

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2015-078

██████████
██████████

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 applicant's completed application on March 25, 2015, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 5, 2016, 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 ██████████ on active duty, asked the Board to remove from his record a CG-3307 ("Page 7") Administrative Remarks form¹ documenting his involvement in an "alcohol-related situation" on April 9, 2009. The disputed Page 7, dated May 6, 2009, is signed by the applicant's commanding officer (CO) and states the following:

On 09 APR 09 you were involved in an alcohol-related situation at a unit sponsored Morale Event at ██████████ ██████████. As part of a large group of coworkers in which excessive drinking occurred, several members of the group performed actions that were in direct violation of the UCMJ and our core values. Although it was determined that you were not personally involved in any misconduct, it is imperative that you understand how this type of behavior affects the unit and our service. Not only is this behavior not allowed for yourself, you have a responsibility to warn others and report violations to your chain of command.

This is not considered an alcohol incident, but is entered in your record for documentation purposes only. You have been advised of the contents of Chapter 20, Personnel Manual, COMDTINST M1000.6 (series) concerning conduct expected of Coast Guard personnel.

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.

The applicant, who was then a first class petty officer, acknowledged receipt of this counseling by his signature.

The applicant alleged that when he received the Page 7, he was told that it “would not be placed in my record and that it would be considered as an in-house matter.” Therefore, he did not check his record until February 2015, when he was applying for an appointment as a chief warrant officer (CWO), and the Page 7 was in his record when the CWO selection board convened on April 6, 2015. The applicant asked the Board to remove the disputed Page 7 so that it would not hamper his advancement opportunities. In support of this request, the applicant submitted letters from the officer who was his supervisor in 2009 and from his current CO:

- The supervisor, now a commander, stated that she supervised the applicant until the applicant’s transfer to another unit in 2010. She stated that “[t]he Command’s intention, which I was party to the discussion, was to use the administrative remarks as a counseling tool and not to submit the document to the member’s permanent file unless there was a repeated pattern of disrespect for the rules and Coast Guard values; this did not occur with [the applicant]. This document should not have been submitted to [his] permanent record. ... Allowing this document to remain in his permanent record may unjustly impact the member’s career advancement opportunities.”
- The applicant’s current CO, a lieutenant commander, stated that he supports the applicant’s request to have the Page 7 removed. The CO described the applicant’s current, highly responsible duties and workload, which “he performs exceptionally.” The CO stated that the applicant has “distinguished himself in his leadership and management of the unit’s enlisted workforce” and that he is “a role model of junior enlisted.” The CO stated that he had designated the applicant as the unit’s Command Chief because of his honesty, expertise, and leadership and that, based on the information presented, he believes that the Page 7 was not supposed to be entered in the applicant’s record.

APPLICABLE REGULATIONS

Article 20.B.2.d. of the Personnel Manual in effect in 2009 stated the following about “alcohol-related situations”:

An alcohol-related situation is defined as any situation in which alcohol was involved or present but was not considered a causative factor for a member's undesirable behavior or performance. A member does not have to consume alcohol to meet this criterion, e.g., purchasing alcohol for minors. Commands shall not use the term “alcohol related situations” when a member's behavior clearly meets the criteria of an “alcohol incident.”^[2] Members involved in alcohol related situa-

² Article 20.A.2.d.1. of the Coast Guard Personnel Manual in effect in December 2010, 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.” U.S. Coast Guard, COMDTINST M1000.6A, Personnel Manual (Change 41, June 2007). Article 20.B.2.g. requires an alcohol incident to be documented on a Page 7 in the member’s record. Under Article 20.B.2 h.2., members who receive a second alcohol incident are normally processed for separation.

tions shall be counseled on their use of alcohol and informed of the conduct expected of Coast Guard members. Commanding officers are strongly encouraged to consider whether screening and/or alcohol awareness training such as IMPACT is appropriate. Commanding officers shall document such occurrences with an appropriate Administrative Remarks (CG- 3307) entry in the member's Personnel Data Record (PDR). Documentation of alcohol related situations provides commands with significant background information for determining whether any administrative or medical action is necessary.

