

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-131

████████████████████
██████ FN

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 May 1, 2018, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated March 8, 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 fireman (FN/E-3) on active duty, asked the Board to remove non-judicial punishment (NJP) from his record. He stated that he had been granted leave to attend his father’s Coast Guard retirement ceremony on May 19, 2017. His liberty/leave began on May 16, 2017, and he was to return to work on Monday, May 22, 2017. Before he left, his department head, an MK1 who was the Engineering Petty Officer (EPO) of the Station, told him that he had to be back at the Station on May 22nd because a Ready For Operations (RFO) inspection started that week, “but on the same day I spoke with my XPO [Executive Petty Officer] in the station’s galley about not coming in the morning of the 22nd and pushing it one more day so the 22nd could be used for a travel day. I was told that it shouldn’t be a problem and that he would correct the orders. The orders never got revised.”

The applicant stated that he did not report for duty on May 22, 2017, and the XPO “could not remember me discussing changing my permissive orders so it was perceived as me trying to take advantage and purposely not coming to work.” Therefore, he was awarded NJP for failing to obey an order in violation of Article 92 of the Uniform Code of Military Justice (UCMJ). The applicant complained that essentially he received NJP for missing just two hours of work because according to the work schedule, May 22, 2017, “would have been my off-going duty morning with liberty granted after boat crew relief usually at 0830.” The applicant alleged that his EPO told him that the Officer in Charge (OIC) of the station awarded him NJP “because he was upset after my father emailed him a suggestion following my alcohol incident.” The applicant explained that he had incurred an “alcohol incident” on February 15, 2017, by allowing an underage member to

consume alcohol at his residence even though he was unaware at the time that the member was underage. Moreover, the applicant argued, the NJP should be removed because the OIC was temporarily relieved of his duties in 2018 for loss of confidence and inability to lead.

To support his allegations, the applicant submitted the following documents:

- A CG-3307 (“Page 7”) dated February 13, 2017, states that the applicant incurred an alcohol incident when his “abuse of alcohol was determined to be a significant and/or causative factor in consuming alcohol with and providing alcohol to persons under 21 years of age. This occurred at your residence on multiple dates from October to December 2016. These incidents were documented on Snapchat and viewed by members of [the Station].”
- Another Page 7 dated February 13, 2017, states that the applicant had been removed from AET “A” School for failing to maintain the general eligibility requirements.
- A Page 7 dated February 22, 2017, states that the applicant had been screened for alcohol abuse or dependence because of his alcohol incident.
- A Page 7 dated February 24, 2017, states that the applicant was required “to fulfill the post screening requirements” set for the in COMDTINST M1000.10 and abstain from alcohol for three months, complete an educational program, attend six Alcoholics Anonymous meetings, and meet weekly with the Command Drug and Alcohol Representative.
- A print-out of an incomplete leave request dated March 3, 2017, indicates that the applicant requested leave from May 15 to 19, 2017, to attend his father’s retirement ceremony. The EPO endorsed his request and added the written comment, “RFO starts on the 22nd of May.”
- On April 4, 2017, the Station XPO signed a memorandum authorizing seven days of administrative absence for the applicant from May 15 to 21, 2017, to attend his father’s retirement ceremony.
- A Report of Offense and Disposition dated May 22, 2017, states that the EPO reported the applicant for failing to report for duty on May 22, 2017, without approved leave, and an MK2 was a witness. This report shows that the XPO appointed a BM1 to serve as the applicant’s mast representative.
- On May 23, 2017, the OIC of the Station, who was a senior chief petty officer, assigned another BM1 to serve as a Preliminary Inquiry Officer. The OIC directed the BM1 to investigate all the facts and circumstances regarding the allegations that the applicant had been absent without leave on May 22, 2017, and to prepare a Letter Incident Report.
- On May 31, 2017, the applicant signed a form on which he was advised that he was suspected of violating Article 92 of the UCMJ by failing to report for duty. He acknowledged his rights under Article 31(B) of the UCMJ and his *Miranda/Tempia* rights. The applicant indicated on the form that he did not want to consult a lawyer but did want to make a statement and answer questions.
- The Letter Incident Report, dated June 2, 2017, states that on April 24, 2017, the applicant had requested three weeks of leave to go home for his father’s retirement ceremony. Because the Station was preparing for an RFO inspection, his request was not approved, but he was given Administrative Absence that allowed him to be absent from May 15 to

21, 2017. The EPO told the applicant that he had to be back and ready for work on May 22, 2017, because the RFO was starting that day. On May 22, 2017, an MK2 in the Engineering Department inquired about the applicant's whereabouts from the EPO because the applicant was not at work. Then the applicant called the MK2 and asked if he was going to get in trouble for not being at work. The applicant did not report for duty that day. The PIO stated that the applicant had received a copy of his electronic leave chit as well as a signed copy of the memorandum authorizing his administrative absence from May 15 to 21, 2017, which was signed by the XPO. The PIO concluded that the applicant's actions had met all of the elements of a violation of Article 92 because the EPO had instructed the applicant multiple times that he had to be back at work on May 22, 2017, for the first day of the RFO inspection. The PIO recommended that the violation "be disposed of at mast."

