

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-004

XXXXXXXXXXXXXXXXXX.
XXXXXX, DC1

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 application upon receipt of the applicant's completed application on October 13, 2010, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated July 14, 2011, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his military record by removing the "[a]lcohol incident dated 25 JAN 02, which I believe to be unjust." The alcohol incident is recorded on an administrative remarks page (page 7) dated January 25, 2002. The subject page 7, which the applicant acknowledged with his signature, documents the applicant's first alcohol incident and states the following:

You were referred to the Command Drug and Alcohol Representative (CDAR) on board CGC RELIANCE for evaluation. On 11 Dec 01, while temporarily lodged at TRACEN Cape May, you admittedly consumed alcohol at the enlisted club. An underage Coast Guard member was present with you. Coast Guard regulations and state law prohibit the use of alcohol by minors. Your behavior in this matter will not be tolerated. You were counseled on policies concerning alcohol use/abuse and the serious nature of this incident. You will be screened by CAAC, Naval Station Newport R.I. on 25Feb02. You are to continue to abstain from alcohol until your relationship with alcohol can be determined. This is considered your first alcohol incident for documentation purposes, per Chapter 20 of the Personnel Manual, CODTINST M1000.6 (series). Any further alcohol incidents or use of alcohol as a minor may result in your separation from the U.S. Coast Guard.

Additional Related Page 7

The military record provided to the Board contains a second page 7 dated January 25, 2002 regarding the same incident. Neither the applicant nor the Coast Guard specifically addressed this page 7, which states the following:

On 14 Jan02 you were referred to the Command Drug and Alcohol Representative (CDAR) onboard CGC RELIANCE for evaluation. On 11 DEC 01, while at TRACEN Cape May awaiting transportation to the RELIANCE, you admittedly got inebriated at the enlisted club, and allowed an underage Coast Guard member to consume alcohol in your presence. This action reflects poorly on the Coast Guard, CGC RELIANCE, and yourself and will not be tolerated.

You were counseled on policies concerning alcohol use/abuse and the serious nature of this incident. You will be screened by CAAC, NAS BRUNSWICK on 12 FEB 02. You are to abstain from alcohol until your relationship with alcohol can be determined. This is considered your first alcohol incident for documentation purposes, per Chapter 20 of the Personnel Manual . . . Any further alcohol incidents may result in your separation from the Coast Guard.

APPLICANT'S ALLEGATIONS

The applicant alleged that the incident described on the page 7 does not meet the criteria for an alcohol incident as defined in Article 20.A.2.d. of the Personnel Manual. He asserted that the page 7 inaccurately describes him as an underage drinker, when he was 27 years of age at the time of that incident. He also asserted that the page 7 inaccurately states that an underage person was with him. The applicant denied that the underage member was with him or that he bought alcohol beverages for any underage person. The applicant stated that at the time he was with SN P who was 21 years of age. The applicant stated that he never agreed that the incident was an alcohol incident, but he was pressured into signing the entry by a third class petty officer.

SN P who was with the applicant on the night in question wrote the following: "I was with [the applicant] on the night in question, at the small club on base at Cape May New Jersey. At no time during the night did [the applicant] provide alcohol to [the underage member] or anyone else underage or otherwise."

VIEWS OF THE COAST GUARD

On January 5, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended relief in accordance with the memorandum from the Commander, Personnel Service Center (PSC).

PSC stated that as written, the subject page 7 does not state that the applicant provided alcohol to a minor or in any way contributed to the delinquency of a minor. Rather, the page 7 only documented that, "An underage Coast Guard member was present with you while "you admittedly consumed alcohol at the enlisted club." PSC stated that the applicant's consumption

of an alcoholic beverage in the presence of an underage person was not tantamount to an alcohol incident, particularly since the applicant was of legal age.

PSC stated that Article 20.A.2.d. 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 [law] . . ." PSC stated that the details of the subject page 7 fail to document an alcohol incident as defined in the Personnel Manual and should therefore be expunged from the applicant's record or amended and resubmitted.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 11, 2011, the applicant responded to the views of the Coast Guard. He agreed with the recommendation that the alcohol incident documented on a January 25, 2002, page 7 should be removed from his record. The applicant disagreed with the suggestion that the page 7 should be amended or resubmitted. He argued that an amendment to or resubmission of the page 7 would not cure the fact that his action on the night in question did not constitute an alcohol incident.

APPLICABLE LAW

Article 20.A.2.d.1. defines a 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 [law]. 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.A.2.d.2. states that 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. . . . 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.

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 section 1552 of title 10 of the United States Code. The application was timely under *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. The Board agrees with the JAG that the page 7 documenting an alcohol incident on January 14, 2002 should be removed from the applicant's record. The Board finds the evidence of record is insufficient to support a conclusion that the applicant was involved in an alcohol incident on January 14, 2002, by being an underage drinker or by consuming alcohol in the presence of an underage member. The Coast Guard admitted that the applicant was over the age of 21 on the day in question and that his consumption of alcohol in the presence of an underage member did not constitute an alcohol incident. Therefore, the Board finds that the page 7 fails to describe conduct on the part of the applicant that meets the definition of an alcohol-incident.

3. As noted earlier, a second page 7 documenting the same incident is included in the copy of the military record provided to the Board by the Coast Guard. The second page 7 is worded only slightly differently from the first. It states that the applicant became inebriated and allowed an underage Coast Guard member to consume alcohol in his presence, whereas the first page 7 stated that "[the applicant] admittedly consumed alcohol at the enlisted club. An underage Coast Guard member was present with [him]." Since the Coast Guard has admitted that the circumstances described on the first page 7 failed to meet the definition of an alcohol incident, the Board finds that the second page 7 describing the same incident with almost identical language should also be removed. Neither page 7 states that the applicant gave alcohol to the underage member, knew the age of the then-underage member, or had any responsibility for the underage member. In fact, the applicant denied that the underage member was with him. Therefore, the Board finds that both page 7s failed to describe an alcohol incident as defined by the Personnel Manual and should be removed.¹

4. The Board will not order the page 7s to be amended or resubmitted as suggested by the Coast Guard. The page 7s were prepared in 2002, and no evidence has been presented that the individuals with knowledge of the incident and responsibility for preparing the page 7 are available to corroborate the content for any substitute page 7.

5. Accordingly, the applicant is entitled to relief.

[ORDER AND SIGNATURES APPEAR ON FOLLOWING PAGE]

¹ The Office of the JAG agreed that the second page 7 should also be removed from the applicant's record in a discussion with the BCMR staff.

ORDER

The application of DC1 XXXXXXXXXXXXXXXX, USCG, for correction of his military record is granted. His record shall be corrected by removing the two Administrative Remarks (page 7s) dated January 25, 2002, documenting his first Alcohol Incident.

Troy D. Byers

Francis H. Esposito

Dana Ledger