

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-009

████████████████████
████████ GMC

FINAL DECISION

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the applicant’s completed application on October 6, 2018, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 18, 2019, 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 gunner’s mate (GMC/E-7) on active duty, asked the Board to remove from her record an Administrative Remarks form (CG-3307 or “Page 7”)¹ dated May 22, 2004, documenting her intoxication to the point of unconsciousness during a port call overseas; a Court Memorandum dated May 17, 2005, which documents non-judicial punishment (NJP); and a Page 7 dated May 18, 2005, documenting her “first alcohol incident.”²

The applicant asked that her “underage alcohol situation and incident” be removed. She stated that she wanted to apply for warrant officer “without this mistake looming over [her] career” and has the support of her command. She cited Article 2.B.10.b. of a 2017 edition of the Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10, which includes the following provision, which appeared in Article 20.B.2.j.2. of the Personnel Manual in effect in 2005 and all intervening applicable manuals until June 2018:

¹ An Administrative Remarks record entry, form CG-3307, is better known as a “Page 7” and is used to document a member’s notification of important information, achievements, or positive or negative aspects of a member’s performance in the member’s military record.

² Article 20.A.2.d.1. of the Coast Guard Personnel Manual (COMDTINST M1000.6A) in effect in 2005 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 20.B.2.g. requires that an alcohol incident be documented in the member’s record on a Page 7. Article 20.B.2.h. states that following a second alcohol incident, officers must be discharged and enlisted members “will normally be processed for separation.”

Removal of Alcohol Incident from Record. 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 member has had no further alcohol incidents in that 3-year period.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on December 16, 2003, at age 19. Upon completing recruit training, she was assigned to a large cutter. On a Page 7 dated May 22, 2004, the applicant acknowledged receipt of the following counseling:

On 20MAY04 during a port call in ... you were highly intoxicated which rendered you in a unconscious state requiring other shipmates to take you back to the ship and HSC treating you due to your state. This is not an alcohol incident, but is entered for documentation purposes as an alcohol situation^[3] as outlined in chapter 20 of the Personnel Manual, COMDTINST M1000.6 (series).

On May 17, 2005, at age 20, the applicant was taken to mast and given NJP on three charges: (1) failing to obey a lawful order or regulation in violation of Article 92 of the Uniform Code of Military Justice (UCMJ), (2) making a false official statement in violation of Article 107 of the UCMJ, and (3) committing disorderly conduct and drunkenness in violation of Article 134 of the UCMJ.⁴ The attached offense narrative states that she violated

- Article 92 by violating Section 2-3-1 of COMDTINST 5000.7 by possessing or consuming liquor aboard the cutter on three occasions, by drinking alcohol while underage, and by disobeying the four-person buddy rule;
- Article 107 by denying that she had possessed or drunk alcohol in the berthing area; and
- Article 134 by consuming alcohol on the mess deck in breach of service custom and being drunk and disorderly on two occasions.

³ Article 20.B.2.d. of the Personnel Manual in effect in 2004 defined an “alcohol-related situation” as follows: 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. A member does not have to consume alcohol to meet this criterion, e.g., purchasing alcohol for minors. Commands shall not use the term “alcohol related situations” when a member's behavior clearly meets the criteria of an “alcohol incident.”^[3] Members involved in alcohol related situations shall be counseled on their use of alcohol and informed of the conduct expected of Coast Guard members. Commanding officers are strongly encouraged to consider whether screening and/or alcohol awareness training such as IMPACT is appropriate. Commanding officers shall document such occurrences with an appropriate Administrative Remarks (CG- 3307) entry in the member's Personnel Data Record (PDR). Documentation of alcohol related situations provides commands with significant background information for determining whether any administrative or medical action is necessary.

⁴ Article 134 of the UCMJ, codified at 10 U.S.C. § 934, is a “general article” prohibiting “all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital.” Manual for Courts Martial United States (1995), IV-93.

Her commanding officer (CO) gave her NJP consisting of reduction in paygrade from E-3 to E-2 and restriction to the cutter with extra duties for 45 days.