- A statement signed by the EPO for the investigation states that after the MK2 asked about the applicant being absent on the morning of May 22, 2017, the EPO checked his calendar and then checked the applicant's orders to make sure that his administrative absence had not been extended, and it had not. Then he call the applicant, who told him that he was still on the East Coast and that his return flight would land at 10:00 p.m. The EPO stated that he had told the applicant "on several occasions while reviewing his requests for permissive orders and leave ... about the start of Ready For Operations (RFO) inspection and that his presence was required on Monday the 22nd."
- A statement signed by the MK2 for the investigation states that he noticed that the applicant was not at work at about 7:30 a.m. on May 22, 2017, so he called the EPO to find out if the applicant's orders had been extended. The EPO checked and confirmed that the applicant was supposed to be at work. The applicant called the MK2 at 8:08 a.m. and asked if he was going to get in trouble. The MK2 replied that he did not know. The applicant told him that "he was pretty sure his orders were through Monday." The MK2 told him that he did not think so because he remembered the EPO telling the applicant that he could not be absent for the RFO.
- A statement signed by the applicant for the investigation on May 31, 2017, states the following in pertinent part:

With full understanding of my rights, I make the following statement freely, voluntarily, and without any promises or threats made to me. On 22 May 2017 I failed to appear for work. After reviewing my orders once I returned I realized that my orders ended on the 21st and not the 22nd. I booked my flight for the 22nd on 27 APR 2017 with the assumption that I wouldn't have to return to work until the 24th because once again I believed that my orders were good until Monday which would excuse me from work. That however, was not the case. My failure to have good attention to detail and book my flight home for the correct day has gotten me into this situation. I take full responsibilities for my actions, as it was myself that has made this mistake. I apologize to the command for my absence and I promise to have better attention to detail so that nothing like this will ever happen again throughout my career.
- A print-out of an emailed flight receipt shows that on April 27, 2017, the applicant booked a round-trip airplane ticket from the West Coast to the East Coast. The return flight would land at 9:50 p.m. on May 22, 2017.
- A Court Memorandum shows that at mast on July 3, 2017, the OIC found the applicant guilty of violating Article 92 of the UCMJ for failing to obey an order or regulation. The OIC awarded him NJP consisting of three days of restriction to the Station with extra duties, but the punishment was suspended for six months on condition of good behavior.

VIEWS OF THE COAST GUARD

On October 31, 2017, a judge advocate General (JAG) of the Coast Guard submitted an advisory opinion in which she 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 deny relief.

PSC noted that the applicant clearly admitted in his written statement for the investigation that he had not paid attention and had booked his return flight for May 22, 2017—assuming that he did not have to be back at work until May 24, 2017—even though his administrative absence authorization ended on May 21, 2017. PSC noted that the applicant’s statement for the investigation contradicts his allegation to the Board that he thought he did not have to come to work on May 22, 2017, because he XPO had told him that he could use it as a travel day. PSC also noted that although the applicant claimed that he only missed two hours of work on the 22nd, his flight did not land until 9:50 that night, more than 12 hours after he was to report for duty.

PSC concluded that the applicant has failed to show that the NJP constitutes an error or injustice and that the OIC acted within his rights and gave the applicant due process in the proceedings. Therefore, PSC recommended that the Board deny relief.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 30, 2018, the Chair sent the applicant a copy of the Coast Guard’s advisory opinion and invited him to respond within thirty days. No response was received.

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. The applicant was timely filed.¹

2. The applicant alleged that his NJP for violating Article 92 of the UCMJ by disobeying an order or regulation was 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 his 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

¹ *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).

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).

3. The Board finds that the applicant has not overcome the presumption of regularity or proven by a preponderance of the evidence that the NJP he received on July 3, 2017, for disobeying orders to return to work on May 22, 2017, was erroneous or unjust. The record shows that on April 4, 2017, the applicant was authorized an administrative absence from May 15 through May 21, 2017, to attend his father's retirement ceremony on the East Coast and that he was repeatedly advised that he had to be back at work at the Station on the West Coast on Monday, May 22, 2017, because an RFO inspection was starting that day. On April 27, 2017, however, the applicant booked a return flight that landed at 9:50 p.m. on May 22, 2017. The record indicates that even after he booked this flight, he was reminded that he had to be back at work on May 22, 2017, and yet he apparently made no effort to change his flight or admit to the EPO that he had booked a return flight that would not get him back to the Station in time for the start of the RFO inspection.

4. The evidence of record fully supports the OIC's decision to give the applicant NJP. The applicant's claim that the OIC was biased against him is unsupported and unpersuasive. And *assuming arguendo* that the OIC was removed from his position in 2018 for loss of confidence and lack of leadership, that fact would not persuade the Board that the NJP is erroneous or unjust.

5. The Board finds no grounds for removing the NJP from the applicant's record. His request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

March 8, 2019

