

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-144

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Andrews, J.

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 August 11, 2005, upon receipt of the applicant's completed application and military records.

This final decision, dated June 1, 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 remove from his record a CG-3307 ("page 7") dated June 6, 1995, documenting an "alcohol incident"¹ on May 6, 1995. He alleged that because he was not screened for alcohol abuse following the incident on May 6, 1995, it does not count as an "alcohol incident." Therefore, he argued, the page 7 documenting the incident should be removed from his record.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on January 10, 1989. On January 16, 1991, while attending telephone technician "A" school, the applicant was arrested for

¹ Article 20.A.2.c. of the Personnel Manual in effect in 1995 defined an "alcohol incident" as "[a]ny behavior, in which the use or abuse of alcohol is determined 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 (UCMJ), Federal, State, or local laws."

driving under the influence (DUI) of alcohol. As a result of the arrest, the applicant was disenrolled from "A" school the next day "due to fault."

A page 7 dated January 30, 1991, in the applicant's record states that he was screened for alcohol abuse on January 28, 1991, at a Naval Counseling and Assistance Center (CAAC). The CAAC "determined that [he] had no alcohol related problems and that [his] DUI on 16 JAN 91 was an isolated incident." The applicant was ordered to attend "Level I, Naval Alcohol & Drug Safety Action Program (NADSAP) for Self Awareness and Education." The applicant acknowledged the page 7 with his signature.

In 1992, the applicant completed electronics technician "A" school and joined the ET rating. On June 6, 1995, the Executive Officer of the applicant's cutter entered a page 7 in the applicant's record, which the applicant acknowledged by his signature and which stated the following:

This entry documents an alcohol incident as defined in Chapter 20 of the USCG Personnel Manual. On the night of 5 May 1995, you had been drinking alcohol into the morning of 6 May 1995. You returned to the ship at approximately 0450. Your condition later on that morning was such that you were unable to attend Fisheries School, and the acting Executive Officer ordered you to go to bed. Your consumption of alcohol greatly contributed to your inability to attend Fisheries School, a duty to which you were bound ...

In accordance with the provisions of the Personnel Manual, you will undergo alcohol screening and, normally, a treatment plan will be developed for you to follow regarding the use of alcohol. Further Page Sevens will document the results of that screening and treatment plan.

After a review of your unit PDR, it is determined that this is your first alcohol incident. A second alcohol incident will normally result in separation action (a discharge from the Coast Guard).

The Coast Guard's policy on Alcohol Abuse is contained in the USCG Personnel Manual, Chapter 20. You are encouraged to read Chapter 20. ... If you have any questions regarding this counseling, this entry in your PDR, or the Coast Guard's alcohol abuse policy; see myself, the Command Drug and Alcohol Representative, your Division Chief, your Division Officer, and/or your Department Head.

On September 30, 1995, the Executive Officer completed a page 7 documenting the applicant's unsatisfactory conduct mark on his performance evaluation due to the alcohol incident on May 6, 1995. Another page 7 documented the termination of his period of eligibility for a Good Conduct Award. However, his record contains no page 7 documenting the results of alcohol abuse screening or treatment.

On June 18, 2005, the Coast Guard Personnel Command (CGPC) sent the applicant a letter stating that the Chief Warrant Officer (CWO) Appointment Board that convened on April 11, 2005, found that he was

not fully qualified for appointment to CWO2 due to having two alcohol incidents (28 January 1991 and 6 June 1995). In accordance with the Coast Guard Personnel Manual Chapter 20.B.2.h., enlisted members involved in a second alcohol incident will normally be processed for separation. In accordance with Chapter 20.A.2.d. of the PERSMAN, the 28 January 1991 DUI should be classified as an alcohol incident. The second alcohol incident on 6 June 1995 was incorrectly defined as [his] first alcohol incident by [his] command. Enlisted personnel with two alcohol incidents may be retained if approved by CGPC-epm. There is no record of [the applicant] receiving approval from CGPC-epm to be retained in the Coast Guard.

