

**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. 2016-018**

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██████████

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**FINAL DECISION**

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case upon receipt of the applicant's completed application on December 5, 2015, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 22, 2016, 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 asked the Board to correct his record by removing one of two sets of unsatisfactory performance marks he received as a result of an "alcohol incident"<sup>1</sup> he incurred on September 27, 2011. He explained that as a result of the alcohol incident, he received an unsatisfactory conduct mark on his regular, semiannual Enlisted Employee Report (EER) dated October 31, 2011, and then a disciplinary EER with another unsatisfactory conduct mark documenting the non-judicial punishment (NJP) on November 4, 2011. Because of the two unsatisfactory conduct marks for the alcohol incident, he is not eligible for reenlistment under the new reenlistment criteria announced in ALCOAST 093/14. The applicant argued that pursuant to Article 5 of COMDTINST M1000.2A, he should not have received two EERs with unsatisfactory conduct marks based on a single alcohol incident. In support of his allegations, the applicant submitted the following documents:

- A CG-3307 (Page 7) dated September 27, 2011, states that the applicant had incurred his first alcohol incident because his commanding officer (CO) determined that his use of alcohol was a significant or causative factor in his arrest by municipal police on September 24, 2011.

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<sup>1</sup> Article 1.A.2.d. of COMDTINST M1000.10 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."

- On the applicant's regular, semiannual EER dated October 31, 2011, he received four low marks of 3 (on a scale of 1 to 7), nine "standard" marks of 4, five above-standard marks of 5, and seven excellent marks of 6 in the various performance categories, an unsatisfactory conduct mark, and a recommendation against advancement. The accompanying comments state that the unsatisfactory conduct mark was "based on his Alcohol Incident. Member brought discredit to the command and Coast Guard by his actions in ... that resulted with a confrontation with police" and that the recommendation against advancement was "[b]ased on his deficiencies in several areas[. He] is not capable of performing the duties and responsibilities of the next higher paygrade and therefore not recommended for advancement."
- A Court Memorandum dated November 4, 2011, shows that the applicant was punished at mast and awarded NJP on that date for becoming drunk and disorderly in a bar during a port call and being tazed and arrested when he was not compliant with the police. The applicant was reduced in rate from E-5 to E-4, fined, and restricted to his cutter for 60 days.
- On November 4, 2011, the applicant received a disciplinary EER documenting the NJP for his misconduct during the alcohol incident. This EER has several "standard" marks of 4 but two lowest possible marks of 1, three very low marks of 2, and two low marks of 3 in the various performance categories, an unsatisfactory conduct mark, and a recommendation against advancement. The written comments supporting these poor marks state that he caused a safety risk to himself, his shipmates, and others by causing a confrontation with the bar owners and the police; that he allowed himself to become extremely intoxicated while on liberty and provoked altercations with patrons of the bar, the owners, and the police; that junior members had witnessed his misconduct and that he had "fought with a junior shipmate who was only trying to help him through the difficult situation he had placed himself in"; that he had verbally and physically assaulted several members of the public during the altercations and "made numerous inappropriate comments towards civilians and shipmates alike"; that he had failed to obey lawful orders of the local police; and that he had not shown the maturity or judgment required of an E-5.

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

On April 19, 2016, the Judge Advocate General submitted an advisory opinion in which he adopted the findings and analysis of the case provided in an attached memorandum prepared by the Personnel Service Center (PSC) and recommended that the Board grant relief.

PSC cited the following regulations in COMDTINST M1000.2A, which went into effect in December 2015, four years after the events in question:

- Article 4.C.2.c.(7) states that a disciplinary EER is required for a member who incurs an alcohol incident "with an effective date of the day of the incident regardless of the date it is determined an alcohol incident occurred."
- Article 4.C.1.b.(3) states that a regular EER is *not* required when the member has received a regular or unscheduled EER within the prior 92 days.

- Article 4.C.2.c.(1) states that receipt of NJP requires an EER “regardless of the time since the last employee review except in cases where a previous discipline EER was completed for an alcohol incident, where NJP or CM [court-martial] is later awarded.”
- Article 4.C.1.b.(4)(f) states that an EER is *not* required on awarding NJP if the NJP was due to an alcohol incident for which the member was previously assigned an unscheduled EER.

