of their treatment plan. The relapse will be documented as their first alcohol incident and a new aftercare program will be reinstated effective the date the relapse was identified. Should the self-referred member fail to complete the second aftercare plan they will be processed for separation per reference (c), Military Separations, COMDTINST M1000.4 (series).

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 limi-

tations 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.³

3. The applicant, who had not yet been discharged when he applied to the Board, stated that the date of discovery for the alleged error or injustice was February 28, 2014. Because the applicant was on active duty at the time he filed his application, the three-year limitations period was tolled up until his date of discharge on August 11, 2014. Since the applicant was discharged on August 11, 2014, his application falls within the three-year limitation period and therefore the application is timely.

4. The applicant argued that the alcohol incident that occurred on September 8, 2012, which was documented on a negative Page 7 dated January 15, 2013, and all documents associated with that alcohol incident should be removed from his record because the length of time that it took for the command to reach a decision on whether this would be considered the applicant's first alcohol incident made the incident unjust. The applicant also stated that he believed his due process was violated by the command refusing to communicate their intentions with him during the four-month period. 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.⁴ 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."⁵

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.⁶ For the purposes of the BCMR, "injustice" is sometimes defined as "treatment by the military authorities that shocks the sense of justice but is not technically illegal."⁷ The Board has authority to determine whether an injustice exists on a "case-by-case basis."⁸ Indeed, "when a correction board fails to correct an

³ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994).

⁴ 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)).

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 *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.").

⁷ *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.").

⁸ Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

injustice clearly presented in the record before it, it is acting in violation of its mandate,”⁹ and “[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious.”¹⁰

6. The applicant argued that the alcohol incident and the associated documentation should be removed from his record because the length of time it took for the command to make its determination and the command’s alleged failure to communicate their intentions with him throughout the determination process was unjust and violated his due process. This argument is without merit. The record shows that in accordance with Article 1.A.2.d. of the Coast Guard Drug and Alcohol Abuse Program Manual, the applicant’s CO made the determination that he had incurred his first alcohol incident because his consumption of alcohol was a “significant or causative factor that result[ed] in the member’s loss of ability to perform assigned duties, [brought] discredit upon the Uniformed Services, or [was] a violation of the Uniform Code of Military Justice, Federal, State, or local laws.” The CO determined that alcohol played a “significant or causative factor” in the applicant’s arrest for Breach of Peace. During the incident, the responding police officer noted that that the applicant had a strong smell of alcohol on his breath, had slurred speech, and impaired coordination.

7. The applicant also argued that the alcohol incident is erroneous and unjust because the Breach of Peace charges against him were later dismissed. However, under Article 1.A.2.d. of the Coast Guard Drug and Alcohol Abuse Program Manual, 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.” Therefore, the fact that the charges against the applicant were subsequently dismissed does not prove he did not incur an alcohol incident under Coast Guard policy.

8. The applicant has failed to prove by a preponderance of the evidence that the alcohol incident and disputed Page 7s documenting his first alcohol incident and alcohol screening are erroneous or unjust. The Page 7s are required documentation under Coast Guard policy in the Drug and Alcohol Abuse Program Manual, which also requires separation processing when a member incurs a second or third alcohol incident, as the applicant did before he was discharged on August 11, 2014.

9. Accordingly, the applicant’s request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁹ *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)).

¹⁰ *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).

ORDER

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

October 3, 2010