On a Page 7 dated May 18, 2005, which the applicant acknowledged by signature, her CO documented her first “alcohol incident” as follows:

On 28-29 Apr 2005, you received an alcohol incident when your abuse of alcohol was determined to be a significant and/or causative factor in that you violated local law by consuming alcohol as a minor onboard CGC ... during an official reception and while on liberty in Per USDAO instructions and orders from the Commanding Officer, the legal drinking age in [country] was 21. You were observed drinking alcohol on the flight deck and in berthing #7 on 28 April 2005. You were also observed drinking alcohol with shipmates in the [bar] on 29 April 2005. Additionally, you broke the four-person buddy rule by departing your group with only one other person. During Non-Judicial Punishment proceedings for violation of Art 92, UCMJ, you admitted to consuming alcohol both on the flight deck and while on liberty then being under the age of 21. Your use of alcohol as a minor shows questionable petty officer potential and will not be tolerated.

You were counseled on USCG policies concerning alcohol use and abuse, underage drinking, and the serious nature of this incident. The unit CDAR [Command Drug and Alcohol Representative] will arrange an appointment with a provider who will determine the nature of your relationship with alcohol. You will abstain from alcohol use until your screening and assessment is completed and you have reached the legal drinking age of 21.

This is considered your first documented alcohol incident. Your command may request removal of this incident from your permanent record after three years if no further incidents occur. Any further alcohol incidents or use of alcohol as a minor may result in your separation from the U.S. Coast Guard per Chapter 20 of the Personnel Manual, COMDTINST M1000.6 (series).

On a Page 7 dated July 18, 2005, the applicant acknowledged the following counseling:

CONGRATULATIONS! On 06 JUL 05, you successfully completed ADAPT Training at Madigan Army Medical Center ASAP. You have also successfully completed all requirements of your aftercare program. I encourage you to consider all that you have learned and take steps towards making POSITIVE changes in your life-style that will minimize your risk of further alcohol abuse. Your journey has already begun. If you return to a pattern of misuse of alcohol, take the first step and ask for help.

You have been advised of the contents of Chapter 20, Personnel Manual, COMDTINST M1000.6 (series) concerning the expected conduct of Coast Guard personnel.

VIEWS OF THE COAST GUARD

On February 1, 2019, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case.

Regarding the Page 7 dated May 20, 2004, the JAG also noted that the term “alcohol-related situation” is also no longer used, but there was never a policy allowing a Page 7 documenting one to be removed from a member’s record. She stated that this type of Page 7 is no longer used because “it had no association with alcohol use, but relates to general misconduct.”

Regarding the Page 7 dated May 18, 2005, the JAG stated that while Article 2.B.10.b. of COMDTINST M1000.10 used to permit removal of an alcohol incident incurred solely for underage drinking, this policy was removed from the manual in June 2018, before the applicant applied to the Board. She stated that since the applicant incurred the alcohol incident in May 2005, she could have pursued removal of the incident beginning in May 2008, but she did not. She “failed to seek removal during the ten-year timeframe in which the removal policy was in place and has offered no reason why it would be proper to remove it now in direct contradiction of current Coast Guard policy. Moreover, under the prior policy, removal was not guaranteed and at the discretion of Commander (PSC).”

The JAG did not address the applicant’s request for removal of the Court Memorandum dated May 17, 2005.

The JAG also adopted the findings and analysis in a memorandum on the case prepared by PSC, which stated that since COMDTINST M1000.10 was updated in June 2018, removal of alcohol incidents for underage drinking is no longer permitted. PSC also noted that the prior policy permitted only removal of a Page 7 documenting an alcohol incident solely for underage drinking and not any other documents.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 28, 2019, the applicant responded to the Coast Guard’s advisory opinion and stated that she had “no objection.”

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. Although the application was not filed within three years of the applicant’s discovery of the alleged error or injustice, it is considered timely because she has remained on active duty since the disputed documents were entered in her record.⁵

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.⁶

3. The applicant alleged that Page 7s documenting a 2004 alcohol-related situation and a 2005 alcohol incident and a Court Memorandum documenting NJP in her record are erroneous and unjust. In considering allegations of error and injustice, the Board begins its

⁵ *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).

