

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-047

████████████████████
██████████ CPO

FINAL DECISION

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. After receiving the applicant's completed application on December 11, 2018, the Chair docketed the case and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 20, 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 petty officer serving on active duty, asked the Board to remove from his record a negative CG-3307 Administrative Remarks ("Page 7")¹, dated February 20, 2005, documenting his first "alcohol incident."² He also asked the Board to remove "subsequent documentation" that he received as a result of the alcohol incident.

The applicant argued that the Page 7 should be removed because it was not signed by his commanding officer (CO) or himself. He alleged that the person who signed it was not in his chain of command. He stated,

¹ An "Administrative Remarks" 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 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." And after a third alcohol incident, enlisted members must be separated.

No formal investigation was completed. No non-judicial punishment occurred. As a result, I was never afforded the opportunity to make a statement on my behalf, and when I requested to make a statement in regard to what I was accused of, this piece of paper was placed in my EIPDR. I was also never informed of my right to counsel by the accuser.

The applicant claimed that he discovered the error in his record on November 19, 2018, but then stated that that was the date he learned about the BCMR.

SUMMARY OF THE MILITARY RECORD

The applicant enlisted in the Coast Guard on October 31, 2000. After recruit training, he attended "A" School; advanced to E-4; and was assigned to a Detachment in [REDACTED]

On a Page 7 dated February 14, 2003, the applicant was counseled about being repeatedly tardy to work. He was advised that if he could not arrive at work on time, he would be ordered to arrive at 0430 hours and Extra Military Instruction would be implemented.

On December 1, 2003, the applicant advanced to E-5. On February 25, 2004, however, he was counseled on a Page 7 about being excessively late for work on February 9, 18, 23, and 25. Therefore, his unit Supervisor imposed Extra Military Instruction and new collateral duties on him and warned him failure to comply would result in further action.

On April 19, 2004, the applicant was counseled on a Page 7 about being excessively late for work on numerous occasions. Therefore, his unit Supervisor imposed Extra Military Instruction on him and warned him that he risked being reduced in rank or discharged for unsuitability.

On a Page 7 dated July 8, 2004, the applicant was advised that he had been involved in an "alcohol situation." He was found in violation of regulations by consuming alcohol while in a work status at a job site. "This was in evidence by the purchase of a beer and later posting of the label on the equipment enclosure, as well as the careless disposal of government equipment." Because the applicant's consumption of alcohol was not considered to have been a significant or causative factor in his behavior, it was not documented as an "alcohol incident" but as "the latest in a series of careless decisions." The applicant was advised about the Coast Guard's alcohol policies.

The primary disputed Page 7 in the applicant's record states the following:

20 FEB 05: After consuming alcoholic beverages at the [hotel], you walked to the [restaurant] in [REDACTED]. During the walk you kicked and broke a light on the pier. When you went inside the [restaurant] one of the boat owners informed the bartender that you had broken the light. The bartender asked you to leave. You were argumentative and belligerent with the bartender and boat owner prior to departing. The [REDACTED] Police Department investigated the damages and suggested that you offer to pay for the light.

04 MAR 05: You paid \$500 to the Dockmaster for the [restaurant] for the damages caused to the light.

You were counseled on USCG policies concerning alcohol use and abuse as well as the serious nature of this incident. The LANTAREA CDAR has requested that your Unit CDAR make 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.

This is considered your first alcohol incident for documentation purposes. Per Chapter 20 of the Personnel Manual, COMDTINST M1000.6A (series), any further alcohol incidents may result in your separation from the Coast Guard.

The Page 7 is signed by a senior chief petty officer “by direction.” In addition, another member signed the Page 7 as a witness to the fact that the applicant “refused to sign claiming inaccuracy.” The Page 7 shows at the bottom that the Detachment was the applicant’s “permanent unit” but that the “unit preparing this form” was the Atlantic Area command, where the applicant was serving on temporary duty.

On a Page 7 dated March 24, 2005, the applicant’s permanent unit Supervisor noted that as a result of the alcohol incident, the applicant had been evaluated by a psychologist, who determined that he did not meet the criteria for a diagnosis of alcohol abuse or dependence. The applicant was directed to attend IMPACT and PREVENT courses.

