

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-162

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX, Ensign

FINAL DECISION

AUTHOR: Ulmer, D.

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 on September 6, 2005, upon receipt of the applicant's completed application and military records.

This final decision, dated April 26, 2006 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 adjusting the marks and remarks in sections 8., 9., and 10. of the Officer Evaluation Report (OER) for the period October 1, 2004, to March 31, 2005 (disputed OER). On September 2, 2005, the Chair of the Board contacted the applicant to clarify his request since he did not specify what the disputed marks should be. The applicant clarified his request by stating that he wanted the entire reporting officer's section of the disputed OER removed from his record.

APPLICANT'S ALLEGATIONS

The applicant alleged that certain of the reporting officer's marks and comments are erroneous and inaccurate because they were based on an incident that a command investigation found resulted from racial discrimination and not from the applicant's misuse of alcohol. In this regard, the applicant stated the following:

An investigation was done and the result stated that the incident was racially motivated and alcohol was not a contributing factor. On the night in question the [civilian police] officer assured me that the incident was confidential and there was no need to inform my command. Understanding that this was a confidential situation and realizing that I had done nothing wrong I felt as though there wasn't any significant information to report. After all, I wasn't drunk. I didn't fight with anyone and I did the responsible thing by taking a taxi out that night. In retrospect, even though I felt I was the victim I should have informed my command. By doing so my character would not be in question. Although, I did not inform my command I do not feel this level of punishment is appropriate.

Disputed OER

In block 8. of the reporting officer's section of the OER, the applicant received marks of 4 in initiative and well being, marks of 3 in judgment and professional presence, and a mark of 2 in responsibility. The comments supporting the below average marks were as follows:

In March 2005, [the applicant] was involved in an altercation with bouncers at a local night club resulting in his being held by city police. Demonstrated poor judgment and avoided responsibility for his actions when did not contact the command; provided no information about the incident until approached by his supervisor two days after it had been reported to the unit. This command determined that alcohol was not a factor in the incident. However, [the applicant's] negative involvement with local police reflected poorly on the Coast Guard and the officer corps.

The reporting officer rated the applicant as a qualified officer (the second of seven blocks, with the seventh block being the highest) when he compared him with other ensigns the reporting officer has known throughout his career.

The reporting officer evaluated the applicant's potential for future service as follows:

While [the applicant's] performance of duties was satisfactory during the reporting period, his personal conduct while off-duty was questionable and demonstrates a reluctance to acknowledge his responsibilities as an officer when he is not at work or on duty. He has not earned the confidence of this command to resume law enforcement duties or be granted access to classified materials & weapons. His potential for

assuming positions of increased authority and responsibility remains poor. [The applicant] is not recommended for promotion with his peers.

SUMMARY OF THE RECORD

The applicant was commissioned an ensign in the Coast Guard Reserve on February 2, 2004. He began serving on a three-year active duty contract on March 10, 2004, and was assigned to a Marine Safety Office.

During liberty hours on the evening of March 18, 2005, the applicant went to a bar with friends. He had been there for approximately an hour to two hours when, according to the applicant, one of the bouncers came up behind him, grabbed his arms, and told him to leave the club for no apparent reason. The applicant stated that he pulled his arms away from the bouncer but did not touch him, at which point several other bouncers arrived and handcuffed the applicant and removed him from the club. A city police officer (not called by the club) was driving by and saw an individual handcuffed and on the ground. The bouncers told the police officer that they did not want to file a complaint against the applicant, but the police officer took the applicant to a detoxification center where he remained until approximately 5:30 that same morning. No sobriety tests were administered to the applicant. The applicant did not immediately report the incident to his command, but the police officer notified the command that the applicant was in the detoxification center.

Investigating Officer Report

On March 25, 2005, the executive officer appointed an officer to investigate (investigating officer (IO)) the circumstances regarding the applicant's alleged misconduct on March 18 and 19, 2005.