⁶ *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).

analysis in every case 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.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

4. The applicant alleged that the disputed documents should be removed because applicable policy allowed her to seek removal of an alcohol incident for underage drinking. Article 20.B.2.j.2. of the Personnel Manual in effect in 2005 and in all intervening applicable manuals until June 2018 states that 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 member has had no further alcohol incidents in that 3-year period." Although her record shows that the applicant incurred no further alcohol incidents, for the reasons explained below, the Board finds that even if she had applied for removal of the disputed documents before June 2018, while the policy was in effect, her requests would have been denied:

a. The Page 7 dated May 22, 2004, documents an "alcohol-related situation" in accordance with Article 20.B.2.d. of the Personnel Manual, rather than an "alcohol incident" pursuant to Article 20.A.2.d.1. Article 20.B.2.j.2. of the Personnel Manual (and its successors) applied only to certain types of alcohol incidents, not to alcohol-related situations. It is not clear why the applicant's conduct in May 2004 was documented as an alcohol-related situation, instead of an alcohol incident, but even if it had been documented as an alcohol incident, it would not have qualified for removal under Article 20.B.2.j.2. because the applicant became intoxicated to the point of unconsciousness and had to be carried aboard the cutter. Article 20.B.2.j.2. allowed removal of a Page 7 documenting an alcohol incident for underage drinking only if the member's drinking did not leave her "unable to perform prescribed duties or [bring] discredit upon the Uniformed Services." Because this Page 7 was never removable under applicable policy and the applicant has not shown that it is erroneous or unjust, the Board finds no grounds for removing it from her record.

b. The Coast Guard argued that the applicant's request to remove the May 18, 2005, Page 7 documenting her "first alcohol incident" should be denied because the policy in Article 20.B.2.j.2. of the Personnel Manual and its successors was repealed in June 2018. But the Board normally applies policies that are contemporaneous with the disputed events or documents; the applicant could have requested to have this Page 7 removed anytime between May 2008 and June 2018 while the policy was in effect; and an applicant's failure to exhaust a remedy that has lapsed does not negate the Board's jurisdiction or mandate to

⁷ 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).

correct errors and injustices.⁹ Therefore, the repeal of the policy in 2018 does not *per se* persuade the Board that the applicant's request to remove this Page 7 should be denied. However, Article 20.B.2.j.2. of the Personnel Manual and its successors authorized the removal of Page 7s documenting alcohol incidents received "solely for underage drinking." The Page 7 and associated Court Memorandum show that the applicant received the alcohol incident not only for underage consumption of alcohol while on liberty but also for drinking and possessing alcohol aboard the cutter, on the flight deck, and in berthing on a few occasions contrary to regulations and for disobeying the cutter's four-buddy order after drinking alcohol while on liberty. Because the preponderance of the evidence shows that the applicant received the alcohol incident not only for drinking while underage but also for committing other misconduct in which the consumption of alcohol was a significant or causative factor,¹⁰ the Board finds that the Page 7 dated May 18, 2005, would not have qualified for removal under Article 20.B.2.j.2. Therefore, the Board finds no grounds for removing the Page 7 from the applicant's record.

c. Article 20.B.2.j.2. of the Personnel Manual and its successors allowed members to seek removal of a Page 7 documenting an alcohol incident received solely due to underage drinking. But that article did not authorize removal of a Court Memorandum documenting NJP for misconduct committed at the time of the alcohol incident or for subsequent false official statements regarding the alcohol incident. Therefore and because the applicant has not shown that the NJP was erroneous or unjust, the Board finds no grounds for removing the Court Memorandum dated May 17, 2005, from her record.

5. The applicant has not proven by a preponderance of the evidence that any of the disputed documents are erroneous and unjust. Accordingly, her requests should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁹ 33 C.F.R. § 52.13(b) (requiring applicants to have exhausted "such legal remedies as the Board may determine are practical, appropriate, and available to the applicant" (emphasis added)).

¹⁰ An "alcohol incident" is "[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." Personnel Manual, Article 20.A.2.d.1.

ORDER

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

October 18, 2019