On March 29, 2005, the applicant received a disciplinary Enlisted Evaluation Report (EER) from his permanent chain of command with numerous poor marks. On a scale from 1 (worst) to 7 (best), he received four marks of 2 for Responsibility, Setting an Example, Health and Well-Being, and Integrity; three marks of 3 for Monitoring Work, Communicating, and Respecting Others; thirteen “standard” marks of 4; two marks of 5; an Unsatisfactory Conduct mark; and a Not Recommended for Advancement mark. The comments supporting the poor marks state that the applicant had incurred an “alcohol incident” while on temporary duty in [REDACTED] and thus disqualified himself from executing his orders to be deployed overseas. They also state that he was “caught in deceptive explanations or omission of information with the intentions of gain. When Mbr was involved in incidents outside of normal work hours with military authorities Mbr failed to contact this unit.”

The applicant also received a Page 7 dated March 29, 2005, which was signed by his CO and acknowledged by the applicant with his signature on April 11, 2005. It states that he had been placed on performance probation for misconduct until January 15, 2006, pursuant to Article 12.B.18. of the Personnel Manual due to “repeated discreditable involvement with civil or military authorities. This behavior brings discredit upon yourself and the Coast Guard, and calls into question your judgment and suitability for continued service in the Coast Guard.” The Page 7 advised him about how he needed to conform his behavior during that period or risk not being recommended for reenlistment and being recommended for discharge.

On May 2, 2005, the applicant was transferred to a different Detachment.

On a Page 7 dated October 13, 2005, the applicant was advised that he was still Not Recommended for Advancement. The Page 7 states that he “has yet to obtain the leadership, personal integrity, and adherence to core values necessary to recommend advancement to [first class petty officer/E-6]. The Page 7 states that he had received the lowest possible mark of 1 in three performance categories: Responsibility, Setting an Example, and Adaptability and a mark of 2 for Integrity. He was advised to act “responsibly in all situations, on and off duty, specifically in the

use of your government travel card,” to maintain professionalism, to “display the utmost integrity and loyalty,” to “lead by example,” and to “use alcohol discriminately or not at all. Your use of alcohol has made significant contributions to your inability to make sound decisions.” This Page 7 is signed by a chief warrant officer and the applicant.

On a second Page 7 dated October 13, 2005, the applicant was advised that he had received an Unsatisfactory Conduct mark on his performance evaluation and so his eligibility period for a Good Conduct Medal had terminated and restarted.

In May 2007, the applicant was transferred to a cutter. In 2010, he changed ratings, transferred to another unit, and advanced to E-6. He transferred again in 2014 and advanced to chief petty officer (E-7) on December 1, 2017. In 2018, he became a trainer for his rating. He has received many positive Page 7s in his new rating.

VIEWS OF THE COAST GUARD

On June 12, 2019, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant partial relief in this case in accordance with the findings and analysis provided in a memorandum submitted by the Commanding Officer, Coast Guard Personnel Service Center (PSC).

Citing current regulations—Enclosure 6 to PSCINST M1000.2A—PSC claimed that the Page 7 documenting the alcohol incident “was not signed by the appropriate authority.” PSC stated that it should have been signed by the applicant’s CO and not by “an E-8 with By Direction authority.” However, PSC stated, a CO may determine that a member has incurred an “alcohol incident” without initiating an investigation, and the applicant’s conduct did meet the definition of an “alcohol incident.” PSC noted that the fact that the applicant refused to acknowledge receipt of the Page 7 with his signature does not make it invalid. PSC concluded that the Page 7 “was not erroneously issued but it was erroneously signed by a member without appropriate authority.”

PSC also stated that the disciplinary EER should have been dated the same date as the alcohol incident but was not.

Therefore, PSC recommended removing the Page 7 documenting the alcohol incident “because it was not issued in accordance with policy” even though PSC “believes the alcohol incident did occur.” PSC also recommended correcting the date of the disciplinary EER to February 20, 2005—the date of the alcohol incident.

