

**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. 2019-129**

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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. § 2507. The Chair docketed the case after receiving the completed application on May 10, 2019, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated May 1, 2020, 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 First Class Petty Officer on active duty, asked the Board to correct her record by removing all documentation related to a December 5, 2009, arrest for driving under the influence (DUI). Specifically, the applicant requested that the following be expunged from her service record: 1) a Court Memorandum documenting non-judicial punishment (NJP); 2) three Administrative Remarks forms ("Page 7s"); 3) documentation of her Alcohol Prescreening Interview; 4) a Report of Offense and Disposition; 5) a memorandum from the applicant's Commanding Officer; and 6) and a message from the Commander of the Personnel Service Center.

The applicant, through counsel, argued that she deserves clemency because this is the only disciplinary incident in her Coast Guard career. She stated that the punishment she received has served its purpose. She argued that given the passage of time and her contributions to the Coast Guard, all documents pertaining to the DUI and related NJP should be expunged from her record. The applicant further argued that she is more than deserving of clemency and it would be an error and unjust to allow this one blemish to continue to tarnish her outstanding Coast Guard career.

The applicant explained that in the summer of 2009, she filed for divorce from her first husband. Then, in December of that year, she was informed that her estranged husband had received a third extension on the divorce. She was depressed, angry, and upset.

Around that same time, the applicant was set up on a blind date by a friend and they arranged to go on a double date. On December 5, 2009, the two couples went to a sports bar to eat, drink, and socialize. The applicant's friend agreed to be the designated driver. The applicant alleged that her date never let her glass of beer get empty. At the end of the evening, the applicant stated, she saw a woman in the parking lot who was upset and crying. The applicant learned that the woman was in an abusive relationship and that her boyfriend was threatening to harm her. The applicant called law enforcement to assist the woman. Once the applicant called law enforcement, the two couples walked to their vehicle to drive home.

While the applicant's friend had initially agreed to be the designated driver, she was having trouble operating the vehicle. The applicant became frustrated and decided that she would be the one to drive back to her friend's apartment. On the way out of the parking lot, the applicant encountered the law enforcement officers who were responding to her call. After speaking with the officers, the applicant was arrested for suspicion of driving under the influence.

On the night of her arrest, the applicant was supposed to be on duty as a Pollution Responder. However, she alleged, a fellow Pollution Responder had agreed to respond to any calls while she was out on the date.

The applicant stated that she was punished by civilian authorities. She received a fine of \$483.00 and was ordered to complete a 3-day Driver Intervention Program in lieu of jail time. Her driving privileges were also suspended for six months and she had to pay a \$475.00 reinstatement fee.

The applicant stated that since the incident, she has diligently worked on her professional development. This was a one-time incident involving alcohol and a serious lack of judgment. She stated that she has used this negative experience as a positive motivator in both her personal and professional life. She asked the Board to remove this stain from her record so that she can move onward and upward in her career.

The applicant provided several documents in support of her application. She provided performance evaluations that demonstrate consistently above-average marks, positive Page 7s, letters of commendation, awards, and medals which all demonstrate her admirable work in the Coast Guard. The applicant also submitted five letters of recommendation. The letters attest to the applicant's professionalism, technical expertise, volunteerism, and integrity.

### **SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard on June 5, 2007, at age 28. Following recruit training, she was enrolled in "A" School to be a Marine Science Technician. By 2009, the applicant had advanced to Second Class Petty Officer.

On December 5, 2009, the applicant was arrested for driving under the influence (DUI). She submitted to a breathalyzer exam and registered a 0.184 Blood Alcohol Content.<sup>1</sup> Additionally, at the time she was arrested, her name was on the duty roster as the Duty Petty Officer, and

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<sup>1</sup> The legal limit in the state in which the applicant was arrested is .08.

so she had violated the no alcohol consumption on duty policy. This was considered the applicant's first alcohol incident which was documented on a Page 7.

On December 7, 2009, the applicant received a Page 7 notifying her that she was restricted from operating a motor vehicle aboard all Coast Guard installations for one year. Additionally, she was restricted from operating government vehicles for one year. She was notified that her driving privileges would be reinstated on December 7, 2010, if she successfully completed an alcohol safety awareness program.