PSC argued that based on these regulations, the EER documenting the applicant’s alcohol incident should have been documented with an EER dated the day of the incident, which was September 24, 2011. If it had been, then a semiannual EER dated October 31, 2011, and the EER documenting NJP on November 4, 2011, would not have been required. Therefore, PSC stated, the applicant’s record should contain just one disciplinary EER documenting the alcohol incident. PSC recommended that the Board remove the EER dated November 4, 2011, from the applicant’s record and correct the October 31, 2011, EER to be a disciplinary EER dated September 24, 2011, so that he will have only one EER with an unsatisfactory conduct mark documenting the alcohol incident.

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

On April 27, 2016, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond in writing within thirty days. No response was received.

### **APPLICABLE REGULATIONS**

Through the end of September 2011, the Coast Guard’s regulations for submitting EERs appeared in Article 10.B.5. of the Personnel Manual, COMDTINST M1000.6A (Change 42). As of October 1, 2011, these same regulations were renumbered and moved to Article 5.E. of COMDTINST M1000.2, the new Enlisted Accessions, Evaluations, and Advancements Manual. Because no substantive changes relevant to this case were made at the time, only the new manual will be cited here.

Article 5.E.2.c. states that “[t]he following events require an unscheduled [EER], regardless of the time since the last [EER]. (1) On Receipt of Non-Judicial Punishment or Courts-Martial. ... (6) Alcohol Incident. A disciplinary [EER] is required for a member who has an alcohol incident.”

Article 5.E.1.a. of COMDTINST M1000.2 requires active duty members in pay grade E-5 to receive a regular EER dated the last day of every April and October. Article 5.E.1.b.(3) includes the following guidance:

(3) Circumstances which do not Require a Regular Enlisted Employee Review. Do not complete a regular enlisted employee review on a member until the next regular period ending date when:

(a) A regular or unscheduled enlisted employee review has been completed within 92 days for E-6 and below employee reviews, 184 days for E-7 and above employee reviews, or 19 drill periods for reservists before the end of a regular period ending date, ...

(4) Circumstances which do not Require Any Enlisted Employee Review. Do not complete any enlisted employee review for the following circumstances: ...

(f) On awarding NJP or civil conviction if the NJP award or conviction was due to an alcohol incident for which the member was previously assigned an unscheduled [EER]. This exemption applies to alcohol incidents only, ...

On March 7, 2014, PSC issued ALCOAST 093/14, which implemented additional reenlistment criteria. Under paragraph 2.b. of the ALCOAST, members who have received more than one unsatisfactory conduct mark during their current period of enlistment are no longer eligible to reenlist unless they receive a waiver from PSC. The new reenlistment criteria were incorporated in COMDTINST M1000.2A, issued in December 2015.

### 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 receipt of the two EERs, it is considered timely because he has continued to serve on active duty in the interim.<sup>2</sup>

2. The applicant alleged that his receipt of two EERs with unsatisfactory conduct marks for a single alcohol incident is erroneous and unjust. In 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>3</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>4</sup>

3. Article 5.E.2.c.(1) and (6) of COMDTINST M1000.2 require the preparation of a disciplinary EER for a member who is awarded NJP or incurs an alcohol incident. Because not all alcohol incidents are punished at mast with NJP,<sup>5</sup> the requirement is not necessarily duplicative. However, the Board is not persuaded that two disciplinary EERs were required for an alcohol incident punished with NJP just because NJP and alcohol incidents are both listed as circumstances requiring an unscheduled, disciplinary EER in Article 5.E.2.c.

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<sup>2</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>3</sup> 33 C.F.R. § 52.24(b).

<sup>4</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>5</sup> COMDTINST M1000.10, Art. 1.A.2.d. ("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.").

