

**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. 2015-079**



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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. The Chair docketed the case on April 14, 2015, upon receipt of the completed application, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 10, 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 former [REDACTED] E-4, asked the Board to remove from her record a negative CG-3307 Administrative Remark ("Page 7"), dated October 22, 2010, documenting an "alcohol incident." The Page 7 states the following in relevant part:

On 10 October 2010 while in Ready Reserve status you were involved in an alcohol incident. You were arrested by the [REDACTED] Police Department for operating under the influence (OUI) of alcohol, failure to stop for a police officer, and marked lanes violation. You were observed by Officer Wing to be crossing back and forth between lanes on route one north in [REDACTED]. Several different times you either hit the warning area or the sidewalk with such force to cause sparks and to lose both front hubcaps. You eventually pulled over to the side of the road and up onto the sidewalk where Patrolman [REDACTED] approached your vehicle and after talking to you noticed a strong odor of alcoholic beverage, he asked you to consent to some field sobriety tests and you refused. You were placed into hand cuffs and given your Miranda warnings. You were taken to the [REDACTED] Police Station and processed by Officer [REDACTED] who you gave consent to for a breath test with a result of 0.22%. Your abuse of alcohol was determined to be a significant and/or causative factor.

You were counseled on USCG policies concerning alcohol use and abuse as well as the serious nature of this incident. You must make an appointment with a provider...who will determine the nature of your relationship with alcohol...

This is considered your first documented alcohol incident. Any further incidents will result in you being processed for separation...

The applicant alleged that she vomited right before the breathalyzer was administered due to food poisoning. She stated that the officer used the breathalyzer results that were taken when she still had vomit in her mouth. She alleged that the vomit caused the test results to be inaccurate and that the breathalyzer test was not re-administered.

The applicant alleged that the Page 7 should be removed from her record because she was found not guilty of DUI by jury trial in 2013. The applicant's other charges of failing to stop for police and marked lanes violation were dismissed. She stated that there was no evidence that alcohol was consumed or used irresponsibly.

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

On August 31, 2015, the Judge Advocate General (JAG) submitted an advisory opinion recommending that the Board deny relief and adopting the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC stated that according to Coast Guard Personnel Manual, Article 20.A.2.d., an "alcohol incident" is defined as follows:

Any behavior in which alcohol is determined by the commanding officer to be a 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.

PSC stated that the applicant received a Page 7 documenting an alcohol incident that occurred on October 10, 2010. The Page 7 stated that the applicant's "abuse of alcohol was determined to be a significant causative factor" and was properly signed by the applicant's commanding officer (CO). PSC noted that, according to the Coast Guard Personnel Manual, Article 20.B.2.g., the first time an enlisted member is involved in an alcohol incident, the CO shall ensure counseling is conducted and that the incident is recorded on a Page 7 and placed in the member's record.

PSC recommended that no relief be granted and argued that the fact that the applicant was found not guilty of DUI by a jury is irrelevant as to whether she incurred an alcohol incident. PSC noted that the Personnel Manual states that a "member need not be found guilty...in a civilian court...for the behavior to be considered an alcohol incident." Further, a CO uses a preponderance of the evidence standard when determining whether an alcohol incident occurred. Here, PSC argued, the applicant has not proven that her CO committed an error or injustice by finding that her conduct constituted an alcohol incident. PSC stated that the applicant's CO correctly adhered to policy when documenting the incident and therefore the Page 7 should not be removed.

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

On September 17, 2015, the Chair sent the applicant a copy of the views of the Coast Guard and invited her to submit a written response within thirty days. After requesting three extensions, the applicant responded on January 14, 2016.

The applicant alleged that she was found not guilty by the civilian jury, that the breathalyzer results were not admissible in court, and that the alcohol incident checklist was not followed by her command.

The applicant alleged that the alcohol incident checklist was only partially completed by her command. She stated that in order for an alcohol incident to be processed properly, a final Page 7 must be recorded ensuring that that member has completed alcohol screening, that the member be counseled by both the command and unit Command Drug and Alcohol Representative (CDAR), and that the Page 7 be signed by both the member and command. The applicant alleged that her command did not write a final Page 7 and her command did not verify that screening was performed to evaluate her alcohol dependency. The applicant concluded that without the proper documentation, the Page 7 is invalid and should be removed from her record.