On December 8, 2009, the applicant received a Page 7 notifying her that she was being considered for discharge for reason of unsuitability or misconduct as a result of her alcohol incident. She was advised that she had one year to demonstrate that she was willing and able to comply with all rules, regulations, and command expectations. The applicant's Commanding Officer (CO) stated that this probationary period was her opportunity to prove to the command that she was deserving of remaining in the Coast Guard. Her CO stated the following:

In summation, if you show up at work on time every day, perform all tasks expected, do not absent yourself without authority, treat everyone in a respectful manner, do not violate the Uniform Code of Military Justice, do not violate any federal or local laws, do not violate any general regulations, obey all orders, and adhere to the Coast Guard Core Values of Honor, Respect and Devotion to Duty, the command will terminate this probationary period in 6 months and you will get a fresh start.

Also on December 8, 2009, the applicant received a Report of Offense and Disposition. She was charged with drunken or reckless driving,<sup>2</sup> being drunk on duty,<sup>3</sup> and leaving the duty vacant.<sup>4</sup> At mast, the applicant's CO dismissed the charge of drunken or reckless driving (presumably because that charge was prosecuted by civil authorities).

On December 11, 2009, the applicant received nonjudicial punishment (NJP) for being drunk on duty and for leaving the duty vacant. She was sentenced to forfeiture of half her pay for 2 months and a reduction in paygrade to E-4 (suspended for 6 months).

On January 13, 2010, the applicant received an Alcohol Prescreening Interview. The Command Drug and Alcohol Representative determined that the applicant was not an alcohol abuser and she did not exhibit signs of alcohol dependency. The applicant was described as a "dedicated employee of the US Coast Guard, has never missed a workday, and is looked on as model for other members at this unit to emulate for her work habits."

On June 11, 2010, the applicant's CO recommended that she be restored to her former rate (prior to NJP). The CO stated that the applicant had completed alcohol screening and a Driver Intervention Program. The CO described the applicant as an "excellent asset" to the Coast Guard who had worked diligently to restore the trust that her indiscretion cost her.

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<sup>2</sup> Article 111, UCMJ.

<sup>3</sup> Article 112, UCMJ.

<sup>4</sup> Article 134, UCMJ.

On August 1, 2010, the Commander of the Personnel Service Center (PSC) authorized the restoration of the applicant's rate.

### VIEWS OF THE COAST GUARD

On October 23, 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 and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC argued that the application was not timely filed. PSC also argued that the BCMR's enacting statute, 10 U.S.C. § 1552, limits the Board's clemency review to actions of court-martial.

PSC alleged that the Coast Guard does not have a policy that permits clemency review of nonjudicial punishments (NJP). However, the Coast Guard does have the power to set aside executed punishment. This should only be exercised within a reasonable time after the punishment has been executed. PSC argued that ten years is not a reasonable time.

PSC commended the applicant for improving her life. Nonetheless, PSC argued that she committed an infraction and those documents related to the matter must remain in her Personnel Data Record (PDR).

The JAG reiterated PSC's allegation that it is not within statutory authority for this Board to grant clemency as requested. Instead, the JAG argued that this Board's clemency review is limited to cases of courts-martial. The JAG argued that the true relief that the applicant is seeking is expungement of documents in her PDR that are not favorable to her.

The JAG argued that the Coast Guard did not commit an error or injustice. In fact, the JAG noted that the applicant did not argue that the Coast Guard committed an error or injustice. Instead, the applicant argued that it would be an error or injustice not to grant her clemency because the documents related to her arrest for DUI might preclude her from advancing in her career. The JAG argued that this is a misapplication of the "error or injustice" standard.

The JAG argued that it would be an error to expunge the applicant's record. According to the JAG, there are legitimate reasons for the Coast Guard to retain documentation of a member's past conduct and performance issues for their entire career. Specifically, Page 7s document counseling or other information required by current directives that are considered to be of historical value. The JAG argued that information related to the applicant's arrest for DUI and NJP are of historical value because there are escalating consequences for subsequent DUIs and/or alcohol incidents pursuant to Coast Guard policy. Additionally, this information is required under the Military Justice Manual and Military Drug and Alcohol Policy. The JAG argued that while this documentation could have a negative impact on the applicant's professional opportunities, this potential impact does not render the documentation erroneous or unjust.

