

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-149



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 completed application on June 8, 2016, and assigned it to staff attorney [REDACTED] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated May 5, 2017, 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, an active duty member of the Coast Guard, asked the Board to correct his record by removing comments regarding an underage alcohol incident from his June 20, 2003, Enlisted Evaluation Report (EER) that stemmed from his receipt of non-judicial punishment (NJP). The applicant argued that Coast Guard policy allows members to request removal of one underage alcohol incident from their record. He stated that he obtained approval from the Coast Guard to remove the incident. The applicant contended, however, that the incident was "not documented properly and the only trace is in [his] evaluations." The applicant further stated that the comments in his EER have put restraints on his ability to advance in the Coast Guard to the next higher pay grade, particularly in light of the fact that "it has been approved from the USCG for removal."

In support of his request, he submitted a copy of the EER comments he would like to be removed, the ALCOAST policy on this topic, and a memorandum approving removal of the alcohol incident from Enlisted Personnel Management (EPM), all of which are summarized below.

SUMMARY OF THE RECORD

On June 30, 2003, the applicant received a disciplinary EER following NJP for underage consumption of alcohol and using a fake identity card (ID). The EER comments state that the

applicant “was awarded NJP on 20JUN03 for buying and consuming alcohol at local bars and convenient stores. MBR is under the legal drinking age and was using a fake ID.” The comments also state that the applicant was “awarded NJP for violations of article 92 and article 134 [of the Uniform Code of Military Justice (UCMJ)]. Period of eligibility for the Coast Guard Good Conduct Award terminated 20JUN03 due to member receiving NJP... [The applicant] has displayed poor judgement [sic], maturity and loyalty since he has reported aboard this unit. He was recently taken to mast and awarded NJP for not following military rules and regulations.”

On July 11, 2003, the applicant received a counseling form CG-3307 (“Page 7”), which states that the applicant’s “period of eligibility for Coast Guard Good Conduct Award terminated this date due to member receiving non-judicial punishment (NJP) for being in violation of two articles of the UCMJ. On 20 June 2003 [the applicant] was awarded NJP for Article 92, failure to follow an order or regulation and Article 134, general article.”

On September 2, 2008, the applicant received a negative Page 7. It states the following:

Member counseled this date for disregard for the security of Personally Identifiable Information and inappropriate use of Direct Access for personal gain. On 29Aug08 you approached Petty Officer [H]...introduced yourself and provided her with your phone number. She did not offer her phone number in return. The following day, Saturday, 30Aug08, you sent a text message to her cell phone. You also sent her an e-mail. When asked by three separate individuals how you acquired her cell phone number, they reported that you responded “I’m a [REDACTED] which implied to all who heard that you had accessed her personal information via Direct Access. If true, this constituted an entirely inappropriate use of a government system, namely Direct Access. Regardless of your source, contacting another member on their personal phone for personal purposes without their consent is an inappropriate use of Personally Identifiable Information. As an independent duty yeoman you, in particular, have been entrusted with the safeguarding and maintenance of Coast Guard member’s personal information. You will not access the information of any member who is not attached to this unit unless they are in receipt of PCS orders to [this unit]. You will not access the information of any crew member for any reason other than official business. You will only access that information which is absolutely necessary to complete your tasks. This information will never be used for personal gain, as was clearly done in this instance, nor to satisfy curiosity... You are directed to immediately cease all social contact with Petty Officer [H]. If any issues arise that require you to contact Petty Officer [H], you must refer to your chain of command.

In response to a memorandum from the applicant on July 28, 2015, EPM approved the applicant’s request to remove a Page 7 from his record, “specifically documenting [his] alcohol incident on 20 June 2003.” EPM stated that the Page 7 could not be located in the applicant’s military file. Should the document be found and entered into his file, EPM gave the applicant authority to contact the Personnel Service Center (PSC) to have it removed. The memorandum further states that the Page 7 the applicant received on July 11, 2003, documenting the termination of his eligibility for the Coast Guard Good Conduct Award, did not meet the criteria to be removed from his record.¹

On May 25, 2016, the applicant received a memorandum from PSC with a subject line of “Chief Warrant Officer (CWO) Appointment Board Action.” The memorandum included the following:

¹ To receive a Good Conduct Award, a member must receive no NJPs for three years, among other qualifications that must be met. When a member receives NJP, a Page 7 is entered into their record denoting the termination of their eligibility for the Good Conduct Award.

Your record was placed before the PY16 [Promotion Year 2016] CWO Appointment Board which convened on 4 April 2016 to consider personnel for appointment to warrant grade. I regret to inform you that the Report of the Board did not include your name as one of the candidates recommended for appointment. The Board elected to remove you from consideration under the provisions of [the Officer Accessions, Evaluations, and Promotions manual]. The following excerpt from the Board Report sets for the specific reason:

...The Board determined that this member is not fully-qualified for selection for appointment to CWO2. As cited in [Page 7] dated 02 September 2008, he was counseled for disregarding the security of Personally Indefinable Information and inappropriate use of Direct Access for personal gain. He obtained a personal cell phone number for a female Petty Officer from Direct Access after she refused to give her number to him when asked in person. As cited in his Enlisted Employee Review dated 20 June 2003, he received Non-Judicial Punishment for purchasing and consuming alcohol while under the legal drinking age and using a fake ID. These actions demonstrated a pattern of behavior inconsistent with Coast Guard Standards. By at least two-thirds majority, the Board determined this behavior to be inconsistent with the definition of a chief warrant officer found in Section 1.D.1.a. of the Officer Accessions, Evaluations, and Promotions [manual].