On July 22, 2005, the applicant and his commanding officer signed a page 7 for his record stating the following:

A recent review of your record found documentation of two (2) different events involving alcohol during your Coast Guard career. The first event, which occurred on 16 Jan 91, was properly documented and you received the required screening; this event is counted as an alcohol incident. The second event, which occurred on 6 Jun 95, was documented by administrative remarks. However, there is no documentation indicating that you received the required screening. Per 19 Jul 2005 conversation between [the unit's Executive Officer] and [the Chief of the Advancements and Separations Branch] CGPC-EPM-1, the omission of an alcohol screening means that the 6 Jun 95 event is not counted as an alcohol incident. In summary, as of this date, you officially have one alcohol incident.

For documentation purposes, this administrative remarks entry serves as official notice that any further alcohol incidents will result in you being processed for separation as per the Personnel Manual, COMDTINST M1000.6 (series), Chapter 20.

VIEWS OF THE COAST GUARD

On January 3, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request.

The JAG stated that the applicant's command followed Coast Guard policy in determining that his inability to perform his assigned duty by attending class on May 6, 1995, as a result of his consumption of alcohol the night before constituted an alcohol incident. He pointed out that the applicant submitted no evidence to refute the facts stated in the page 7 dated June 6, 1995.

Regarding the page 7 completed by the applicant's commanding officer on July 22, 2005, the JAG stated that the Coast Guard's Office of Military Personnel—rather than CGPC's Advancement and Separations Branch—establishes all military personnel management policies. The JAG stated that the applicant's conduct on May 6, 1995, met the definition of an alcohol incident in the Personnel Manual, and the definition does not require that a member be screened for alcohol abuse. No part of the Personnel Manual states that an omission of alcohol screening voids a determination that the

member's conduct constituted an alcohol incident. The JAG stated that "the omission of an alcohol screening after an alcohol incident has no bearing whatsoever on whether the event is counted as an alcohol incident."

Moreover, the JAG stated, the applicant has not proved that he was not screened. He argued that absent evidence to the contrary, the Board must presume that Coast Guard officials have carried out their duties "correctly, lawfully, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). Therefore, "[p]resumably, the applicant was properly screened as his command said he would be. The record only proves that the screening and its results were not documented in a Page 7 entry as required by the PERSMAN."

Furthermore, the JAG pointed out, the commanding officer's statement that the lack of a page 7 concerning the results of screening voids the alcohol incident directly contradicts a recent finding by the Board in BCMR Docket No. 2005-073:

The applicant argued that his discharge was erroneous because following his second alcohol incident, his command failed to follow the administrative procedures provided under PM Article 10.B. and failed to have him screened and treated for alcohol abuse. However, under PM Article 20.B.2.h.2., the applicant was subject to discharge following his second alcohol incident whether or not the command followed other procedures by taking him to mast, preparing an unsatisfactory performance evaluation, counseling him with a page 7, preparing a report of the arrest, or referring him for screening and treatment. In fact, under PM Article 20.B.3.b., a member's discharge need not be delayed following a second alcohol incident to allow time for treatment.

The JAG stated that the policies in Articles 20.B.2.h.2. and 20.B.3.b. correspond with those in Articles 20.B.2.g. and 20.B.3.b. of the Personnel Manual in effect in 1995. Therefore, the applicant "was subject to discharge following the 6 May 1995 alcohol incident even if his command did not refer him for screening." The JAG further stated that since in 1995 the applicant's commanding officer did not follow proper procedures to retain him on active duty despite the second alcohol incident, the applicant's retention on active duty was an administrative oversight that benefited the applicant.

The JAG stated that although the page 7 dated July 22, 2005, is erroneous, the Board should not remove it from the applicant's record as it appears to protect the applicant from being discharged as a result of the alcohol incident in 1995. He stated that removing the recent page 7 would violate *Doyle v. United States*, 599 F.2d 984 (Ct. Cl. 1979), which "prohibits the BCMR from changing a record in a manner adverse to an applicant's interests."²

² *Doyle v. United States*, 599 F.2d 984, 1000 (Ct. Cl. 1979) (stating that "[i]t should be kept in mind that 10 U.S.C. § 1552 grants to the Secretary, acting through correction boards, broad powers to correct and remedy errors and injustices. It is clear that the statute only confers on the Secretary the power to correct records in favor of a serviceman and never against him").

