

**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. 2011-021**

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XXXXXXXXXXXXXXXXXX**

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**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 completed application November 6, 2010, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 23, 2011, 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 a Page 7 documenting his first “alcohol incident”<sup>1</sup>; by erasing his “fault disenrollment” from the xxxxxx program; and by authorizing him to attend “A” School to become an xxxxxxxxxxxxxxxxxxxxxxxxxxxx.

With regard to the alcohol incident, the applicant stated that on December 29, 2009, he went camping with five other enlisted members assigned to another xxxxxxxx, only two of whom—Y and Z—were his friends. They arrived at the campsite at about 3:30 p.m. and began drinking, listening to music, and cooking hotdogs over a campfire. During the course of the day, the applicant stated, he drank eight 12-ounce beers. At some point after it got dark, he and another member, X, went to a building that had a row of doors into separate, small bathrooms. The applicant alleged that after he entered one and began to urinate, X came in, violating his privacy, and began to talk about rape, which made the applicant very uncomfortable. The applicant alleged that he finished urinating, turned around, and said with a nervous laugh, “What are you talking about?” He alleged that X replied, “You won’t think it’s so funny with your

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<sup>1</sup> 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 that any alcohol incident be documented on a Page 7 in the member’s record. Article 20.B.2.h. states that members will normally be processed for discharge if they receive a second alcohol incident.

brains on the wall.” When he tried to leave, the applicant alleged, X kicked the door shut. The applicant alleged that he was terrified because he was trapped in a stall with a man he barely knew who was at least six inches taller than him and was talking about raping and hurting him. He estimated that he was in the bathroom with X for approximately 20 minutes. However, he alleged, X finally moved away from the door, and the applicant flung it open and ran to the campsite. The applicant alleged that he was too shaken up to talk but told his friends repeatedly to keep X away from him. When X returned to the campsite and Z asked X what had happened, the applicant alleged, he was still feeling threatened and so he knocked X down and punched him about six times in the back and kicked him twice before Z restrained him.

The applicant stated that he was shouting and crying so much that the police showed up quickly. He felt relieved because he was terrified of X. However, the police arrested the applicant and charged him with assault with a deadly weapon and public intoxication. The applicant alleged that the “assault charges were dropped because the state of xxxxxxxx considered [him] as the victim of false imprisonment and terrorist threats.” He pled guilty to public intoxication even though he was never given a breathalyzer, blood, or field sobriety test. He alleged that he pled guilty because otherwise he would have had to spend a few days in jail and would have been absent without leave from the Coast Guard. Therefore, he pled guilty as “the lesser of two evils.” When his friend Z picked him up from the jail the next day, Z told him that X “had tried to make a joke about rape and that I had misunderstood him.” The applicant alleged that he got home at 11:00 p.m., went to sleep, and reported for duty the next morning. In response to this incident, his command documented his arrest on a Page 7 entry in his record as an alcohol incident, and he was disenrolled from the xxxxxxxx program.

The applicant argued that the Page 7 documenting this alcohol incident should be removed because “[c]ircumstances surrounding this incident were in self defense,” no alcohol testing was performed, and his command did not ask him for a statement before deciding that he had incurred an alcohol incident. He stated that he was arrested for acting in self defense, not because he had drunk alcohol, and what happened “would have happened even if I had not consumed any alcohol that day.” The applicant stated that his attainment of a rating has been greatly delayed because of this unjust incident. He acknowledged that “What I did was wrong. I would have handled the situation differently if I could. I am embarrassed and I regret nothing more, but I truly believe that I have been punished enough.”

## **SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard on May 22, 2007. On July 17, 2009, he reported for duty at xxxxxxxx in xxxx, where he was enrolled in the xxxxxxxx program. The Executive Officer of the xxxxxxxx entered the following Page 7 in his record to document the applicant’s alcohol incident:

On 29 December 2009 you were involved in an alcohol incident. After consuming approximately 8 beers while camping at xxxxxxxx State Park, you were involved in an altercation with another Coast Guard member. Due to your actions with the other Coast Guard member, you were taken into custody and arrested by the xxxxxxxx Police Department. You pled guilty to public intoxication which is a direct violation of Coast Guard policy ultimately bringing discredit upon the service. The investigation recommends no other punitive action be taken against you.

You were counseled on USCG policies concerning alcohol use and abuse as well as the serious nature of this incident. The unit CDAR will arrange an appointment with a provider who will determine the nature of your relationship with alcohol. It is recommended that you abstain from the use of alcohol until your screening and assessment is completed

This is your first alcohol incident.

Any further incidents will result in you being processed for separation as per chapter 20, Personnel Manual COMDTINST M100.6 (series).