VIEWS OF THE COAST GUARD

On January 6, 2017, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he adopted the findings and analysis provided in a memorandum on the case prepared by PSC. PSC recommended that the Board deny relief in this case. PSC stated that the Coast Guard Drug and Alcohol Abuse Program manual states that when a member is involved in a first alcohol incident, the commanding officer will counsel the member, and for enlisted members record the incident on a Page 7. If a member receives an alcohol incident solely for underage drinking, after three years he may request removal of the alcohol incident, predicated on positive performance. Removal also requires that the member had no other alcohol incidents in those three years. In addition, according to ALCOAST 104/14 members are allowed one opportunity to remove an underage alcohol incident from their record.

PSC stated that the applicant received discipline marks on June 20, 2003, as a result of receiving NJP for purchasing and consuming alcohol while underage and for using a fake ID. While EPM did authorize the removal of the Page 7 denoting the alcohol incident, PSC noted that EPM did not authorize removal of the Page 7 denoting the applicant's termination of eligibility of the Good Conduct Award. PSC further stated that EPM did not mention the comments in the EER.

PSC also argued that the applicant was removed from consideration of Chief Warrant Officer not only because of the comments in the disputed EER, but also because of his conduct when he disregarded the security of Personally Identifiable Information and misused the human recourse database, Direct Access. PSC stated that the letter the applicant received on May 25, 2016, specifically states that the reasons he was removed from consideration was due to the 2003 NJP *and* the 2008 incident. PSC therefore argued that the applicant did not prove by a preponderance of the evidence that his record is erroneous or unjust, and recommended that no relief be granted.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 10, 2017, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited a response within 30 days. No response was received.

APPLICABLE REGULATIONS

According to ALCOAST 104/14, members are allowed "one opportunity to remove underage alcohol incidents (with no other associated misconduct) from their record."

The Officer Accessions, Evaluations and Promotions manual, COMDTINST M1000.3A, Article 1.D.2.a., lists the minimum eligibility requirements for an applicant to be appointed to warrant grade. Number (11) on the list states that the applicant must "have no court-martial, civil conviction, or nonjudicial punishment." Article 1.D.3.c. states that if it is determined that a member does "not possess the officer-like qualities necessary to serve successfully as a chief warrant officer after being recommended by their commanding officer, Commander (CG PSC-C) may remove their names from competition."

According to COMDTINST M1000.10, Coast Guard Drug and Alcohol Abuse Program, Article 2.B.7., the "first time a member is involved in an alcohol incident...the commanding officer shall ensure this counseling is [redacted]: for enlisted members recorded on [a Page 7], entry in the member's [record]; acknowledged by the member; and a copy sent to Commander (CG PSC-EPM)." Article 2.B.10., regarding the underage consumption of alcohol, states that underage drinking is considered an alcohol incident. Article 2.B.10.b. states the following:

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 (CG PSC) remove the alcohol incident from his or her record. Removal requires that the members 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 submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.²

2. The applicant requested that the Board correct his record by removing comments regarding his 2003 alcohol incident from the June 20, 2003, EER. He alleged that the EER comments are erroneous and unjust because the Page 7 documenting the alcohol incident has been removed from his record. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record

² *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).

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.³ 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.”⁴

3. The Coast Guard Drug and Alcohol Abuse Program manual and ALCOAST 104/14 both allow a member to request removal of one underage alcohol incident from his record. Typically, after a second alcohol incident, members are processed for discharge from the Coast Guard.⁵ By allowing members to request removal of one underage alcohol incident following three years of good conduct, the Coast Guard ensures that they are not processed for discharge if they receive only one more alcohol incident in their Coast Guard career. The policy specifically states that the “alcohol incident”—i.e., the Page 7 documenting the alcohol incident—may be removed and does not mention removing or altering other matters of record that may result from the same misconduct.⁶ It is the Page 7 documenting the alcohol incident—not the NJP or the EER—that counts in determining if a member has already had a previous alcohol incident. The manual and ALCOAST provide no authority for removing an NJP or comments about misconduct from an EER. In addition, according to Article 2.B.10.b. of COMDTINST M1000.10, an alcohol incident may only be removed if it was “solely for underage drinking.” ALCOAST 104/14 likewise notes that an incident may be removed when there is “no other associated misconduct.” In the applicant’s case, he was found to have purchased alcohol underage using a fake ID card. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that the NJP or EER constitute an error or injustice in his record.

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

(ORDER AND SIGNATURES ON NEXT PAGE)

³ 33 C.F.R. § 52.24(b).

⁴ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁵ COMDTINST M1000.10, Article 2.B.8.

⁶ COMDTINST M1000.10, Article 2.B.10.b.

ORDER

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

May 5, 2017

