

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2023-010

██████████ ██████████ ██████████
EM3

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 January 18, 2023, and assigned the case to the staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision dated May 17, 2024, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT’S REQUEST & ALLEGATIONS

The applicant, an Electrician’s Mate, Third Class (EM3/E-4), asked the Board to remove a June 8, 2022, alcohol incident documented in a June 10, 2022, CG-3307 (“Page 7”).

The applicant alleged that the “alcohol incident”¹ is unjust because his command told him he would not receive any form of punishment due to the lack of paperwork from the Navy Shore Patrol. According to the applicant, on the night of the event at issue he was told to show up to work on time the next day and nothing more. He alleged that his command said that as long as he showed up to work on time the next morning, he would not get punished. The applicant stated that the following day, he showed up to work on time per his command’s instructions, while the other member who was present the night before did not show up to work on time. The applicant alleged that this is what caused his command to “merge [the applicant] and the other member into one” and treat the applicant unjustly.

¹ Article 1.A.2.d. of COMDTINST M1000.10A defines an “alcohol incident” as “any behavior, in which the CO/OIC determines by a preponderance of evidence after considering the relevant facts(i.e., police reports, eyewitness statements, and member’s statement if provided) that alcohol was a significant or causative factor that resulted in the member’s loss of ability to perform assigned duties or is a violation of the UCMJ, Federal, State, or local laws. The military member need not be found guilty at court-martial, in civilian court, or be awarded non-judicial punishment for a behavior to be considered an alcohol incident.”

To support his claims of injustice, the applicant pointed to an incident two months prior to his alcohol incident, in which another member of his command was detained and given official paperwork of intoxication but did not receive any punishment or an alcohol incident. The applicant further alleged that this different treatment is unjust and his alcohol incident is “a very harsh and detrimental punishment.” The applicant explained that he is bringing this issue to light because he always assumed he would make a career out of the Coast Guard, but considering the way he was treated, the probability of him remaining in the Coast Guard has dropped dramatically.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on June 23, 2020. He trained as an Electrician’s Mate, advancing to the rank of EM3/E-4. After graduating from EM “A” School, he was transferred to a unit overseas in December 2021.

General Order

Before he was transferred overseas, on January 9, 2020, the unit commander had issued a General Order implementing a curfew and requiring all military members of the unit to abstain from certain conduct, such as the public consumption of alcohol after certain hours. The relevant portions of the order state the following:

1. Purpose. The purpose of this general order is to identify and regulate authority in references (a) through (d), and promulgated additional guidance for Joint Security Area (JSA) [redacted] based on current Force Protection conditions. This order is effective immediately.

...

3. Authority and Applicability. As the senior military officer in [redacted], Commander U.S. Naval Forces Central Command (COMUSNAVCENT) is responsible for force protection of military personnel, their families, and civilians serving with or employed by the Department of Defense (DoD). Per reference (a), COMUSNAVCENT is designated as Commander, JSA [redacted] and is responsible for the execution of Joint Security Operations in [redacted]. It also applies to personnel transiting through or temporarily visiting [redacted]. These provisions do not apply to [redacted] local national employees, third country national employees, civilian mariners, or military members under the authority of the U.S. Chief of Mission.

4. Force Protection Measures

...

e. Curfew. Personnel subject to JSA [redacted] Force Protection shall be in a hotel or private residence by 0100 nightly. After midnight, all personnel are prohibited from being in clubs, bars, and other establishments where the consumption of alcohol is a primary focus of activity. Extended liberty hours may be approved on a case-by-case basis for special events and shall be requested via a special event request and force protection plan per reference (b). The Commanding Officer of deployed and/or visiting ships, squadrons, and units may approve overnight liberty; however, prohibitions on public alcohol consumption after midnight and requirements to be in a private residence or hotel room by 0100 remain in effect.

Page 7

On June 10, 2022, the applicant was issued a Page 7 documenting the alcohol incident. The Page 7 states the following:

You received an alcohol incident on 08 June 2022 when your abuse of alcohol was determined to be a significant and/or causative factor in the violation of [redacted] General Order [redacted] a curfew prohibiting U.S. military members in [redacted] from being in clubs, bars and establishments after midnight where the consumption of alcohol is the primary focus of activity. You were discovered in [redacted] well after midnight and detained by U.S. Navy Shore Patrol.

