

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-086

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Andrews, J.

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on April 7, 2006, upon receipt of the completed application.

This final decision, dated December 14, 2006, is 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 her record to show that she was not reduced in rate from E-3 to E-2 following her graduation from "A" School on April 8, 2005. She alleged that her rate was reduced without notification to her or due process. She stated that she did not discover the reduction in rate until she had left the training center and reported to her new unit on April 22, 2005, when she learned that the training center had amended her transfer orders to show that she was an E-2, instead of an E-3.

The applicant alleged that on April 7, 2005, she was informed by her command that something that happened on February 10, 2005, would be documented in her record as an "alcohol incident," rather than an "alcohol-related situation." She had previously been led to believe that the matter would likely be documented as an alcohol-related situation. On April 8, 2005, she stated, she was presented with a page 7 (form CG-3307) documenting the alcohol incident and advised to sign it. She alleged that she was told that she would be allowed to graduate that day "with [her] bonus, rate and billet," but that if she challenged the page 7, she might "lose one or all of them." She alleged that she was told that "no further disciplinary action was going to follow." She alleged that she was allowed to graduate and advanced to E-3 the same day.

The applicant alleged that on April 11, 2005, the command at the training center prepared her performance evaluation with an unsatisfactory conduct mark and a mark of "not recommended for advancement" without counseling or informing her. In addition, the command amended her transfer orders to show that she was an E-2 instead of an E-3. She did not receive a copy of the amended orders until April 22, 2005, when she reported to her new unit. Moreover, she did not learn about the performance evaluation until April 27, 2005.

In support of her application, the applicant submitted a letter from her current commanding officer, a lieutenant commander, who wrote that the applicant

Graduated from xx "A" School on 08 April 2005 and was presented a certificate indicating advancement to xxxx/E3. Three days later on 11 April 2005, after xxx had departed TRACEN ... to execute her PCS transfer, the admin staff at TRACEN ... created an Enlisted Performance Evaluation in Direct Access to deny her recommendation for advancement based on an alcohol incident on 11 February 2005. An amendment to her PCS orders was also created on 11 April 2005, indicating that the member was not advanced. [She] was not made aware of either of these actions until she reported to [her current unit].

[The applicant's] alcohol incident dated 10 February 2005 being defined as an alcohol incident was reason she was not recommended for advancement. At the time, [she] was counseled by the TRACEN CDAR that it would probably be treated as an alcohol situation rather than an alcohol incident. On the morning of her graduation, [she] was presented with a CG-3307 documenting an alcohol incident and was advised to sign it rather than risk further disciplinary action. She was not informed that her advancement would be denied.

The principal area of contention is that [the applicant] was advanced to xxxx on 08 April 2005 and was then reduced in rate to xxxx three days later without being informed of the action being taken or the reason. I believe that taking administrative action after graduation, after she was advanced and after she physically departed the unit for a PCS move was inappropriate.

[The applicant's] performance and conduct since reporting to [her current unit] as an xxxx have been exceptional. ... I have little doubt that if [she] would have arrived at [her current unit] as an xxxx/E3 rather than as an xxxx/E2 that she would now be a second class petty officer [E-5]

There is no simple formula to calculate the consequences to [the applicant's] career progression that were caused by this reduction in rate. At a minimum, I propose restoration of pay to the difference between E3 and E2 for the period from 08 April 2005 through 31 August 2005 when [she] was restored from xxxx to xxxx.

SUMMARY OF THE RECORDS

On September 7, 2004, the applicant enlisted in the Coast Guard as a seaman recruit (E-1). On the same day, she was advised about the Coast Guard's drug and alcohol policies. After completing boot camp, she advanced to seaman apprentice (E-2) and sent to "A" School at a training center to join the XX rating.

On March 24, 2005, the Coast Guard Personnel Command (CGPC) issued transfer orders stating that between April 8 and May 8, 2005, the applicant was to transfer from the training center to a new unit on the East Coast. The orders also state that the applicant would be advanced to xxxx (E-3) on April 8, 2005.

The Coast Guard's PeopleSoft database shows that Coast Guard Headquarters received a performance evaluation for the applicant from the training center on April 5, 2005. A print-out shows that as a result of her alcohol incident on February 11, 2005, the applicant was not recommended for advancement, received an unsatisfactory conduct mark, and lost her eligibility for a good conduct medal.

On April 7, 2005, the command at the training center prepared a page 7 with the following text in the applicant's record with her signature in acknowledgement:

On 11 February 2005 you received an alcohol incident after being taken to the local hospital and were unresponsive to medical personnel. Your use of alcohol was determined to be a significant and/or causative factor in this situation.