The JAG agreed with PSC that an unauthorized person signed the Page 7 documenting the applicant’s alcohol incident and so argued that it should be removed from his record. However, the JAG stated, all of the remaining negative documentation in his record is appropriate, and the applicant has submitted no evidence to show that any of the statements in his record are false.

The JAG noted that current policy requires a disciplinary EER to be dated the date of the alcohol incident but there was no such requirement in the Personnel Manual in effect in 2005.

Regarding the applicant's other claims, the JAG noted that the applicant had no right to an attorney under the Personnel Manual in effect in 2005. An alcohol incident could be documented in his record as long as his CO believed that alcohol was a causative factor in his behavior that caused disrepute to the Service. "Here, the Commanding Officer believed that because Applicant consumed alcohol, he caused \$500 worth of personal property damage of a civilian business owner, which brought the Coast Guard into disrepute. As such, the elements for an alcohol incident are met." Therefore, the JAG argued, the disciplinary EER in the applicant's record is not erroneous or unjust.

The JAG also stated that the Page 7 dated March 24, 2005, which documents the results of the applicant's screening was properly issued. Therefore, the JAG concluded, the Page 7 documenting the alcohol incident should be removed, but all other requests for relief should be denied.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 24, 2019, the Chair of the BCMR sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. The BCMR did not receive a response.

APPLICABLE LAW AND POLICY

Personnel Manual

Article 20.A.2.d.1. 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.e.1. states that a member involved in an alcohol incident must undergo screening and the results must be documented in the member's record on a Page 7.

Article 20.B.2.g., "First Alcohol Incident," states the following:

The first time a member is involved in an alcohol incident, except those described in Article 20.B.2 f., the commanding officer shall ensure this counseling is conducted; for enlisted members recorded on a CG-3307 entry in the member's PDR; acknowledged by the member; and a copy sent to Commander (CGPC-epm) and (CGPC-adm-3). For officers the record of counseling shall be by letter with copy to Commander (CGPC-opm) and (CGPC-adm-3). This entry is in addition to that required by Article 20.B.2.e.

Article 20.B.2.h.2. states that enlisted members who incur a second alcohol incident will normally be processed for separation. Article 20.B.2.i. states that enlisted members involved in a third alcohol incident "shall be processed for separation from the Service."

Article 10.B.5.b.8. of the Personnel Manual requires a member who incurs an alcohol incident to receive a disciplinary EER.

Article 10.B.2.a. requires an EER to include adverse remarks to be entered in a member's record to support any marks of 1 or 2 on an EER, Unsatisfactory Conduct marks, or marks of Not Recommended for Advancement.

Article 14.B.2.a. of the Personnel Manual allows members to appeal a personnel record entry through the chain of command to the CO. The example provided of such an entry that may be appealed is a Page 7.

Personnel and Pay Procedures Manual

Chapter 1 of the Personnel and Pay Procedures Manual (PPPM), PPCINST M1000.2A, that was in effect in 2005 states that the CO "may authorize in writing for officers, chief petty officers, first class petty officers, and second class petty officers to sign forms and worksheets 'by direction,' subject to the following restrictions." The list of restrictions does not include Page 7s concerning alcohol incidents or members of other commands.

Enclosure 6 to the manual states that if a unit other than the member's current permanent duty station is preparing a Page 7 entry, the name of the unit preparing the Page 7 must appear on the form.

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.
2. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice. Although the applicant alleged that his date of discovery was in 2018, he has known about the disputed documents in his record since 2005. Therefore, the preponderance of the evidence shows that he discovered the alleged errors in his record in 2005. However, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service.³ Because the applicant has remained on active duty since the disputed Page 7 and other documents were entered in his record, the three-year limitations period has been tolled. Therefore, the application is timely.
3. The applicant alleged that he was erroneously and unjustly given a negative Page 7 documenting an alcohol incident in 2005. 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.⁴ Absent evi-

³ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994).