You were counseled on Coast Guard policies concerning alcohol use and abuse as well as the serious nature of this incident. The unit Command Drug and Alcohol Representative (CDAR) will arrange an appointment with a provider who will determine the nature of your relationship with alcohol. You shall abstain from the use of alcohol until your screening and assessment is completed.

The Page 7 also indicated this was the applicant's first documented alcohol incident.

CGIS Report

On June 12, 2022, the Commander of the unit contacted Coast Guard Investigative Services (CGIS), initiated an investigation, and requested help in obtaining a copy of the Shore Patrol Report. The CGIS report stated that the Navy Shore Patrol apprehended the applicant and another EM3 for having violated the curfew, a violation of Uniform Code of Military Justice (UCMJ), Article 92 – Failure to Obey Order or Regulation. The Navy Shore Patrol told CGIS that they did not investigate the service members and, as a courtesy, turned the case over to the chain of command. CGIS attempted, but was unable, to collect surveillance videos from the night of the incident.

VIEWS OF THE COAST GUARD

On September 10, 2023, a Judge Advocate (JAG) for the Coast Guard submitted an advisory opinion in which he 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).

The JAG argued that the applicant has failed to prove an error or injustice with regards to the alcohol incident. The JAG noted that the applicant did not deny the factual allegations contained within the alcohol incident, but claimed the decision to punish him was an injustice due to disparate treatment of other members. The JAG argued that the applicant merely “postulates” that the reason for his punishment is that the other member failed to report to work on time. The JAG further noted that the applicant provided no evidence other than an anecdotal reference to another member who allegedly did not receive an alcohol incident for a similar incident. Finally, the JAG argued that because the applicant provided no evidence, he failed to overcome the presumption of administrative regularity and meet his burden of establishing an error or injustice by a preponderance of the evidence.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 28, 2023, the Chair sent the applicant a copy of the Coast Guard’s advisory opinion and invited him to respond within thirty days. As of the date of this decision, the Chair has not received a response from the applicant.

APPLICABLE LAW AND POLICY

Article 1 of the Coast Guard Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10, provides the necessary guidance on the procedures for alcohol incidents. In relevant part:

1.A.2.d. Alcohol Incident

(1) Alcohol is the Significant or Causative Factor. 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.

(2) Alcohol Must be Consumed. The member must actually consume alcohol for an alcohol incident to have occurred. Simply being present where alcohol is consumed does not constitute an alcohol incident. The member may be counseled on appropriate behavior or may be held jointly responsible for any damage or untoward behavior associated with the group. Purchasing alcohol for use by minors is not an alcohol incident, but does represent a serious breach of discipline and subjects the member to civil or military (UCMJ) penalties.

...

2.B.2. Alcohol Incident. The definition of an alcohol incident (See Article 1.A.2.d. of this Manual.) gives commands broad latitude in curbing intemperate alcohol use. A key fact to keep in mind is that the member must actually consume alcohol for an alcohol incident to have occurred.

...

2.B.8.b. Second Alcohol Incident. Enlisted. Enlisted members involved in a second alcohol incident will normally be processed for separation in accordance with Article 1.B.15. of reference (c), Military Separations, COMDTINST M1000.4 (series).

...

The Manual for Courts Martial, Part IV, Paragraph 16 (Article 92—Failure to obey order or regulation of the Uniform Code of Military Justice (UCMJ)), the “General” article under the UCMJ, states:

a. *Text of statute.*

Any person subject to this chapter who—

(1) violates or fails to obey any lawful general order or regulation;

...

shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Violation of or failure to obey a lawful general order or regulation.*

- (a) That there was in effect a certain lawful general order or regulation;
- (b) That the accused had a duty to obey it; and
- (c) That the accused violated or failed to obey the order or regulation.

...

c. *Explanation.*

(1) *Violation of or failure to obey a lawful general order or regulation.*

(a) *Authority to issue general orders and regulations.* General orders or regulations are those orders or regulations generally applicable to an armed force which are properly published by the President or the Secretary of Defense, of Homeland Security, or of a military department, and those orders or regulations generally applicable to the command of the officer issuing them throughout the command or a particular subdivision thereof which are issued by:

- (i) an officer having general court-martial jurisdiction;
- (ii) a general or flag officer in command; or
- (iii) a commander superior to (i) or (ii).