4. Under Article 5.E.1.b.(3)(a) of COMDTINST M1000.2, a regular EER is not required if either another regular EER or a disciplinary EER “has been completed within 92 days for E-6 and below employee reviews.” Therefore, the applicant’s command presumably prepared his regular, semiannual EER, dated October 31, 2011, because the command had not yet complied with Article 5.E.2.c.(6) of the manual by preparing a disciplinary EER to document the alcohol incident. The Board notes that at the time, Article 5.E.2.c.(6) did not specify the date of such an EER and even under the current manual, COMDTINST M1000.2A, the corresponding regulation does not provide a deadline for preparing the EER although it specifies that the EER should be dated the date of the alcohol incident. Nor had the applicant’s command awarded him NJP by the date the regular EER was due, October 31, 2011. The record shows that the applicant was not punished at mast until November 4, 2011. The mast and disciplinary EER were presumably delayed while the investigation of the applicant’s misconduct was being completed.

5. The applicant’s command did not violate any of the EER regulations in effect in COMDTINST M1000.2 in 2011 by preparing both EERs. At the time, however, receiving the two EERs with unsatisfactory conduct marks for a single alcohol incident had no effect on the applicant’s right to reenlist. Since the issuance of the new reenlistment eligibility criteria under ALCOAST 093/14, the command’s preparation of two EERs with unsatisfactory conduct marks in the fall of 2011 because of a single alcohol incident has left the applicant ineligible to reenlist. Therefore, although the command did not violate the EER regulations in effect in 2011 by preparing both EERs, the Board finds that because of the new reenlistment eligibility criteria in ALCOAST 093/14, the result for the applicant is unjust.<sup>6</sup> This would not be true if the applicant’s record reflected misconduct in addition to the alcohol incident during the marking period for the regular EER, but because the only misconduct mentioned in his record during the evaluation period is the alcohol incident, the Board is persuaded that the applicant’s ineligibility to reenlist under the new criteria because he received two unsatisfactory conduct marks due to one alcohol incident is unjust.

6. In recommending relief, PSC has applied the current regulations and argued that the applicant’s November 4, 2011, disciplinary EER documenting his NJP should be removed and his October 31, 2011, regular EER should be corrected to reflect a disciplinary EER dated the day of the alcohol incident, September 24, 2011. This correction would remove from his record the very low EER marks and negative comments that the applicant received as a result of the alcohol incident and NJP, even though he has not shown that those low marks and negative comments are in any way erroneous and even though that EER was authorized under the regulations in effect at the time. The Board finds that the removal of the November 4, 2011, EER is unwarranted.

7. The marks that the applicant received on the regular EER dated October 31, 2011, are significantly better as they cover the entire marking period and at the time, the command pre-

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<sup>6</sup> *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (finding that for the purposes of the BCMRs, “injustice” is “treatment by the military authorities that shocks the sense of justice but is not technically illegal”); 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.”); Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002) (finding that the Board has the authority to determine whether an injustice exists on a case-by-case basis).

sumably expected that they would be punishing the applicant at mast and documenting the NJP and alcohol incident on another EER. Under the rules in effect in 2011, this EER was properly prepared, and removing it just to remove the conduct mark would remove a valid performance evaluation from his record.

8. Under the new reenlistment eligibility criteria announced in ALCOAST 093/14, the only reason the applicant is ineligible to reenlist is because he received two unsatisfactory conduct marks in 2011. Because his command did not violate any regulations then in effect in preparing the two EERs but the two unsatisfactory conduct marks—both based on a single incident of misconduct—are now unjustly causing him to be ineligible to reenlist, the Board finds that the unsatisfactory conduct mark in the applicant’s regular EER dated October 31, 2011, should be changed to satisfactory and the supporting comment should be removed. This is the only correction warranted by the injustice in the applicant’s record.

9. Accordingly, the conduct mark of “unsatisfactory” on the applicant’s October 31, 2011, EER should be changed to “satisfactory” and the supporting comment should be removed, but no other relief should be granted.

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

**ORDER**

The application of [REDACTED], USCG, for correction of his military record is granted in part as follows:

The Coast Guard shall correct the conduct mark on his Enlisted Employee Report dated October 31, 2011, from “unsatisfactory” to “satisfactory” and remove the comment supporting the unsatisfactory conduct mark. No other relief is granted.

September 22, 2016