You were screened by PO1 ... of the PACAREA Substance Abuse Prevention Team on 01 March 2005. You were then evaluated by CDR ... at Ralph R. Nix Medical Center, Petaluma, CA on 05 April 2005. It was determined that you did not meet the criteria for Substance Abuse or Dependence, due to no diagnosis.

This is considered your first alcohol incident for documentation purposes. Per Chapter 20 of the Personnel Manual, ... any future incidents may result in your separation from the U.S. Coast Guard.

Also on April 7, the command prepared a page 7 for the applicant's record in recognition of her "outstanding performance." The page 7 states that she had "aced" one of "the most challenging modules of xxxxxxxxxx 'A' School."

On April 8, 2005, the applicant graduated with her class from "A" School and was given a certificate stating that she had advanced to xxxxxxxxxxxxxxxx (xxxx; pay grade E-3).

On April 11, 2005, the applicant's transfer orders were amended to show she was an xxxx (E-2) instead of an xxxx (E-3) because she had not been advanced due to her alcohol incident.

Upon arrival at her new unit on April 27, 2005, the applicant was counseled about the performance evaluation prepared by the training center.

VIEWS OF THE COAST GUARD

On August 22, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request.

The JAG stated that the Coast Guard's records show that the performance evaluation that resulted from the applicant's alcohol incident was prepared on April 5, 2005, while she was still assigned to the training center. The JAG stated that the applicant was not recommended for advancement on that evaluation pursuant to Article 5.C.4.b.3. of the Personnel Manual. He further stated that "[a]lthough unfortunate, Training Center Petaluma's issuance of an advancement certificate on April 8, 2005 was an administrative error and treated as an erroneous advancement," under Article 5.C.38.e. of the Personnel Manual.

The JAG adopted the facts and analysis of the case provided in a memorandum prepared by the Coast Guard Personnel Command (CGPC). CGPC stated that the performance evaluation documenting the applicant's alcohol incident was required under Article 10.B.5.b.8. of the Personnel Manual. Because the applicant was not recommended for advancement and received an unsatisfactory conduct mark on that evaluation, she was not eligible for advancement under Articles 5.C.6.a. and 5.C.25.d.

CGPC stated that because of the close timing of the applicant's alcohol screening, the preparation of the performance evaluation, the documentation of her alcohol incident, and the graduation ceremony, she "may not have been aware that she was not being advanced" until after she left the training center. CGPC stated that the applicant's original transfer orders and graduation certificate were prepared in advance and should have been amended prior to her graduation and departure on April 8, 2005. However, CGPC argued, "this administrative oversight does not negate the fact that CG Training Center Petaluma did not recommend the Applicant for advancement and cancelled the advancement with the Enlisted Employee Review entered on April 5, 2005."

CGPC stated that the applicant was not reduced in rate without due process, as she alleged, because on the day she graduated and would have advanced, the command at the training center had already canceled her advancement by not recommending her for advancement on her performance evaluation. CGPC stated that although the command should have informed her of the non-recommendation prior to the graduation ceremony, under Article 10.B.7. of the Personnel Manual, a non-recommendation for advancement is not subject to appeal by an enlisted member. Therefore, CGPC argued, the applicant "was not denied any rights." Moreover, CGPC pointed out, even if the applicant had been erroneously advanced, her commanding officer could have corrected the matter administratively under Article 5.C.38.e.

CGPC concluded that the delays in documentation and counseling in this case and the fact that the applicant was given an erroneous graduation certificate "do not negate the fact that her advancement was cancelled due to her misconduct. The Applicant was not treated unjustly or unfairly by the command. The command could have disenrolled the Applicant from Class "A" School and/or pursued UCMJ proceedings.

Instead, the command elected to graduate the Applicant, but withheld her advancement to E-3 in accordance with Coast Guard policy.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 24, 2006, the Chair sent copies of the Judge Advocate General’s advisory opinion and CGPC’s memorandum to the applicant and invited her to respond within 30 days. No response was received.

RELEVANT REGULATIONS

Article 20.A.2.d.1. of the Personnel Manual 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.” Article 20.B.2.g. requires documentation of counseling about the Coast Guard’s alcohol policy on a page 7 in the member’s record following an alcohol incident.

Article 20.B.2.e.1. states that “[a]ny 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 Health Promotions Manual 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 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.”