(b) *Effect of change of command on validity of order.* A general order or regulation issued by a commander with authority under Article 92(1) retains its character as a general order or regulation when another officer takes command, until it expires by its own terms or is rescinded by separate action, even if it is issued by an officer who is a general or flag officer in command and command is assumed by another officer who is not a general or flag officer.

(c) *Lawfulness.* A general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it. See the discussion of lawfulness in subparagraph 16.c.

(d) *Knowledge.* Knowledge of a general order or regulation need not be alleged or proved as knowledge is not an element of this offense and a lack of knowledge does not constitute a defense.

(e) *Enforceability.* Not all provisions in general orders or regulations can be enforced under Article 92(1). Regulations which only supply general guidelines or advice for performing military functions may not be enforceable under Article 92(1).

...

d. *Maximum punishment.*

- (1) *Violation of or failure to obey lawful general order or regulation.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

...

[Note: For (1) and (2) of this rule, the punishment set forth does not apply in the following cases: if, in the absence of the order or regulation which was violated or not obeyed, the accused would on the same facts be subject to conviction for another specific offense for which a lesser punishment is prescribed; or if the violation or failure to obey is a breach of restraint imposed as a result of an order. In these instances, the maximum punishment is that specifically prescribed elsewhere for that particular offense.]

FINDINGS AND CONCLUSIONS

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

2. The application is timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

3. The applicant alleged that the Coast Guard committed an error and injustice when it issued him an alcohol incident because he was told he would not receive any punishment and was treated differently than another member who was involved in a similar incident. 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.² 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."³

4. The applicant alleged he was unjustly given an alcohol incident because he was told he would not receive any punishment if he arrived to work on time the next day and because, previously, another member had not received an alcohol incident for a similar event. Article 1.A.2.d.1. of the Coast Guard Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10, states, "[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." Article 1.A.2.d.2. of COMDTINST M1000.10 states that in order for an alcohol incident to have occurred, the member must consume alcohol. According to the Manual for Courts Martial, Part IV, Paragraph 16 (Article 92 of the UCMJ—Failure to Obey Order or Regulation), the maximum punishment for violating a lawful general

² 33 C.F.R. § 52.24(b).

³ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

order is a Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

The Board's review of the record shows that a General Order was issued on January 29, 2020, to all military members serving in a specific overseas Joint Security Operation, requiring all military members to be in a hotel or private residence by 1 a.m. and prohibiting members from being in bars after midnight, seven days a week. On June 8, 2022, the applicant and another EM3 were found in a bar "well after midnight" by the U.S. Navy Shore Patrol. Instead of arresting them, the Shore Patrol turned the applicant over to the Coast Guard as a courtesy. On June 10, 2022, the applicant was issued an alcohol incident documented in a Page 7, wherein the applicant's command found that alcohol was a significant or causative factor in the applicant breaking the designated curfew.

The Board is not persuaded by the applicant's claims in this case. The applicant does not dispute the allegations in the alcohol incident, but instead argued that the alcohol incident was unjust because he was told he would not receive punishment if he arrived promptly to work the next day. The applicant claimed that he arrived on time, but the other member did not, which is why he received the alcohol incident. To support his claims, the applicant alleged that another member who had been in a similar situation several months earlier did not receive an alcohol incident, but this is not evidence of error or injustice. The applicant proffers nothing but speculations and unproven anecdotal evidence in his defense, which is not sufficient to overcome the presumption of regularity afforded to the Shore Patrol and Coast Guard officials.⁴ The applicant has not shown that the alcohol he consumed that night was not a significant or causative factor that caused him to disobey a General Order—a violation of Article 92 of the UCMJ—by remaining at a public bar after curfew. Thus, the Board finds that the applicant has failed to prove by a preponderance of the evidence that the alcohol incident was erroneous or unjust, and his request for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁴ *Id.*

ORDER

The application of EM3 [REDACTED] [REDACTED] USCG, for correction of his military record is denied.

May 17, 2024

[REDACTED] Digitally signed by [REDACTED]
Date: 2024.05.22 13:21:21 -04'00'

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