⁴ 33 C.F.R. § 52.24(b).

dence 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.”⁵

4. The applicant’s conduct as described on the Page 7 and the disciplinary EER, which was prepared by his designated rating chain, meets the definition of an “alcohol incident” in Article 20.A.2.d.1. of the Personnel Manual. Article 20.B.2.g. of the manual does not require an investigation, NJP, or legal representation for the member for a CO to find that the member had incurred an alcohol incident. The documentation shows that after the applicant drank alcohol at his hotel and walked to a restaurant, civilians reported to the police that on the way to the restaurant, he had kicked and damaged a light on the dock. The police investigated, and the applicant voluntarily paid the dockmaster for the restaurant \$500 in restitution for the damage he had caused. Therefore, the preponderance of the evidence shows that the applicant incurred the alcohol incident. And if he had wanted to contest the Page 7, he could have appealed it through his chain of command by submitting a request chit in accordance with Article 14.B.2.a. of the Personnel Manual.

5. Despite the Coast Guard’s recommendation, the Board finds no grounds for removing the disputed Page 7 from the applicant’s record. In recommending its removal, both PSC and the JAG cited current policy, instead of the policy in effect in 2005. In 2005, nothing prevented the applicant’s CO from finding that the applicant had incurred an alcohol incident, in accordance with Articles 20.A.2.d.1. and 20.B.2.g. of the Personnel Manual, and authorizing a senior chief at the applicant’s temporary duty command to prepare and sign the Page 7 documenting the alcohol incident “by direction.” Chapter 1 of the Personnel and Pay Procedures Manual, PPCINST M1000.2A, in effect in 2005 authorized COs to authorize chief petty officers to sign Page 7s, and Enclosure 6 allowed Page 7s to be prepared at units other than the member’s permanent unit.⁶ The applicant waited almost fourteen years to challenge the propriety of this Page 7 and the determination of an alcohol incident, which are presumptively correct.⁷ In addition, as the JAG noted, the applicant’s refusal to acknowledge the Page 7 with his signature did not render it invalid.

6. The applicant also asked the Board to remove “subsequent documentation” that was entered in his record as a result of the alcohol incident. Because he incurred an alcohol incident, Article 20.B.2.e.1. of the Personnel Manual required that he undergo screening for alcohol abuse or dependence and that the results be documented on another Page 7. Therefore, the Page 7 dated May 24, 2005, was properly entered in the applicant’s record.

7. Likewise, Article 10.B.5.b.8. of the Personnel Manual required his rating chain at his permanent unit to prepare a disciplinary EER to document the alcohol incident. His rating chain prepared the EER dated March 29, 2005, with numerous low marks and negative comments about both the alcohol incident and the applicant’s “deceptive explanations.” Although PSC recommended that the date of this EER be changed to the date of the alcohol incident, the Personnel Manual in effect in 2005 does not specify the date of the required EER, and the EER comments address the applicant’s “deceptive explanations” about his conduct, which presumably occurred

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁶ Tighter restrictions on who could sign adverse Page 7s did not go into effect until 2009 with Change 14 to PPCINST M1000.2A.

⁷ 33 C.F.R. § 52.21(b).

during discussions with his command after the date of the alcohol incident. Therefore, the Board will not change the date of the disciplinary EER because the preponderance of the evidence does not show that it is erroneous or unjust.

8. The record shows that the applicant's CO reasonably decided to place him on performance probation for misconduct for almost ten months. Article 12.B.18.c. of the Personnel Manual required preparation of a Page 7 to show that he had been counseled about the terms of his probation. Therefore, the Page 7 dated March 29, 2005, was also properly entered in the applicant's record.

9. After he transferred to a different Detachment in May 2005, the applicant received an EER with even lower marks on October 13, 2005. The Page 7 documenting the Unsatisfactory Conduct mark and the termination of his eligibility period for a Good Conduct Medal was required by Articles 10.B.2.a. and 10.B.8. of the Personnel Manual. The applicant submitted no evidence to show that these documents are erroneous or unjust.

10. The applicant has not proven by a preponderance of the evidence that any of the negative documentation in his record from 2005 is erroneous or unjust. Accordingly, the applicant's requests should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

December 20, 2019