VIEWS OF THE COAST GUARD

On October 2, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief and adopting the findings and recommendations provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

PSC stated that the disputed Page 7 was properly prepared in accordance with regulation when he failed to warn others involved in misconduct and to report violations to his command. PSC noted the applicant's arguments about not being the most senior person present and being unaware of any misconduct until the next day but submitted the following statement from the CO who signed the Page 7:

I do not support removing this P-7 from [the applicant's] record. ... [Following the incidents in ██████████], an admin investigation was conducted. The investigation revealed a number of issues that required the command's attention. Some of these issues involved [the applicant] and several other military co-workers drinking excessively, "horseplaying" at ██████████ (in which a trash can was knocked over requiring CG & ██████████ staff intervention), and a fist fight between [the applicant] and another petty officer. After many discussions, it was decided that [the applicant's] behavior needed to be documented in his record. A number of options were considered such as NJP, alcohol incident, P-7, etc, and the command felt a P-7 was appropriate. We were sensitive to the career implications of NJP and an alcohol offense and since [the applicant] was not the instigator of the issues at ██████████ we felt a "soft blow" was appropriate. As CO of Military Personnel it was my responsibility to draft and sign the P-7.

[The applicant's] conduct was not in alignment with our Core Values and brought discredit to the Coast Guard. His excessive drinking and his behavior while at ██████████, and after the game, were worthy of documenting [in] his record. I did not personally counsel [him] on the P-7, so I am not aware of what he was told in regards to the P-7 (getting or not getting entered into his record). There were 8 total people that were identified in the investigation as being part of the various incidents that took place during this ██████████ day. 1 member was taken to court martial (████████ incident combined with previous misconduct), 1 member went to NJP & received an alcohol incident, 2 members ([the applicant] and another member) received P-7's in their record, and 4 members received P-7's but they were never entered into their records. The last 4 were used as counseling tools.

It is possible [the applicant] was told the P-7 was not going to be placed in his record. I have an e-mail from [his] department head that shows 6 members were counseled ([the applicant] was one of them) on May 6, 2009, and in this e-mail the department head requested that all 6 P-7's not be entered into the member's records. After this counseling session and after several command discussions, the same department head later recommended that [the applicant's] and another member's P-7 be entered into their records. I do not know if [he] was told of the decision that his P-7 was going to get entered into his record.

I believe the P-7 entry was appropriate and was the correct level of documentation. [The applicant] was not an innocent bystander. There was solid justification for entering his P-7 into his record and not the others.

PSC argued that the applicant has not proven that the Page 7 is erroneous or unjust. PSC also noted that the text of the Page 7 states that it would be entered in his record. PSC recommended that the Board deny relief because the CO prepared the Page 7 and entered it in the applicant's record in accordance with policy.

The JAG stated that in 2009, the applicant's CO properly documented the alcohol-related incident on a Page 7 in the applicant's record in accordance with the Personnel Manual. The JAG stated that a "member does not need to be personally involved in any misconduct for an alcohol-related situation to be deemed to have occurred." Moreover, the JAG noted, the applicant had been involved in a fist fight and although the CO decided that he had not incurred an "alcohol incident" because he was not the instigator the CO also decided that documenting his conduct as an "alcohol-related situation" in his record was appropriate. Therefore, the JAG concluded, the Board should deny relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 18, 2015, the applicant responded to the views of the Coast Guard. The applicant noted that in 2014, the Commandant abolished the policy regarding "alcohol-related situations," which "indicates that it may not have effectively served as originally intended." The applicant stated that he was counseled about the Morale Day events by his supervisor, who had admitted that he was told the Page 7 would not go in his record. He stated that the Page 7 was entered in his record without his knowledge and that it has prevented him from being selected for appointment to CWO three times. The applicant stated that if he had known the Page 7 was going in his record, he would have refused to sign it³ and sought the advice of his department head. The applicant alleged that his department head also did not intend for the Page 7 to be entered in his record and that "the unintentional filing of this document into my permanent record has resulted in a clear injustice, which has effectively destroyed any further opportunity for advancement." He stated that the selection board's counselor told him that the "only factor resulting in my inability to competitively compete is the 'alcohol situation' in my record." (The applicant's record also contains a Page 7 documenting an "alcohol incident" and a Court Memorandum documenting nonjudicial punishment (NJP) in 2002, when the applicant was arrested for DUI while underage.)

The applicant denied "drinking alcohol in amounts outside of Coast Guard policy" on April 9, 2009, and denied being present when the misconduct occurred at [REDACTED]. He stated that he undoubtedly would have stepped in to de-escalate the situation had he witnessed it. He alleged that he "was in fact an innocent bystander" that day and should not have received the Page 7.

³ When a member refuses to sign a Page 7, the refusal to sign is noted on the form, which may be entered in the member's record regardless of the refusal to sign. COMDTINST 1000.14.

