

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-092



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 10, 2017, and prepared the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated December 15, 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 [REDACTED] (E-5), asked the Board to remove from her record a Page 7¹ dated September 17, 2015. She argued that it should be removed because it includes "medical orders that should instead be documented in my military record." She stated that in the Page 7, she was ordered not to drink alcohol and that this order was not documented in her medical record. The applicant stated that she underwent the required alcohol screening and, after answering the questions, was told that she did not require alcohol rehabilitation treatment. The applicant stated that the Page 7 also names a psychiatrist, which would inform a reader of what type of medical condition was being evaluated. In addition, she noted, the Page 7 was labeled P&D-7, which denotes counseling regarding negative performance or discipline, even though it only documents medical orders for her to follow as a patient. She stated that having these medical orders in her record is prejudicial and so the Page 7 should be removed.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on February 23, 2010. The disputed Page 7 is signed "by direction" by a chief warrant officer (CWO), who was her Department Head. It states 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 or conduct in the member's military record.

Entry Type: Performance and Discipline (P&D-7)

Reference: None

Responsible Level: Unit

Entry:

(General - Negative)

17 SEP 2015: Temporary Duty Orders (TDY) have been approved for you starting 17 SEP 2015. You are directed to report to USCG Base XXX at 1000 tomorrow morning for a medical appointment with LTjg XXXX, CG Physician Assistant, where you will be provided with an official duty status. Immediately following that appointment, you are to report to CWO2 XXXXXXXX for further orders and directions.

The following treatment plan must be followed:

1. You are to abstain from drinking alcohol and you are to use all prescribed medications as directed.
2. You are to report for a medical appointment with Dr. [psychiatrist's name] on Monday, 21 SEP 2015 at 1045, and you are to attend all follow-on appointments with Dr. [psychiatrist's name] as directed.
3. As of this date, you shall schedule and attend all medical appointments with Base XXX Medical Officers (Dr. XXXXXXXXXX and LTjg XXXX) for all further medical treatment and care.
4. You shall not reschedule or "no show" for any appointment.
5. Your point of contact for any medical or dental scheduling issues is HSCS XXXXXXXX, Base XXX Clinic Administrator, (XXX) XXX-XXXX. If you have any after-hours questions, problems, or issues you are to contact CWO XXXXXXXXXXXXXXXX at cell phone number (XXX) XXX-XXXX.

The applicant did not explain the circumstances surrounding this Page 7, but the record contains a decision of the Personnel Records Review Board (PRRB) dated February 13, 2017, in which the PRRB removed from her record a different Page 7, dated February 18, 2016, which documented an "alcohol incident."² The decision shows that the PRRB removed the Page 7 from the applicant's record after concluding that her conduct on the night of August 14, 2015, had not met the definition of an alcohol incident. The applicant had submitted to the PRRB a personal statement about what had happened on that night; police and fire department patient care reports dated August 14, 2015; a psychiatric evaluation dated June 15, 2015; and a psychiatric evaluation dated September 19, 2015.

The PRRB removed the Page 7 documenting the alcohol incident because it considered the Page 7 to be "punishment for a suicide attempt" and noted that under the Uniform Code of Military

² Article 1.A.2.d. of COMDTINST M1000.10 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." Pursuant to Article 2.B.8.b., "members involved in a second alcohol incident will normally be processed for separation," and a member's CO may request retention of the member if there are mitigating or exceptional circumstances. However, pursuant to Article 2.B.9., "members involved in a third alcohol incident shall be processed for separation."

Justice, Article 134, “Bona fide suicide attempts should not be charged as criminal offenses.” The PRRB stated that although the applicant’s commanding officer (CO) had the authority and discretion to determine whether an alcohol incident had occurred, the applicant had—

3. ... provided sufficient evidence to prove that alcohol was not a significant or causative factor that resulted in the member’s bringing discredit to the Uniformed Services. The Applicant provided sufficient evidence to convince the Board that a bona fide suicide attempt, and related mental health issues for which the Applicant sought treatment, was the sole significant or causative factor in the event leading to the issuance of the disputed CG-3307. ... Therefore the disputed CG-3307 is in error.

4. The Board found the UCMJ Art. 134 discussion to be persuasive authority for the fact that the military services do not intend to inflict punitive measures for bona fide suicide attempts. It follows that the alcohol incident policy, while not directly addressing suicide attempts, does not serve to add additional punitive and administrative consequences for a member who engaged in a bona fide suicide attempt, which the Board is convinced occurred in this case.

The record also shows that on December 19, 2016, the applicant submitted a request to the Personnel Service Center (PSC) to have the Page 7 disputed in her BCMR application removed from her record and claimed that it violated Article 8.e. of COMDTINST 1000.14C by documenting a medical diagnosis and treatment of a medical condition in her record. Her request was denied on the grounds that the Page 7 “does not violate the provisions of [Article 8.e.], specifically it does not provide a diagnosis or a treatment of any named medical condition.”

VIEWS OF THE COAST GUARD

On August 4, 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 PSC and recommended denying relief.

