

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-091

██████████ ██████████
██████████ ██████████

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on March 16, 2017, and assigned it to staff attorney ██████████ ██████████ to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated September 29, 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 Senior Chief ██████████ ██████████/E-8), asked that the Board correct his record by removing a Page 7¹ dated May 6, 2013, which documents an alcohol incident.² He stated that two alcohol incidents can lead to separation from the Coast Guard.³ He further stated that he recently learned that a Senior Enlisted Retention Board may soon meet and he claimed that “any alcohol incident” could be cause for a “forced retirement.” He claimed that he was issued the alcohol incident as an example for the benefit of the crew. The applicant asserted that his Commanding Officer (CO) at the time did not intend “to make it difficult to remain in the Coast Guard after 20 years.” With the Senior Enlisted Retention Board coming up, the applicant claimed that this alcohol incident may be the only reason that he is asked to retire

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, 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.”

³ Article 2.B.8.b. of the Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10 (series) states that “[e]nlisted members involved in a second alcohol incident will normally be processed for separation.”

early. He stated that the knowledge of the Senior Enlisted Retention Board is new information, and so he asked that the Board consider his application in the interest of justice.

Regarding the alcohol incident, the applicant explained that on the evening of March 19, 2013, he had liberty until 2:00 a.m. and had gone out to a bar with a friend. He and the friend got a ride back to the ship with someone they had been speaking with. On the ride, the driver “made several racist remarks about black people.” The applicant asked the driver to refrain from making such remarks, as the applicant is married to an African American woman and has two mixed-race children. The driver dropped the applicant and the friend off at the front gate at approximately 2:05 a.m. As they were walking towards the gate, the driver yelled a racial slur towards the applicant. The applicant decided “to go back and have a word with the driver.” However, the driver drove towards the applicant and struck him with the vehicle and then drove off. The applicant stated that he woke up in the hospital the next morning.

The applicant stated that he was thereafter investigated for an unauthorized absence and lying, although he stated the investigation proved he had not lied. However, he was supposed to be back on the ship by 2:00 a.m., but he did not arrive at the gate until 2:05 a.m. The applicant acknowledged that this does constitute an authorized absence, but he noted that he had only been late for work one other time in his Coast Guard career when he accidentally set his alarm for p.m. instead of a.m. He again claimed that he was given the Page 7 to make an example for the crew. He stated that he understands Coast Guard alcohol policy and that “even if you have just one drink, if something happens, it’s an automatic alcohol incident.” He asserted that it would be very difficult to allow someone to make racial slurs directed towards him and his family and not react. He claimed that alcohol was not a causal factor in his decision to attempt to confront the driver. The applicant took issue with the fact that the Page 7 does not state that the driver instigated the confrontation. The applicant added that he self-referred to alcohol counseling and has not had a drink since. He asked that the Board consider his request because he does not believe that his CO intended to force the applicant to retire after twenty years in the military.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on February 5, 2002, after previously serving four years in the [REDACTED]. The applicant has received other neutral and positive Page 7s during his time in the Coast Guard. In addition, he has received two other negative Page 7s. The first was on July 31, 2003, which documented his violation of the Coast Guard’s Standard Work Station policy governing the use of the internet on the Coast Guard Data Network when he obtained “material of an inappropriate nature.” The second was on January 20, 2005, documenting his involvement in an alcohol-related situation.⁴ It states:

On 09OCT04 you were involved in an alcohol-related situation. Alcohol was not considered to be a significant factor in you tripping and injuring yourself at Naval Base...; however your excessive consumption of alcohol did not help the situation either. Your physical state severely hampered the Naval medical

⁴ Article 2.B.4. of the Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10 (series) states that 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. ... Commands shall not use the term ‘alcohol-related situation’ when a member’s behavior clearly meets the criteria of an ‘alcohol incident.’” The manual does not require the discharge of a member due to a second alcohol-related situation.

personnel's ability to determine the extent of your injuries due to your level of intoxication. This is not considered an alcohol incident, but is entered for documentation purposes only. You have been advised of the content of Chapter 20, Personnel Manual, COMDTINST M1000.6 (series) concerning conduct expected of Coast Guard personnel. You shall attend alcohol screening.

The applicant received Non-Judicial Punishment (NJP) on May 3, 2013, for violation of Uniform Code of Military Justice (UCMJ) Article 86, absence without leave, and Article 107, false official statements. The Court Memorandum states:

Article 86, UCMJ: Absence without leave beginning at 0200 on 20Mar2013. Article 107, UCMJ: False official statement, that ETC told the OOD [Office of the Day] he was visiting his brother-in-law when he asked to have liberty extended from midnight to 0200.