Regarding the fist fight, the applicant stated that it occurred after the game, in the evening, and that it “was less of a ‘fight’ and more of an act of self-defense in response to an assault. The member in question subsequently received court martial for ‘sucker punching’ me. I was not the perpetrator or violator in this incident, rather a victim,” as he had testified at the member’s court-martial.

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. Although the applicant received the Page 7 in 2009, it is considered timely because he has continued serving on active duty.⁴

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.⁵

3. The applicant alleged that the Page 7 documenting an “alcohol-related situation” in his record is erroneous and unjust because he was an innocent bystander, because he did not drink excessively, because he was unaware of certain misconduct committed by other members, and because he was told the Page 7 would not be entered in his record. He also alleged that the Page 7 has prevented his selection for appointment to CWO and noted that the policy for alcohol-related situations has been removed from the manual. 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.⁶ 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.”⁷

4. The evidence shows that the applicant’s command conducted an investigation into the events of April 9, 2009, and found that eight members’ conduct warranted a response. One member was court-martialed in part for initiating a fist fight with the applicant that evening; another received NJP and an alcohol incident; and six were counseled on Page 7s documenting alcohol-related situations pursuant to Article 20.B.2.d. of the Personnel Manual then in effect. For these six, the CO prepared and signed the Page 7s, and the members’ supervisor(s) counseled

⁴ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, 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).

⁵ *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

⁶ 33 C.F.R. § 52.24(b).

⁷ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

them. Apparently, the applicant's supervisor led him to believe that the Page 7 would not be entered in his record, but after subsequent deliberations, the CO determined that the conduct of two of the six, including the applicant, warranted entering the Page 7 in their records.

5. The applicant has not proven by a preponderance of the evidence that the text of the Page 7 is erroneous or that his conduct did not warrant documenting in his record as an "alcohol-related situation." While he believes that he was merely an innocent bystander, based on the investigation, his CO clearly concluded to the contrary and decided that the Page 7 was justified and should be entered in his record in accordance with policy.

6. The applicant alleged that the Page 7 is unjust because he signed it believing it would not be entered in his record and because he did not learn that it was in his record until 2015, when he checked his record while applying for appointment to CWO. If the applicant had refused to sign the Page 7, pursuant to paragraph 8.1. of COMDTINST 1000.14 (series), the comment "member refused to sign" would have been entered in lieu of his signature, and his refusal to sign would not have prevented the Page 7 from being entered in his record. As the signature line on a Page 7 shows, members sign their own Page 7s as an acknowledgement of having received the counseling; their signatures are not required and do not indicate either agreement with or approval of the content of the Page 7.

7. The applicant alleged that he would have sought the advice of his department head had he been told the Page 7 was going in the record, but the CO's statement shows that the department head carefully considered the matter and could make only a recommendation to the CO because it was the CO's decision whether the Page 7 should be entered in the record:

It is possible [the applicant] was told the P-7 was not going to be placed in his record. I have an e-mail from [his] department head that shows 6 members were counseled ([the applicant] was one of them) on May 6, 2009, and in this e-mail the department head requested that all 6 P-7's not be entered into the member's records. After this counseling session and after several command discussions, the same department head later recommended that [the applicant's] and another member's P-7 be entered into their records. I do not know if [he] was told of the decision that his P-7 was going to get entered into his record.

I believe the P-7 entry was appropriate and was the correct level of documentation. [The applicant] was not an innocent bystander. There was solid justification for entering his P-7 into his record and not the others.

8. The applicant should have been notified that the Page 7 was being entered in his record, and he claims he was not, although the text of the Page 7 expressly states that it is going to be entered in his record. Assuming he was not notified, however, the Board is not persuaded that, had he been notified, he could have changed the CO's decision. The CO's assessment of the applicant's conduct on April 9, 2009, clearly differs from the applicant's own assessment, and the CO has strongly supported the retention of the Page 7 in the applicant's record.

9. The applicant alleged that the disputed Page 7 is unjustly preventing his selection for appointment to CWO. However, because he has not shown that his receipt of the Page 7 in 2009 was erroneous or unjust, the Board will not intervene in the selection process. Nor does the fact that the Commandant no longer authorizes Page 7s documenting "alcohol-related situations"

persuade the Board that a Page 7 issued properly under the policy in effect in 2009 is erroneous or unjust.

10. The applicant has not proven by a preponderance of the evidence that the Page 7 documenting an “alcohol-related situation” in his record is erroneous or unjust. Therefore, his request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

February 5, 2016