PSC stated that the disputed Page 7 was properly signed by the applicant’s Department Head, who had been delegated authority by the CO in the Base instruction to sign such documents and provided Base instruction showing the delegation.

PSC stated that under Article 8.e. of COMDTINST 1000.14C, Page 7s “will not be used to document the diagnosis or treatment of medical conditions. If there is a need to refer to a member’s medical condition in an Administrative Remarks, Form CG-3307, the specific medical condition shall not be referenced.” PSC stated that the disputed Page 7 does not violate this policy because it does not mention any diagnosis or treatment of a medical condition.

PSC concluded that the applicant has not shown that the disputed Page 7 is either erroneous or unjust and that there is no justification for removing it from her record.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 6, 2017, the applicant responded to the views of the Coast Guard and disagreed. She argued that because a doctor named on the Page 7 is a known psychiatrist, anyone reading the Page 7 would know that her medical condition was a mental health condition. She also argued that because the Page 7 orders her to abstain from alcohol, a reader would conclude that she is alcohol-dependent, even though she has never been diagnosed as alcohol-dependent, because under COMDTINST M1000.10, members diagnosed as alcohol-dependent must abstain from consuming alcohol indefinitely. The applicant also argued that the order was erroneous because, she alleged, under Chapter 7.D.3. of the Health Promotion Manual, "Abstaining from alcohol is only required for members who are diagnosed with a substance abuse disorder (alcohol or drug) and is awaiting treatment,"³ which did not apply in her case.

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.⁴

2. The applicant asked the Board to remove a Page 7 dated September 17, 2015, from her record and alleged that 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 her record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁵ 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."⁶

3. The preponderance of the evidence shows that on August 14, 2015, the applicant attempted suicide, and her CO subsequently found that the circumstances met the definition of an "alcohol incident," although the Page 7 documenting the alcohol incident has been removed by the PRRB. About a month later, on September 17, 2015, her command found it necessary to document on a Page 7 the issuance of direct orders prohibiting her from skipping or postponing various medical appointments and requiring her "to use all prescribed medications as directed" and "to abstain from drinking alcohol." Although the applicant did not explain why her command

³ This language is not found in either the 2015 or the current Health Promotion Manual or in the Drug and Alcohol Abuse Program Manual.

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 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)).

⁶ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

issued these orders, a reasonable inference is that she had skipped or postponed medical appointments and had drunk alcohol contrary to the directions for a prescribed medication. Therefore, the applicant has not proven by a preponderance of the evidence that the orders issued to her on September 17, 2015, may not properly be considered counseling about negative performance or conduct and documented on a P&D-7 Page 7.

4. The applicant argued that the Page 7 violates COMDTINST M1000.14C, which prohibits mentioning a specific medical diagnosis or treatment on a Page 7. She argued that a reader would erroneously conclude from reading the Page 7 that she is alcohol-dependent because of the order to abstain from alcohol. Contrary to the applicant's claim, however, members may be required to abstain from alcohol under various circumstances, including interference with prescribed medications or because of prior conduct or particular duties. The disputed Page 7 does not imply that the applicant is alcohol-dependent and does not mention any other diagnosis or mention a specific treatment. The Board finds that the language in the Page 7 does not violate Article 8.e. of COMDTINST M1000.14C, which states that Page 7s "will not be used to document the diagnosis or treatment of medical conditions. If there is a need to refer to a member's medical condition in an Administrative Remarks, Form CG-3307, the specific medical condition shall not be referenced."

5. Although the Page 7 is not erroneous pursuant to COMDTINST M1000.14C, the Board must also consider whether it is unjust.⁷ The Board assesses injustice on a case-by-case basis.⁸ The applicant argued that the Page 7 is prejudicial because it names a "known psychiatrist" and so reveals that she was being evaluated or treated for a mental health disorder. Naming doctors who are not general practitioners on a Page 7 does potentially reveal at least the type of medical condition that the member is being evaluated or treated for. And because the applicant is an HS2, her future supervisors and unit personnel are more likely than most to know the specialties of the doctors employed by the Coast Guard. Therefore, to mitigate any potential prejudice associated with psychiatric care, the Board finds that the psychiatrist's name should be redacted from the Page 7 even though it does not technically violate COMDTINST M1000.14C. The psychiatrist's name should be removed from the two places it appears in paragraph #2 of the Page 7. No other relief is warranted.

6. Accordingly, partial relief should be granted by redacting only the psychiatrist's name in the two places it appears in paragraph #2 of the disputed Page 7.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁷ 10 U.S.C. § 1552(a); 41 Op. Att'y Gen. 94 (1952), 1952 WL 2907 (finding that as used in 10 U.S.C. § 1552 the words "error" and "injustice" do not have limited or technical meanings).

⁸ Coast Guard BCMR Docket No. 2002-040 (Decision of the Deputy General Counsel, May 2, 2002). (Tab 8)

ORDER

The application of [REDACTED] 5, USCG, for correction of her record is granted in part. The Coast Guard shall redact the name of the psychiatrist in the two places that it appears in paragraph 2 of the CG-3307 dated September 17, 2015.

December 15, 2017