Sentence Narrative: Member was giv[en] letter of reprimand.

On May 6, 2013, the applicant received the Page 7 at issue here. The applicant acknowledged that Page 7 with his signature on April 6, 2013.⁵ It states:

On 03MAY2013 you received an alcohol incident when your abuse of alcohol was determined to be a significant and/or causative factor, when, on 20MAR2013 you were found to be absent from the ship after the expiration of liberty after having consumed an excessive amount of alcohol...at a local bar. Additionally, your use of alcohol led you to choose to be a party in a confrontation with a civilian who proceeded to strike you with his moving vehicle. This confrontation led to your injury and emergency medical treatment, and prevented you from sailing with the unit that same morning for its scheduled underway period. Your BAC was determined by hospital personnel to be in excess of .20.

You were counseled on USCG policies concerning alcohol use and abuse as well as the serious nature of this incident. The unit CDAR will arrange an appointment with a provider who will determine the nature of your relationship with alcohol. It is recommended that you abstain from the use of alcohol until your screening and assessment is completed. You will also receive a disciplinary set of marks, as required by the Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10 (series).

This is considered your first documented alcohol incident. I strongly encourage you to carefully consider your actions and conduct, both on and off duty, in the future. Any further incidents will result in you being processed for separation as per Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10 (series).

VIEWS OF THE COAST GUARD

On August 8, 2017, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC) and recommended denying relief.

PSC stated that the applicant did not provide any evidence to show that the Page 7 is erroneous or unjust. The applicant's CO at the time found that the situation constituted an alcohol incident and followed the appropriate policy to document the alcohol incident on a Page 7. PSC noted that the applicant did not dispute the validity of the Page 7, but merely asserted that his CO did not intend to have the alcohol incident adversely affect the applicant later in his career. PSC

⁵ The dates are as they appear on the Page 7.

stated that it found no merit to the applicant's argument and likewise found no justification to remove the Page 7 from his record.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 14, 2017, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a response within thirty days. No response was received.

APPLICABLE REGULATIONS

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."

Article 2.B.7. states that the first time a member is involved in an alcohol incident the CO must ensure that the member is counseled on a Page 7, that the member acknowledges the Page 7, and that it is entered into the member's military record.

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.⁶
2. The applicant asked the Board to remove the May 6, 2013, Page 7 from his record because it is erroneous and unjust. 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.⁷ 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."⁸

⁶ *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).

⁷ 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)).

⁸ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

3. Following an alcohol incident, Article 2.B.7. of the Coast Guard Drug and Alcohol Abuse Program Manual requires that the CO counsel the member on a Page 7. The applicant argued that alcohol was not a causative factor in the confrontation that led to his hospitalization on March 20, 2013. However, the applicant's CO determined at the time that alcohol was "a significant and/or causative factor." In addition, the Page 7 states that the applicant was found to have a BAC in excess of .20. The applicant has not submitted sufficient evidence to overcome the presumption of regularity accorded his CO's determinations that his consumption of alcohol was a significant or causative factor in his behavior that night and that he incurred an alcohol incident pursuant to the definition in Article 1.A.2.d. of the manual.

4. The applicant also argued that the Page 7 is unjust because his CO did not intend to negatively affect his career or cause his early retirement and that his CO merely wanted to make an example of the applicant at the time. The applicant claimed that this Page 7 may be the only determining factor causing the applicant's early retirement. However, the fact that a retention board might not select someone for retention because of a past alcohol incident is not evidence that the alcohol incident is erroneous or unjust and does not warrant removing a valid alcohol incident from a member's record. Whether the applicant's CO was aware in 2013 that the Page 7 might result in his non-retention at some point in the future is likewise irrelevant to the validity of the alcohol incident. Moreover, the underlying incident is documented in the applicant's record not only on the May 6, 2013, Page 7, but also by the May 3, 2013, NJP. The Board notes that the applicant claimed in his application that the "investigation proved that [he] was not lying," yet he was awarded NJP for both absence without leave and a false official statement. The Board is not persuaded that the May 6, 2013, Page 7 documenting the applicant's alcohol incident is unjust.

5. Accordingly, relief should be denied because the applicant has not proven by a preponderance of the evidence that an error or injustice exists in his record.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

September 29, 2017