The JAG concluded by stating that the applicant's post-incident conduct does not create a basis for expungement. The JAG acknowledged the applicant's stellar Coast Guard career. However, the Coast Guard is entitled to know the applicant's entire record.

## APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 30, 2019, the Chair sent the applicant a copy of the Coast Guard's views and invited her to respond within thirty days. The applicant, through counsel, asked the Board to disregard the recommendation of the JAG and correct the applicant's military record as requested.

The applicant opposed the JAG's limited meaning of "injustice". She argued that there is more than one definition of "injustice" under 10 U.S.C. § 1552. The applicant stated that it would be an injustice to both herself and the Coast Guard if the Board failed to remove the NJP and related documentation from her record.

The applicant argued that clemency is not limited to court-martial convictions. She argued that there is no language in 10 U.S.C. § 1552 that limits clemency to just court-martial convictions and sentences.

The applicant argued that contrary to the JAG's allegation, her post-incident conduct is precisely the basis for granting clemency. She argued that her post-incident conduct demonstrates her rehabilitation. As such, her previous indiscretion should not be used to hinder her Coast Guard career. The applicant argued that there is "little to no value for USCG maintaining this blemish in her record." She concluded by stating that no harm would come from removing this incident from her record.

## APPLICABLE LAW AND POLICY

Chapter 20.A.4. of the Personnel Manual in effect in 2009 discusses the consequences of driving under the influence of intoxicants. According to the manual, Commands shall restrict a member's driving privileges aboard Coast Guard installations following an apprehension based upon a BAC test whose level meets or exceeds 0.08%. Notification of restrictions shall be made in writing and acknowledged by the person whose driving privileges have been restricted. A copy of the notification and acknowledgement shall be placed in the Personnel Data Record (PDR) and a copy mailed to Commandant for inclusion in the member's headquarters PDR.

Chapter 20.B.2 of the Personnel Manual in effect in 2009 discusses guidelines on alcohol abuse in relevant part:

### 20.B.2.e. Alcohol Screening

1. Any member who has been involved in an alcohol incident or otherwise shown signs of alcohol abuse shall be screened in accordance with the procedures outlined in the Coast Guard Health Promotion Manual, COMDTINST M6200.1 (series), Ch 2, or in Article 20.A.5. for inactive duty reservists. The results of this alcohol screening shall be recorded and acknowledged on a CG-3307 entry or letter, as appropriate, in the member's PDR with a copy to Commander (CGPC-epm) or (CGPC-opm), as appropriate, and (CGPC-adm-3). The entry shall describe the facts of the incident or risk factors, the results of alcohol screening, the position and organization of the individual conducting the screening, and a statement of the treatment recommended, if any.

### 20.B.2.g. First Alcohol Incident

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 (CGPCopm) and (CGPC-adm-3). This entry is in addition to that required by Article 20.B.2.e.

1. The member shall be counseled on Coast Guard policy on alcohol abuse contained in this article.

2. Officers and chief warrant officers shall be advised that an additional alcohol incident will result in their being processed for separation under Chapter 12.A of this manual. Enlisted members will be advised an additional incident normally will result in discharge and, a statement shall be made that the member has been involved in his or her first alcohol incident and a subsequent incident normally will result in separation action.

Chapter 1.E.7. of the Military Justice Manual in effect in 2009 discusses the remission, restoration, and setting aside of non-judicial punishments in relevant part:

1.E.7.a. Persons Authorized

The commanding officer who imposed the punishment, successors in command, and superior commanding officers have authority to remit or set aside punishments. [See, paragraphs 6.c. and 6.d., Part V, MCM]

1.E.7.b. Successor in Command

The term "successor in command" is defined as a commanding officer who has succeeded to the command of the commanding officer who imposed the punishment, or under whose delegated power the punishment was imposed, provided that the member punished is still in the command.

1.E.7.c. Initiating Action

Action to remit or set aside a part of the punishment and to restore all rights, privileges, and property affected may be taken at the commanding officer's own initiative or on application of the member punished. Any such application should be made within a reasonable period of time, generally fifteen days.

1.E.7.d. Remission

Remitting a punishment is an exercise of clemency, and applies only to an unexecuted part of a punishment. The unexecuted part of the punishment that is remitted is not carried out, but that part that has already been served, forfeited, etc., is not restored. Once remitted, an unexecuted punishment may never be revived and re-imposed.