According to the IO report, a city police officer arrived at the club and the bouncers told him that the applicant was asked to leave the club because he had removed his shirt after being told to put his shirt on earlier. One of the bouncers stated that the applicant struck him and a second bouncer corroborated the allegation. In contrast, the applicant stated that he and his friend overheard the bouncer tell the police officer that the bouncer approached the applicant because he had his shirt off and because the applicant was dancing with the bouncer's girlfriend. The applicant's friend stated that the applicant's shirt was not off, only unbuttoned, and there was another shirt beneath the unbuttoned shirt.

The IO report stated that according to the applicant, the police officer told him that he was taking the applicant to the city's detoxification center so that he could cool down, and that his placement in the detoxification center was a confidential matter. However, the police officer found the applicant's Coast Guard identification card and

reported the incident to the applicant's command. The applicant remained in the detoxification center until approximately 0530 March 19, 2005.

The IO report stated that no sobriety tests were performed on the applicant during the entire incident. According to the IO report, the police officer stated that the applicant had been drinking but he was not falling down drunk. The police officer described the applicant's eyes as watery and bloodshot and his breath as smelling of alcohol. However, the applicant stated that he had drunk only one beer that evening, which was corroborated by his friend.

The IO offered the following pertinent opinions:

"1. There are two stories as to why [the applicant] was approached by the bouncers. Both stories do not seem to justify why a bouncer would approach a person in a bar. Removing a shirt does not seem worthy of a bouncer approaching a person in a bar. A person dancing with someone's girlfriend when she appears to be accepting of this is also not worthy of a bouncer approaching a person in a bar. It seems probable that the situation could be exacerbated by [the applicant] being Afro-American. [The applicant] stated there seems to be a history of the [club] being prejudiced to African Americans. I [IO] could not determine any way to prove or disprove this claim.

"2. There is not enough evidence available to prove [the applicant] actually did punch a bouncer at the [club].

* * *

"4. There does not seem to be enough evidence to suggest [the applicant] was intoxicated or that alcohol was a cause for this incident . . .

"5. Looking at the definition of an Alcohol Related Incident from [the Personnel Manual] and the facts available for this investigation, this incident should not be labeled as an Alcohol Related Incident. Alcohol does not appear to be a 'significant 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.' It appears an unknown person came up behind [the applicant] and grabbed him forcibly. This person asked him to leave the bar without any explanation. It is understandable that [the applicant] pulled away from this person, who turned out to be a bouncer. [The applicant] did what most members would be expected to do without any alcohol in their system. [The applicant] admits to drinking one beer throughout the entire evening so alcohol was consumed, but there is not enough evidence to indicate alcohol was why this incident occurred . . ."

The IO recommended that the applicant suffer no penalties resulting from the incident.

VIEWS OF THE COAST GUARD

On January 24, 2006, the Judge Advocate General of the Coast Guard submitted an advisory opinion recommending that the Board grant the following alternative relief to the applicant. "Replace the disputed [OER] for the period 1 October 2004 to 31 March 2005 with an OER for Continuity Purposes Only in accordance with [Article 10.A.3.5.c. of the Personnel Manual]." The JAG agreed with the comments of the Commander, Coast Guard Personnel Command (CGPC) that were attached as Enclosure (1) to the advisory opinion.

CGPC, in preparing his memorandum, obtained statements from the reporting officer, the reviewer, and the commanding officer (CO). CGPC stated that there was sufficient evidence in the record to support the applicant's allegation that racial discrimination was a likely or even probable factor that led to the altercation and subsequent detainment of the applicant by local officials. CGPC offered the following facts to support his evaluation of the evidence:

- a. [The] investigating officer opined that, "It seems probable that this situation could be exacerbated by [the applicant] being an African American . . .
- b. In an endorsement dated 25 July 2005 [the] Applicant's [CO], concluded from the Administrative Investigation report that, "the incident was clearly racially motivated."
- c. In his declaration [to CGPC] dated 08 Nov 2005, [the CO] states, "It is also my opinion upon review of the facts and having lived in the Portland area for three years, that the incident was probably racially motivated or that, at least, [the applicant's] race was used against him in this situation in that he was assumed by the police to be guilty until shown otherwise . . .
- d. [The OER reviewer who was also the] Applicant's Executive Officer, acknowledges in his declaration [to CGPC] that "The Investigating Officer believed that race may have been a factor in [the applicant's] being taken to the . . . Detoxification Center" . . . [The Executive Officer] neither agrees nor disagrees with the opinion of the investigating officer.