Article 20.B.2.d. states that an “alcohol-related situation is defined as any situation in which alcohol was involved or present but was not considered a causative factor for a member's undesirable behavior or performance. ... Commands shall not use the term ‘alcohol-related situation’ when a member's behavior clearly meets the criteria of an ‘alcohol incident.’” Alcohol-related situations are also documented on page 7s.

Article 20.B.2.h.2. provides that “[e]nlisted members involved in a second alcohol incident will normally be processed for separation.” No similar article requires the separation of members involved in a second or third alcohol-related situation.

Article 10.B.5.b.8. states that a command is required to prepare a special performance evaluation “for a member who has an alcohol incident.”

Under Articles 5.C.2.a.2., 5.C.26.b.3., and 5.C.14.2., commanding officers may advance members from pay grade E-2 to E-3 upon completion of six months in pay grade E-2 or upon satisfactory completion of Class ‘A’ School. Article 5.C.25.b. author-

izes a commanding officer to withhold advancement if a member does not remain eligible. Article 5.C.4.e.4. states that a "commanding officer's recommendation for advancement is the most important eligibility requirement in the Coast Guard advancement system. A recommendation for advancement shall be based on the individual's qualities of leadership, personal integrity, adherence to core values, and his or her potential to perform in the next higher pay grade. Although minimum performance factors have been prescribed to maintain overall consistency for participation in SWE, the commanding officer shall be personally satisfied that the member's overall performance in each factor has been sufficiently strong to earn the recommendation."

Article 5.C.6.a. states that "[p]ersonnel who received an unsatisfactory conduct mark or a dimension average of less than 3 for the given factor on their last evaluation are ineligible to advance or compete in the SWE [service-wide examination]."

Article 5.C.38.e. states that "[i]f an enlisted member is advanced in error due to no fault of his or her own and solely as a result of administrative error, the member shall be reduced to the correct rate as of the date the erroneous advancement is noted. In such cases, time in grade in present rating will be computed from the date originally advanced to the correct rate."

Article 5.C.38.b.2. states that "commanding officers who have authority to impose NJPs [non-judicial punishment, or 'mast'] under the provisions of Article 15 [of the Uniform Code of Military Justice], may reduce an enlisted person, except a chief petty officer under their command, to the next inferior pay grade for disciplinary purposes" by taking the member to mast.

Article 10.B.7.3. states that if a member is not recommended for advancement on a performance evaluation, the command "must ensure the member is properly counseled on the steps necessary to earn a recommendation and prepare supporting remarks."

Article 10.B.7.4. states that a non-recommendation for advancement "is final and may not be appealed. However, if the Approving Official learns new information and decides to change the recommendation, they should follow the procedures in Article 10.B.11.b."

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 submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The applicant stated that on April 8, 2005, she was unfairly presented with a page 7 documenting her behavior on February 11, 2005, as an alcohol incident even though she had been led to believe that it would likely be documented as an alcohol-related situation. She alleged that she objected to the page 7 but signed it only because she was told that "no further disciplinary action was going to follow." The page 7 states that on February 11, 2005, the applicant was "taken to the local hospital and [was] unresponsive to medical personnel" and that her "use of alcohol was determined to be a significant and/or causative factor in this situation." There is no evidence in the record that the applicant was not responsible for her inebriation. Therefore, the Board finds that the applicant's behavior on February 11, 2005, clearly meets the definition of an alcohol incident under Article 20.A.2.d.1. of the Personnel Manual because such drunkenness on the part of a member brings discredit to the Service. While someone may have told the applicant that her behavior might be documented as only an alcohol-related situation, Article 20.B.2.d. specifically prohibits commands from documenting behavior as an alcohol-related situation when it meets the definition of an alcohol incident. Therefore, the Board finds that the applicant's command committed no error or injustice in documenting her inebriation to the point of unresponsiveness as an alcohol incident.

3. Although the applicant feels that she was tricked into signing the page 7 documenting her alcohol incident, her signature was not an authorization, approval, or indication of agreement with the text; her signature was merely an acknowledgement that she had seen the page 7. When a member refuses to sign a page 7, the command notes the refusal on the page 7 and enters it into the member's record anyway. The applicant did not waive any rights by signing the page 7.