1.E.7.e. Setting Aside and Restoration

Setting aside punishment amounts to wiping the slate clean and, except for collateral administrative action [see, subparagraph 1.E.7.e above] setting aside all punishment awarded at most is the equivalent of the member never having been punished pursuant to Article 15, UCMJ. The power to set aside punishment and restore rights, privileges, and property affected by the executed portion of a punishment should ordinarily be exercised only when the authority considering the case believes that the ends of justice and discipline are best served by setting aside some or all of the punishment. Both executed and unexecuted portions of a punishment may be set aside. Any punishment set aside is extinguished and, unlike suspended punishment may not be resurrected. The power to set aside executed punishment should be exercised only within a reasonable time after the punishment has

been executed (four months absent unusual circumstances). If the entire punishment imposed at a mast is set aside, then:

- (1) The effective date of restoration to the former pay grade is the date of advancement to that pay grade prior to the date of the mast that effected the reduction.
- (2) The NJP that has been set aside is not considered NJP for purposes of determining the member's eligibility for a Good Conduct Medal, advancement, or appointment to warrant officer.
- (3) A conduct mark lowered as a result of the conduct that resulted in the NJP will not automatically be raised, unless the commanding officer assigning the conduct mark deems it appropriate. Assigning an appropriate conduct mark is an administrative decision that must be made as a result of awarding NJP, but NJP is not a prerequisite to appropriately evaluating a member's conduct under personnel regulations.

### FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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. Although the application was not filed within three years of the applicant's discovery of the alleged error or injustice that she wants corrected, it is considered timely because she has remained on active duty in the interim.<sup>5</sup>

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.<sup>6</sup>

3. The applicant alleged that retaining documents in her military record related to her December 5, 2009, arrest for DUI and being drunk on duty 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 the military record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>7</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>8</sup>

4. The applicant did not argue that the Coast Guard committed an error or injustice. Rather, she argued that it would be an error or injustice not to expunge the negative documentation from her record because it might preclude her from advancing in her career. Under 10 U.S.C. §

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<sup>5</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).

<sup>6</sup> *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).

<sup>7</sup> 33 C.F.R. § 52.24(b).

<sup>8</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).

1552, the Board is authorized not only to correct errors but to remove injustices from any Coast Guard military record. For the purposes of the BCMR, “injustice” is sometimes defined as “treatment by the military authorities that shocks the sense of justice but is not technically illegal.”<sup>9</sup> The Board has authority to determine whether an injustice exists on a “case-by-case basis.”<sup>10</sup> Indeed, “when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate,”<sup>11</sup> and “[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious.”<sup>12</sup>

5. The applicant requested that adverse documentation, associated with a DUI arrest and being drunk on duty in 2009, be expunged from her military service records. Regarding the applicant’s request to remove the Page 7 documenting her alcohol incident, Article 20.B.2.g. of the Personnel Manual requires entry of a Page 7 documenting a member’s counseling about an alcohol incident and the consequences of a second alcohol incident. Regarding the applicant’s request to remove documentation of her Alcohol Prescreening Interview, Article 20.B.2.e.1. requires entry of a Page 7 documenting the results of an alcohol abuse and dependency screening whenever a member incurs an alcohol incident. Regarding the applicant’s request to remove the Page 7 documenting her restricted driving privileges, Article 20.A.4.d.4. requires entry of a letter documenting a member’s restriction to operate a motor vehicle aboard all Coast Guard installations. All of the disputed documentation was entered in the applicant’s record in accordance with these rules. The Board does not agree with the applicant’s allegation that the quality of a member’s work justifies removal of the accurate and proper documentation that is required by the Personnel Manual.

6. Further, the applicant’s allegation that “there is little or no value” in retaining these records is incorrect, as retention is required by the Coast Guard’s alcohol abuse prevention program. The objectives of the program are twofold: 1) reduce the incidence of substance and alcohol abuse by Coast Guard members; and 2) facilitate the identification, treatment, and rehabilitation of members who are found to be chemically dependent on drugs or alcohol prior to discharge from the Coast Guard. In order to be effective, documentation regarding a member’s alcohol incident must remain in his or her Personnel Data Record (PDR) for the entirety of his or her career. As the JAG noted, there are escalating consequences for subsequent DUIs and/or alcohol incidents. Specifically, an enlisted member involved in a second alcohol incident is normally processed for separation. Removing documentation of the applicant’s first alcohol incident would prevent her command from identifying a second alcohol incident if that were to occur. Therefore, the Board finds that it is not an error or injustice to retain documentation of the applicant’s alcohol incident, alcohol screening, and restriction of driving privilege in her PDR.

