

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-180



FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the application on July 13, 2014, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 9, 2015, 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 petitioned the BCMR to remove two sets of disciplinary marks and a non-judicial punishment (NJP) from his military record. The applicant alleged that these disciplinary measures stem from an incident that occurred on May 13, 2008, when he admittedly provided alcohol to a minor service member.

The applicant alleged that he plead guilty in a [REDACTED] civil court on June 18, 2008, to the charge of Furnishing Alcohol to a Minor. However, before his court appearance, he stated, his command awarded him NJP on May 14, 2008, pursuant to Article 92 of the Uniform Code of Military Justice (UCMJ).¹ The applicant further alleged that he was awarded two sets of disciplinary marks: one due to the NJP² (dated May 28, 2008), and one due to his civil trial³ (dated June 11, 2008). Each set of disciplinary marks shows an "unsatisfactory" mark for conduct as well as a mark of not recommended for promotion to the next grade.

¹ "Any person subject to this chapter who (1) violates or fails to obey any lawful general order or regulation..." 10 U.S.C. § 892, Article 92, UCMJ.

² U.S. Coast Guard, COMDTINST M1000.6A (Change 41), Personnel Manual (PERSMAN), Art. 10.B.5.b.3.a.(1) (requiring submission of disciplinary marks when a member is awarded NJP or convicted by court-martial).

³ PERSMAN, Art. 10.B.5.b.3.a.(2) (requiring submission of disciplinary marks when a member is convicted in civil court for an offense comparable to an offense under the UCMJ).

The applicant asked the Board to remove the NJP and two sets of disciplinary marks based on the fact that he was punished in state court. The applicant stated his belief that a “double jeopardy clause” should have prevented this.

VIEWS OF THE COAST GUARD

On December 19, 2014, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial relief in this case. The JAG adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC cited the Military Justice Manual (MJM), COMDTINST M5810.1D, which states that “Commandant authorization must be obtained before NJP may be imposed for an offense pending trial or tried by a state or foreign criminal court.” PSC stated that based on this provision, the applicant’s awarded NJP “may have violated CG policy.” PSC also stated that if authorization had been sought, it would have likely been approved, especially considering Command’s desire to maintain a deterrent against the applicant’s actions. However, PSC noted that there is no proof of such authorization in this case; therefore it recommended expunging the NJP from the applicant’s record.

Next, PSC addressed the applicant’s disciplinary marks. PSC recommended that the applicant’s disciplinary marks resulting from the NJP should be removed. However, PSC recommended that the disciplinary marks corresponding to the applicant’s civil trial should remain in his record. PSC based its reasoning on the Enlisted Accessions, Evaluations, and Advancements Manual, COMDTINST M1000.2, Chapter 5.E.2.c., which states that if an approving official determines a civil offense is a “major offense,” it should be equivalent to a court-martial offense, thus requiring performance based marks. PSC alleged that the applicant’s Approving Official in this case did in fact deem his offense “major” and therefore recommended not removing any resulting marks from his civil trial and conviction.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 4, 2015, the applicant submitted a response to the Coast Guard advisory opinion in which he acknowledged and agreed with the JAG and PSC’s conclusions, as he understood them. His stated interpretations of the recommendations were:

1. The NJP will be expunged from my record.
2. One set of disciplinary marks will be expunged off my record.
3. One set of disciplinary marks will stay on my record for the result of my jail sentence.

The applicant also inquired about receiving compensation for his delay in advancement caused by the NJP and removal from the [REDACTED] “A” School list.

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 under 10 U.S.C. § 1552. The application was timely.⁴

2. The applicant asked the Board to remove an NJP and two sets of disciplinary marks from his record. He alleged that the NJP and disciplinary marks constituted unjust double jeopardy because he was also punished by a civil court for the same conduct—providing alcohol to a minor. 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.⁵ 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.”⁶

3. The Board finds that the applicant's NJP and the one set of disciplinary marks dated May 28, 2008, which he received because of the NJP,⁷ should be removed from his record. Article 1.A.7.c. of the Military Justice Manual in effect in 2008⁸ dictated that the applicant's command should have received written authorization from the Commandant before imposing NJP for an offense for which trial was pending in a state court:

NJP may not be imposed for an offense prosecuted in a United States federal court. As a matter of Coast Guard policy, Commandant (G-L) authorization must be obtained before NJP may be imposed for an offense pending trial or tried by a state or foreign criminal court. "Pending trial" means that state or foreign government has issued an indictment or information or has taken similar steps toward prosecution. Requests for such authorization must be in writing and provide a thorough justification why NJP should be authorized.

PSC has stated that no such authorization was granted in this case and none is reflected in the record. However, the other set of disciplinary marks, those corresponding to the applicant's civil adjudication, should remain in his record because they were required by policy then in effect.⁹

⁴ *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).

⁵ 33 C.F.R. § 52.24(b).

⁶ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁷ PERSMAN, Art. 10.B.5.b.3.a.(1) (requiring submission of disciplinary marks when a member is awarded NJP or convicted by court-martial).

⁸ Military Justice Manual, COMDTINST M5810.1D.

⁹ PERSMAN, Art. 10.B.5.b.3.a.(2) (requiring submission of disciplinary marks when a member is convicted in civil court for an offense comparable to an offense under the UCMJ).

4. The applicant also inquired into the possibility of compensation for “the time lost because of the NJP.” Such compensation would not be appropriate in this case. He has not shown that any delays in advancement were attributable only to his NJP and would not have occurred if only the civil conviction and resulting disciplinary marks, with the unsatisfactory conduct mark and recommendation against promotion, had been in his record.

5. Accordingly, the applicant’s request for removal of his NJP and corresponding disciplinary marks dated May 28, 2008, should be granted, while the disciplinary marks corresponding to the civil trial and conviction should remain in his record.

(ORDER AND SIGNATURES ON NEXT PAGE)



ORDER

The application of [REDACTED], USCG, for correction of his military record is granted in part in that the Coast Guard shall remove from his record the NJP dated May 14, 2008, along with the corresponding set of disciplinary marks, dated May 28, 2008.

No other relief is granted.

April 9, 2015

