

**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. 2018-027**

██████████  
██████████ YNC

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**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 November 7, 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 October 19, 2018, 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 Chief Yeoman on active duty, asked the Board to correct his record by removing a special Enlisted Employee Review (EER) dated July 15, 2003. He stated that the special EER, which documents his arrest for driving under the influence (DUI), is not accompanied by a report of a civil arrest, a report of civil conviction, a report of a military conviction, a non-judicial punishment (NJP), or a negative Page 7.<sup>1</sup> The applicant stated that in order to document a DUI in his record, the current Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10, Article 1.C.5., requires these items to be in his record as well. In support of his application, the applicant provided several documents which are discussed below in the Summary of the Record.

**SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard on March 5, 1996. He has no Page 7s documenting “alcohol incidents” in his record.<sup>2</sup> The disputed EER is dated July 15, 2003, and is labeled as a disciplinary EER. The applicant received all marks of 4 (on a scale of 1 to 7 with 7 being best),

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<sup>1</sup> 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.

<sup>2</sup> See Applicable Regulations Section, below, Article 20.A.2.d. of the Personnel Manual.

indicating average performance, except that he received marks of 3 in Health & Well-Being and in Safety. He also received an unsatisfactory conduct mark, but he was recommended for advancement. The only comment states “On 03 Jul 03, [the applicant] was arrested for Driving While intoxicated, resulting in an ‘alcohol incident.’” There is no other documentation in the applicant’s file regarding this incident.

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

On April 26, 2018, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. The JAG stated that according to the Personnel Manual in effect at the time, unscheduled EERs could be conducted for any reason other than a regular EER. The JAG argued that the adverse comment properly supported the unsatisfactory conduct mark as required by Article 10.B.2. The JAG asserted that the policy cited by the applicant outlined what is required to document a member’s DUI but not what is required to initiate a disciplinary EER. According to Article 10.B.4.a. of the Personnel Manual, it is the responsibility of a unit to determine when a disciplinary EER is required.

The JAG also argued that the applicant’s claim should be barred by the doctrine of laches. The JAG stated that the applicant offered no explanation as to why he waited nearly fifteen years to file an application with the Board. The Coast Guard has been prejudiced by his “unreasonable and unexcused delay as there may have been records containing information documenting the alcohol incident that are now lost, and members who could have provided additional information on this matter have since separated from the Coast Guard.” With his recommendation to deny relief, the JAG adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC stated that the application is timely and therefore should be considered on the merits. PSC noted that the applicant has no documentation in his record citing an arrest, conviction, or alcohol incident and that if “there was an alcohol incident, documentation should have been submitted stating as such.” Despite the “clear administrative oversight,” PSC stated that the applicant still may have been involved in an alcohol incident. PSC argued that he was disputing the administrative process but that he did not dispute the comment that he was arrested for a DUI. In addition, according to Article 20.A.2.d. of the Personnel Manual, “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 it is presumed that Coast Guard officials acted in accordance with the Coast Guard policies that were in effect at the time and therefore recommended that the Board deny relief.

### **APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On April 30, 2018, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within 30 days. No response was received.

### APPLICABLE REGULATIONS

The Personnel Manual is the manual that was in effect in 2003 when the applicant received the special EER. Chapter 10 covers the EER system. Article 10.B.2.a.1. states that supporting remarks are required for an unsatisfactory conduct mark and for any marks of 1, 2, or 7. Article 10.B.4.a.2., regarding, unit responsibilities, states that the unit will determine “the reason for employee review[s] if the member is being evaluated for any reason other than a regularly scheduled annual or semiannual employee review.”

Article 20.A.2.d. of the Personnel Manual defines an alcohol incident as:

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. states that an “alcohol incident” shall be documented in a member’s PDR on a Page 7.