7. The applicant requested that the Page 7 notifying her that she was being considered for discharge for reason of unsuitability or misconduct be expunged from her military service

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<sup>9</sup> *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); *but see* 41 Op. Att’y Gen. 94 (1952), 1952 WL 2907 (finding that “[t]he words ‘error’ and ‘injustice’ as used in this section do not have a limited or technical meaning and, to be made the basis for remedial action, the ‘error’ or ‘injustice’ need not have been caused by the service involved.”).

<sup>10</sup> Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

<sup>11</sup> *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)).

<sup>12</sup> *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).



records. Unlike the administrative documentation discussed above, this Page 7 was not required by the Personnel Manual as a result of her DUI. According to the Personnel Manual, a member is not usually discharged after their first alcohol incident. However, the applicant was also drunk on duty, and her CO determined that her conduct warranted consideration for discharge. Before initiating her discharge, the applicant was placed on six months' probation to prove to the command that she deserved to remain in the Coast Guard. Under Articles 12.B.9., 12.B.16., and 12.B.18. of the Personnel Manual then in effect, members could be discharged for disruptive behavior, for alcohol abuse even without a second alcohol incident, or for a pattern of misconduct, respectively, but they were first entitled to a probationary period, and that probationary period had to be documented in their records on a Page 7.<sup>13</sup> Therefore, the Board finds that the Page 7 documenting her probationary period is not erroneous either.

8. The Board notes that the applicant's CO wrote on the Page 7 documenting her probation that if she successfully completed the probationary period, she would get a "fresh start." As the Page 7s documenting the alcohol incident, screening, loss of driving privileges, and probationary period in her PDR were required by the Personnel Manual, the "fresh start" presumably referred to how she would be trusted and treated by the command. Her CO did not have the authority to promise that Coast Guard Headquarters would remove the adverse documentation from her PDR.

9. The applicant requested that adverse documentation associated with her NJP be expunged from her military service records. According to Chapter 1.E.7. of the Military Justice Manual, the applicant's NJP could have been set aside by the CO who imposed the punishment, successors in command, or superior commanding officers. This would have, in essence, wiped her record clean of any evidence of the NJP. The power to set aside a punishment should have been exercised within a reasonable time after the punishment had been executed—four months absent unusual circumstances. In this case, the applicant received NJP more than ten years ago. Whether the applicant did not pursue this recourse or whether her request was denied is unknown. Additionally, the power to set aside punishment should be exercised only when the ends of justice and discipline are best served by setting aside the punishment. The applicant received NJP for being drunk on duty and for having left the duty vacant upon her arrest. The maximum punishment for being drunk on duty is a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 9 months. Further, the applicant's charge of having left the duty vacant falls under the category of offenses that prejudice the good order and discipline of the armed forces. The failure of the applicant's command to set aside her punishment, the extended delay in her request without evidence of unusual circumstances, and the seriousness of the offenses committed do not support setting aside the applicant's NJP. Therefore, the Board finds that it is not an error or injustice to retain documentation of the applicant's NJP and all related documentation in her record.

10. The applicant alleged that if the documents pertaining to her DUI and NJP were to remain in her record, it would preclude her from advancing in her career. However, the fact that documentation of past misconduct might prevent her from advancing does not render that documentation erroneous or unjust. Coast Guard boards that select members for command or for officer appointments, for example, are entitled to assess and compare the candidates based on their entire

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<sup>13</sup>Article 12-B-9, CGPERSMAN (CG 207); Article 12-B-16, CGPERSMAN (CG 207); Article 12-B-18, CGPERSMAN (CG 207).

records, and the BCMR does not remove documentation just to hide misconduct from such boards. Those boards may and should accord the disputed documentation whatever weight they deem appropriate given its age and content when comparing the applicant to other candidates, some of whom may have similar incidents documented in their records.

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

**ORDER**

The application of MST1 [REDACTED], USCG, for correction of her military record is denied.

May 1, 2020