4. Article 10.B.5.b.8. of the Personnel Manual requires that the command of any enlisted member who has had an alcohol incident evaluate the member's conduct in a special performance evaluation. Although the applicant alleged that the performance evaluation was not prepared until after she had been transferred from the training center, the Coast Guard's database indicates that the training center command submitted the evaluation to Headquarters on April 5, 2005, while she was still assigned to the command. On the evaluation, the applicant received an unsatisfactory conduct mark and a mark of not recommended for advancement. The applicant was therefore ineligible to advance upon her graduation from "A" School on April 8, 2005, under both Article 5.C.6.a. and Article 5.C.4.e.4. of the Personnel Manual.

5. The applicant submitted her graduation certificate and alleged that she was actually advanced to E-3 on April 8, 2005, and later reduced in rate without being afforded the due process of appearing at mast in accordance with Article 5.C.38.b.2. of the Personnel Manual. The Board finds that the applicant's receipt of a certificate stating that she had advanced to xxxx/E-3 on April 8, 2005, was an administrative error, given her ineligibility for advancement, and does not prove that her commanding officer had reversed his recommendation and actually intended to advance her that day. Although the applicant would normally have advanced upon graduation in accordance

with Article 5.C.26.b.3., she clearly lost the most important eligibility criterion—her commanding officer’s recommendation—prior to April 8, 2005, and her advancement was properly withheld in accordance with Article 5.C.25.b. Therefore, the command was authorized to correct any records, such as the applicant’s travel orders and graduation certificate, that had been prepared in advance with the wrong pay grade.

6. The applicant’s receipt of the certificate stating that she had advanced to xxxx was an administrative error; she was not advanced to E-3 on April 8, 2005, or subsequently reduced in rate. Therefore, she was not entitled to the due process available to a member reduced in rate at mast under Article 15 of the UCMJ. However, she was entitled to be timely informed of the actions taken against her. After her alcohol incident on February 11, 2005, the applicant was screened by the PACAREA Substance Abuse Prevention Team on March 1, 2005, and then referred for a medical assessment on April 5, 2005. On the same day as her medical assessment, the command prepared the applicant’s performance evaluation. Three days later, the command presented her with the page 7 documenting her alcohol incident and the results of the screening and assessment. Therefore, it appears that, for reasons not stated in the record, the applicant’s commanding officer waited until after her medical assessment to document her conduct on February 11, 2005, as an alcohol incident and prepare the required performance evaluation. Although the seven weeks that passed between her alcohol incident and her receipt of the page 7 may have led the applicant to hope and believe that she would suffer no significant consequences as a result of her behavior, the Board finds that she has not proved that her command unreasonably delayed documentation of her alcohol incident or that she suffered any harm as a result of the delay.

7. The command apparently failed to inform the applicant about the performance evaluation submitted on April 5, 2005, before she graduated and left the command on April 8, 2005. Therefore, she graduated believing that she had advanced and did not learn about the performance evaluation and consequent failure to advance until she arrived at her new unit. However, the point of counseling is not to allow the member to appeal a non-recommendation for advancement, which under Article 10.B.7.4. of the Personnel Manual is not subject to appeal; instead, Article 10.B.7.3. states that the member is to be “counseled on the steps necessary to earn a recommendation.” The failure of the training center’s command to counsel the applicant about her non-recommendation for advancement between April 5, 2005, and her departure following graduation temporarily misled her about her rate and pay grade for a few days, but it did not cause her to lose any substantial rights since she could not appeal the non-recommendation. Moreover, because the applicant was transferring to a new unit and any advancement would depend upon her new commanding officer’s recommendation, any counseling about how she could earn her new commanding officer’s recommendation for advancement would be more accurate if provided by the new command.

8. Although the applicant was unfortunately misled about her advancement for a few days, the Board finds that her command did not err in determining that her behavior on February 11, 2005, constituted an alcohol incident; in preparing the per-

formance evaluation with an unsatisfactory conduct mark and non-recommendation for advancement; or in withholding her advancement. The two-month delay between the applicant's alcohol incident and its documentation is also unfortunate, but the applicant has not proved that she was harmed as a result of the delays in counseling. She would presumably have been disappointed no matter when she learned of her commanding officer's decisions. The Board finds that the applicant has not proved by a preponderance of the evidence that her failure to advance on April 8, 2005, was erroneous or unjust. Likewise, although her command's failure to forewarn her about her non-advancement was unfortunate, it did not constitute "treatment by military authorities that shocks the sense of justice."¹

9. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

¹ For purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is "treatment by military authorities that shocks the sense of justice." *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577 (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976)).

ORDER

The application of xxxxxxxxxxxxxxxxxxxx, USCG, for correction of her military record is denied.

Randall J. Kaplan

Donald A. Pedersen

Adrian Sevier