Based upon this evidence, any mention of the incident or subsequent conduct or performance relating to the incident should not be included in

the OER. Per [Article] 10.a. [of the Personnel Manual] Commanding Officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command. Though not a member of the Applicant's rating chain, the Applicant's [CO] . . . is responsible for ensuring that officers under his command receive fair evaluations. [The CO] clearly feels that the incident was most likely the result of racial discrimination, and therefore the accuracy and fairness of the disputed OER is called into question.

CGPC noted that the reporting officer disagreed that the marks and comments on the disputed OER were inaccurate or erroneous. The reporting officer stated that the OER records the fact that the applicant was involved in a skirmish/altercation, but that, "No judgment was passed in the OER on who caused it or why it happened," and he noted that the OER does not state that the altercation was racially motivated. CGPC stated, however, that a "judgment" of why the incident happened should have been made by the reporting officer to ensure a fair and unbiased evaluation was provided, and that simply documenting that the altercation happened without any due consideration of the substantial evidence suggesting that racial discrimination was a factor was irresponsible.

CGPC also noted that the reviewer's declaration indicated that he was potentially biased in his review and verification of the disputed evaluation because of the applicant's previous involvement in a similar incident during the previous reporting period. In this regard, CGPC stated that the reviewer wrote in his declaration that "The marks on the [disputed] OER dated 2005/03/31 should be viewed from the perspective of the applicant's previous OER dated 2004/09/30." CGPC stated that the facts surrounding the previous incident, already documented in the Applicant's earlier OER should not have been the basis on which to evaluate the applicant's performance for the reporting period under review. CGPC stated that the Personnel Manual states that the reviewer shall limit comments on performance or behavior to that which was observed during the reporting period. CGPC stated that although the marks were supported by comments, it cannot be ignored that had the applicant been a white male instead of a black male the incident may not have occurred at all. CGPC stated that removal of the OER is warranted because policy does not support the option of having a partial OER for continuity purposes only placed in the record, as requested by the applicant.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 22, 2006, the applicant responded to the views of the Coast Guard and agreed with the recommended relief.

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.

2. The Coast Guard recommends, and the Board agrees, that the disputed OER should be removed from the applicant's record and replaced with a report for continuity purposes only. The Board also agrees with the Coast Guard that the applicant's rating chain violated the Personnel Manual by failing to prepare an objective and fair evaluation of the applicant's performance during the period covered by the disputed OER. In this regard, the reporting officer gave the applicant below average marks and comments without taking into consideration the findings of the IO that racial discrimination against the applicant by the bouncers and civilian police officer, rather than any misbehavior by the applicant, probably caused the incident on March 18 and 19, 2005.

3. The Coast Guard also found that the reviewer probably had a prejudice against the applicant because of his involvement in a similar incident during an earlier reporting period. For the reviewer to reach a conclusion about the applicant's performance based on performance during another reporting period violates Article 10.A.4.c.11.g. of the Personnel Manual, which states, "the Reviewer shall limit comments to performance or behavior observed during the reporting period and/or discussions of the Reported-on Officer's potential." Based on the reviewer's declaration to CGPC, the Board agrees with the Coast Guard's assessment on this issue.

4. Accordingly, relief should be granted as described above.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of Ensign XXXXXXXXXXXXXXXXXXXXXXXX, USCG, for correction of his military record is granted as follows: The OER for the period October 1, 2004, to March 31, 2005, shall be removed from the applicant's record and replaced with a report for continuity purposes only.

Bruce D. Burkley

J. Carter Robertson

George A. Weller