Following alcohol dependency screening on January 12, 2010, another Page 7 was entered in the applicant's record noting that his screening had not resulted in a diagnosis but that he should attend IMPACT training on February 6, 2010, and abstain from drinking until that date. After the applicant completed Alcohol Impact training, the command entered a third Page 7 in his record to acknowledge that he had successfully completed the training and his aftercare program and to remind him that "[f]uture alcohol misuse or incidents may lead to separation."<sup>2</sup>

On February 19, 2010, the applicant was disenrolled from the xxxxxxxxx program for "fault" because of his conviction for public intoxication.<sup>3</sup> Because of his disenrollment for fault, the applicant could not apply for a position in "A" School until February 19, 2011.<sup>4</sup>

### ***Police Reports***

On December 30, 2009, a police officer in xxxxxxxxxxxxxxxxxxxx, reported that after being dispatched to xxxxxxxxx Campground at about 11:20 p.m. on December 29, 2009, she was directed to campsite #14, where she found the applicant and several others. The applicant "initially stated nothing had occurred, but was swaying from his upper torso approx. 2 to 3 inches, had the odor of an alcoholic beverage emitting from his person, was muddy, and appeared emotional. [The applicant's] friend indicated [the applicant] had been involved in an altercation and was stating that [the applicant] was going to kill another person." The police officer escorted the applicant to his patrol car because it was raining and asked the applicant what happened. The applicant told him that X had walked with him to the bathroom building, which was about 75 feet from the campsite, and entered one of the rooms but did not lock the door. He said that X used a separate bathroom but then

entered [the applicant's] restroom. The door shut behind [X]. [X] told [the applicant] something similar to, "I could kill you right now. I'm going to bash your skull into the wall." [The applicant] explained that he feared for his safety stating that he is only 5'4" tall and 148 lbs. ([X] is 6'

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<sup>2</sup> Article 20.B.2.e.1. of the Personnel Manual requires members involved in an alcohol incident to undergo screening for alcohol dependency and to have the results of that screening documented on a Page 7 in their record.

<sup>3</sup> Chapter 7.F.15.a. of the Training and Education Manual states that "[s]tudents who are disenrolled from Class 'A' school for misconduct, lack of effort or application to complete training, or disenrollment at member's request are considered to be Fault disenrollments. Such members are prohibited from applying for another Class 'A' school for 12 months from date of disenrollment."

<sup>4</sup> Article 4.C.4.b.4. of the Personnel Manual states that "[f]or a fault disenrollment, which includes cheating, misconduct, injuries not in the line of duty, non-judicial punishment, individual not petty officer material, or voluntary disenrollment, Commander (CGPC-epm-2) will transfer the individual to meet Service needs. The member is prohibited from reapplying to any 'A' School for one year from the date of disenrollment."

tall and 195 lbs.) [The applicant] stated that he attempted to reach for the bathroom door to exit, but [X] pushed the door shut. [The applicant] was fearful and did not ask [X] to leave because he feared it would empower [X] further. [The applicant] attempted to rationalize with [X] indicating that [X] was drunk and swaying. [The applicant] estimated that he was in the bathroom speaking with [X] for approx. 20 minutes. At some point, [X] moved slightly out of the way and [the applicant] was able to reach for the door, throw it open, and sprint back to his campsite. [The applicant] attempted to explain to his intoxicated friends what occurred, but nobody believed him.

[X] walked back to camp and was rushed by others in the campground. [X] was knocked to the ground by other subjects in the campsite. When [X] was knocked down, [the applicant] admittedly approached and kicked [him] in the head with his foot (it should be noted that [the applicant] was wearing black tennis shoes). [The applicant and X] were then separated by the group. While I was speaking with [the applicant], I could tell that he was upset regarding this case. [The applicant] was crying and repeatedly stated, ["D]on't let me out with him. I'll kill him.["]

[The applicant] claimed that he consumed approx. 5 beers and several shots of alcohol during the day. [He] initially did not want prosecution of [X] for false imprisonment and terrorist threats, but later wavered when being booked into the xxxxxxxxxx County Jail.

In X's interview with the police, X admitted that he had entered the applicant's bathroom stall and teased the applicant "about touching a girl earlier within their campsite. X told [the applicant] that [the applicant] had raped the girl" as a joke. X admitted that he had kicked the door once when the applicant reached for the handle but denied blocking him from leaving. They talked for about another minute and then left the bathroom. X reported that the applicant walked faster and arrived at their campsite first. When X arrived back, the group surrounded him and Y told him that the applicant was saying X had raped him, but X said he had never touched the applicant. Then the applicant karate kicked him, he fell face down, and someone started kicking him hard. The police reported that X also appeared very intoxicated and was swaying.