Article 20.A.4.e. of the Personnel Manual, regarding administrative and disciplinary actions following a DUI, states the following:

1. Commanding Officers are responsible for conducting adequate inquiries into incidents of alleged DUI, and for taking remedial action, if necessary, in accordance with this article.
2. Those personnel who are convicted in the civilian or military courts, receive non-judicial punishment, or have a civil revocation/suspension of driving privileges for DUI or other offenses meeting the definition of an alcohol incident, shall be referred for medical screening . . .
3. Reports and documentation required when Coast Guard military personnel are involved with a DUI.
  - a. Report of Civil Arrest: A report of civil arrest and subsequent civil action is required for all military members . . .
  - b. Notification of Restriction: A notification of restriction must be made and acknowledged in writing whenever a person’s driving privileges are restricted. . . .
  - c. Performance Evaluations:
    - (1) Enlisted Members: A special Enlisted Performance Evaluation to reflect a civil conviction, a military conviction, or the award of non-judicial punishment for occurrences of DUI is required by Section 10.B. Alcohol incidents must also be documented in the member’s PDR.

### 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.<sup>3</sup>

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<sup>3</sup> *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).

2. The applicant alleged that the July 15, 2003, EER in his military record is erroneous and unjust because it contains a comment about a DUI and alcohol incident but there is no supporting documentation in 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 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.<sup>4</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>5</sup>

3. The only documentation in the applicant's record of a DUI is the disputed EER dated July 15, 2003. The applicant did not deny being arrested for DUI and did not deny having been awarded an alcohol incident by his command. He complained only that the supporting documentation is missing from his record. The EER comment about the DUI is presumptively correct, but whatever other documentation was obtained or created at the time of his arrest is not now in his record. The command would presumably have obtained the local police report and documentation of any adjudication,<sup>6</sup> but those would not have been entered in his Headquarters PDR.<sup>7</sup> But a Page 7 documenting an "alcohol incident" should have been entered in his Headquarters PDR.<sup>8</sup> According to Article 10.B.4.a.2. of the Personnel Manual, which was in effect at the time the applicant received the disputed EER, individual units were responsible for determining when non-regular EERs, including disciplinary EERs, were necessary. A disciplinary EER was required when a member received an alcohol incident or NJP,<sup>9</sup> but there was no requirement in the EER rules that the disciplinary EER be supported by documentation of the alcohol incident or NJP. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that his unit erred in preparing the disciplinary EER or that the EER should be removed because other documentation is not in his record.

4. The applicant received many marks of 4 and two marks of 3 for Safety and Health & Well-Being on the disputed EER. He did not receive any marks of 1 or 2 which would have required supporting remarks in accordance with Article 10.B.2.a.1. of the Personnel Manual. He did, however, receive an unsatisfactory conduct mark, which under the same article did require a supporting comment. The supporting comment attached to the EER states that the applicant had been "arrested for Driving While intoxicated, resulting in an 'alcohol incident.'" The Personnel Manual does not require such EER comments to be supported by documentation, but alcohol incidents themselves are supposed to be documented on a Page 7.<sup>10</sup> The supporting EER comment refers to an alcohol incident and there is now no corresponding Page 7 documenting an alcohol incident in his record. Although the Board finds that the applicant has not proven by a preponderance of the evidence that the EER as a whole is erroneous or unjust, the Board finds that the EER comment supporting the unsatisfactory conduct mark in the EER should not use the term "alcohol

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<sup>4</sup> 33 C.F.R. § 52.24(b).

<sup>5</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).

<sup>6</sup> Personnel Manual, Article 20.A.4.e.

<sup>7</sup> COMDTINST M1080.10 (series).

<sup>8</sup> *Id.*

<sup>9</sup> Personnel Manual, Article 10.A.5.b.

<sup>10</sup> Personnel Manual, Article 20.B.2.e.

incident” since there is no Page 7 documenting an alcohol incident in his record. The Board finds that the first part of the EER comment—“On 03 Jul 03, [the applicant] was arrested for Driving While intoxicated.”—sufficiently supports the unsatisfactory conduct mark even though not everyone arrested for DUI is convicted by civil authorities. Therefore, the phrase “resulting in an ‘alcohol incident’” should be removed from the EER comment, but no other corrections are warranted.

5. Accordingly, the Coast Guard should strike the words “resulting in an ‘alcohol incident’” from the comment supporting the unsatisfactory conduct mark on the applicant’s July 15, 2003, EER. No other relief is warranted.

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

**ORDER**

The application of YNC [REDACTED], USCG, for correction of his military record is granted in part: The Coast Guard shall remove the phrase “resulting in an ‘alcohol incident’” from the written comment supporting the unsatisfactory conduct mark on his July 15, 2003, EER. No other relief is granted.

October 19, 2018