## APPLICABLE LAW AND POLICY

Article 20.A.2.d. of the Coast Guard Personnel Manual in effect in October 2010 defines an "alcohol incident" as follows:

1. 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 20.B.2.g. of the manual states the following regarding first alcohol incidents:

The first time a member is involved in an alcohol incident, except those described in Article 20.B.2 f., the commanding officer shall ensure that 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). For officers the record of counseling shall be by letter with copy to Commander (CGPCopm) and (CGPC- adm- 3). This entry is in addition to that required by Article 20.B.2.e.:

1. The member shall be counseled on Coast Guard policy on alcohol abuse contained in this article.
2. Officers and chief warrant officers shall be advised that an additional alcohol incident will result in their being processed for separation under Chapter 12.A of this manual. Enlisted 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 20.B.2.e. of the manual states the following regarding alcohol screening:

1. Any 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), Ch 2. The 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.
2. Members who self-refer for alcohol abuse. Unless 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 the Coast Guard Health Promotion Manual, COMDTINST M6200.1 (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. The application was timely filed.
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.<sup>1</sup>
3. The applicant alleged that the Page 7 dated October 10, 2010, in her record is erroneous and unjust and should be removed because she was not convicted by jury trial and because the proper Coast Guard procedures were not followed when documenting the incident. In 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 her record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>2</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>3</sup>
4. The applicant alleged that because she was found not guilty by the civilian court, the Page 7 is invalid and should be removed from her record. However, the fact that the applicant was found not guilty by the civilian court does not invalidate her CO's finding that she had incurred an "alcohol incident." The definition of an "alcohol incident" in the Personnel Manual

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<sup>1</sup> *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).

<sup>2</sup> 33 C.F.R. § 52.24(b).

<sup>3</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).

expressly states “[t]he 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.” Civilian courts and commanding officers apply different burdens of proof when examining the evidence. A civilian court must find beyond a reasonable doubt that the defendant is guilty if they are to convict a defendant. However, a CO must find by a preponderance of the evidence that the alcohol incident happened. Here, the applicant’s CO found by a preponderance of the evidence that the applicant drank alcohol on the night in question and that her actions that night met the definition of an alcohol incident. The applicant has not proven that her CO abused his discretion or committed an error or injustice in finding by a preponderance of the evidence, including the police report of her behavior, the odor on her breath, and the arrest, that she had drunk alcohol and that her conduct constituted an alcohol incident. Therefore, the Board finds that she has not shown that her CO committed error or injustice by documenting the alcohol incident on a Page 7 in her record as required by Article 20.B.2.g. of the Personnel Manual in effect in 2010.

5. The applicant alleged that the disputed Page 7 should be removed because an alcohol incident checklist was not fully completed by her command and so the alcohol incident was improperly documented. The Personnel Manual requires two Page 7s to be entered in a member’s record following an alcohol incident: Article 20.B.2.g. of the manual requires entry of a Page 7 to document the member’s involvement in an alcohol incident and Article 20.B.2.e. requires another Page 7 documenting the results of screening following an alcohol incident. While the applicant’s command apparently neglected to document alcohol screening by adding a second Page 7 to her record, this error does not invalidate the first Page 7. This lack of documentation of alcohol screening does not cast doubt on the validity of the alcohol incident or render the CO’s finding of an alcohol incident incomplete. Therefore, at least with respect to the validity of the disputed Page 7, the lack of a second Page 7 is harmless error.<sup>4</sup> The applicant did not state that she received no screening; rather she stated that her screening results were not documented. Her command’s failure to document the screening results does not negate her involvement in an alcohol incident. If for some reason, the applicant did not receive alcohol screening, the Board notes that the applicant may refer herself for screening at any time pursuant to Article 2.B.3. of the current Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10, Article 2.B.3.

6. Accordingly, the applicant’s request for relief should be denied because she has not proven by a preponderance of the evidence that the disputed Page 7 documenting her involvement in an alcohol incident is erroneous or unjust.

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

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<sup>4</sup> *Quinton v. United States*, 64 Fed. Cl. 118, 125 (2005) (finding that harmlessness requires that there be “no substantial nexus or connection” between the proven error and the prejudicial record that the applicant wants the Board to remove or correct); *Engels v. United States*, 678 F.2d 173, 175 (Ct. Cl. 1982) (finding that an error in an officer’s military record is harmless unless the error is “causally linked with” the record the officer wants corrected); *Hary v. United States*, 618 F.2d 704, 707-09 (Ct. Cl. 1980) (finding that the plaintiff had to show that the proven error “substantially affected the decision to separate him” because “harmless error ... will not warrant judicial relief.”).

**ORDER**

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

June 10, 2016