According to the police, the applicant's friends, Y and Z, both told the police that the applicant and X left the campsite together and were away for approximately 1½ hours and that when the applicant returned, he was frightened, screaming, and saying that X had tried to rape him. In addition, the applicant had said he was going to kill X because X had tried to rape him. The only female at the campsite told the police that no one had assaulted her but that, as a joke, X had tried to convince the applicant that he was a murderer. She was talking to someone near a truck when she heard screaming and saw X in a fetal position on the ground and the others holding the applicant and trying to keep the applicant from kicking X. The fourth member told the police that the applicant returned from the bathrooms ahead of X and, the next thing he knew, the applicant was assaulting X, so they separated them.

## **VIEWS OF THE COAST GUARD**

On February 2, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case.

The JAG argued that the applicant has failed to prove by a preponderance of the evidence that his alcohol incident and fault disenrollment from "A" School were erroneous or unjust. The JAG stated that alcohol incident and disenrollment were correct under applicable regulations.

In recommending denial of relief, the JAG adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC). The PSC stated that the Page 7 documenting the applicant's alcohol incident is presumptively correct and that the applicant has failed to substantiate any error or injustice in his record. The PSC noted that the applicant would be eligible to enroll in "A" School one year after his disenrollment on February 19, 2010.

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

On February 16, 2011, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 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 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 asked the Board to correct his record by removing the Page 7 documenting his alcohol incident; erasing his "fault disenrollment" from the xxxxxxxxx program; and authorizing him to attend XX "A" School. The Board begins its analysis in every case 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>5</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>6</sup>

3. Under Article 4.C.4.b.4. of the Personnel Manual and Chapter 7.F.15.a. of the Training and Education Manual, the applicant presumably became eligible to enroll in "A" School on February 19, 2011, one year after his disenrollment. Therefore, his request for relief in this regard is moot.

4. The applicant alleged that his conduct on December 29, 2009, should not have been deemed an alcohol incident because he was defending himself when he struck and kicked X, and he would not have been arrested if he had not had to defend himself. The evidence in the record shows, however, that the applicant was not under attack or in any danger when he began screaming and striking X, which caused someone to call the police. The applicant was in a public campground surrounded by friends who were questioning X when the applicant launched his attack. What happened in the bathroom is not clear, but even assuming that X threatened him

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<sup>5</sup> 33 C.F.R. § 52.24(b).

<sup>6</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).

with rape in the bathroom, as the applicant alleged, the danger had passed when they returned to the campsite. Therefore, the applicant's assault on X cannot be considered self defense.<sup>7</sup>

5. The applicant alleged that his conduct on December 29, 2009, should not have been deemed an alcohol incident because his alcohol level was never tested. However, under Article 20.A.2.d.1. of the Personnel Manual, a member need not be "drunk" to incur an alcohol incident; the consumption of alcohol need only be a "causative factor" in the member's conduct.<sup>8</sup> In light of the police officer's description of the applicant's condition and odor and the fact that he was convicted of public intoxication, the Board finds that he has not proved by a preponderance of the evidence that his command erred in determining that his conduct on the night of December 29, 2009, met the criteria for an alcohol incident under Article 20.A.2.d.1. Moreover, because Article 20.B.2.e.1. of the Personnel Manual requires preparation of a Page 7 documenting an alcohol incident whenever a member incurs one, the Board finds that the applicant has not proved that the Page 7 should be removed from his record.

6. The applicant alleged that he was unjustly disenrolled for "fault" from the xxxx program after his alcohol incident and asked the Board to remove the "fault" designation. However, under Article 4.C.4.b.4. of the Personnel Manual, any disenrollment from a training program because of the member's misconduct is considered a "fault disenrollment." Since the applicant was disenrolled from the xxxxxxxx program because of his misconduct on December 29, 2009, there are no grounds for removing the "fault" designation from his disenrollment.

7. Accordingly, the applicant's requests should be denied because he has not proved by a preponderance of the evidence that either his "fault disenrollment" from the xxxxxxxx program or the Page 7 documenting his alcohol incident is erroneous or unjust.<sup>9</sup>

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

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<sup>7</sup> To succeed, a defense of "self-defense" requires that the accused have believed, based upon reasonable grounds, that bodily harm was about to be inflicted upon him and that his actions were necessary to protect him from bodily harm. MANUAL FOR COURTS MARTIAL UNITED STATES (2008), p. II-111.

<sup>8</sup> Personnel Manual, Article 20.A.2.d.1.

<sup>9</sup> See *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) (finding that for purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is treatment by military authorities that "shocks the sense of justice").

**ORDER**

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

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Philip B. Busch

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Reagan N. Clyne

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Rebecca D. Orban