The JAG included with his advisory opinion, but did not adopt,³ a memorandum on the case from CGPC. CGPC stated that following the applicant's first alcohol incident in 1991, he was properly screened and treated as required by the Personnel Manual. CGPC stated that the lack of documentation of screening following the second alcohol incident "does not negate the incident." CGPC stated that the applicant "has had two alcohol incidents which can be taken into consideration by the Coast Guard." CGPC further stated, however, that because there is no documentation of screening following the second incident it "cannot be used to discharge the applicant." CGPC recommended removing only the following sentence from the page 7 dated June 6, 1995: "After review of your unit PDR, it is determined that this is your first alcohol incident."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 4, 2006, 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.

³ In a telephone conversation on May 12, 2006, the Coast Guard's Office of Military Justice informed a BCMR staff member that CGPC's memorandum on this case was mistakenly sent to the Board and should not be considered part of the Coast Guard's advisory opinion. CGPC's memorandum is summarized here, however, because it was received from the Coast Guard and forwarded to the applicant in accordance with the Board's rules at 33 C.F.R. § 52.42(d).

APPLICABLE REGULATIONS

The following regulations from the Personnel Manual (PM) were in effect in both 1991 and 1995, although the designation of the articles by numbers and letters changed. The article designations below are those from the manual in effect in 1995.

PM Article 20.A.2.c. defined an "alcohol incident" as "[a]ny behavior, in which the use or abuse of alcohol is determined 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 (UCMJ), 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 (NJP) for the behavior to be considered an alcohol incident."

PM Article 20.A.2.e. defined "alcohol screening" as an "evaluation by a physician, clinical psychologist, or a Navy (or DoD or civilian equivalent) CAAC counselor to determine the nature and extent of alcohol abuse. An evaluation by a Collateral Duty Alcohol Representative (CDAR) does not satisfy the screening requirement contained in this Manual."

PM Article 20.B.2.d. stated that "[a]ll members who have been involved in alcohol incidents or have otherwise shown to be alcohol abusers shall be screened The results of this alcohol screening shall be recorded and acknowledged in the Personnel Data Record on form CG-3307 The entry shall include a description of the facts of the incident, the results of alcohol screening, the position and organization of the individual conducting the screening, and a statement of the treatment recommended (if any)."

PM Article 20.B.2.f. stated that following an alcohol incident "the commanding officer will ensure that the following counseling is conducted and that it is recorded and acknowledged by an entry in the member's Personnel Data Record on form CG-3307 . . . This entry is in addition to that required by paragraph d. above. (1) The member shall be counseled on Coast Guard policy on alcohol abuse contained in this article." In 1991, subparagraph (2) required that the member be placed on probation. By 1995, subparagraph (2) had been revised to state that "[f]or enlisted members, a statement shall be made that the member has been involved in their first alcohol incident and that a subsequent incident will normally result in separation action."

PM Article 20.B.2.g. stated that "[e]nlisted members involved in a second alcohol incident will normally be processed for separation under Article 12-B-16 of this Manual. (1) In those cases involving enlisted members where the Commanding Officer feels that an exceptional situation warrants consideration for retention, a letter request for reten-

tion and treatment ... shall be forwarded via the chain of command to Commandant ... who shall ... direct the appropriate action regarding retention."

PM Article 20.B.2.h. stated that "[e]nlisted members involved in a third alcohol incident shall be processed for separation from the service."

PM Article 12.B.16.b.5. authorized the administrative discharge for unsuitability of members who have abused alcohol in accordance with Article 20.B.2.

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 application was timely.

2. The applicant asked the Board to remove from his record a page 7 dated June 6, 1995, which documents an alcohol incident on May 6, 1995. However, the applicant's conduct of May 6, 1995, clearly met the definition of an alcohol incident under Article 20.A.2.c. of the Personnel Manual since his commanding officer determined that his consumption of alcohol caused or greatly contributed to his inability to attend his fisheries class that day, which was an assigned duty. Pursuant to Article 20.B.2.f., the applicant's command was required to document the alcohol incident on a page 7 in his record. Article 20.B.2.f. states that the page 7 documenting an alcohol incident is supposed to be in addition to a page 7 documenting the results of alcohol screening prepared in accordance with Article 20.B.2.d.

3. The applicant argued that the incident on May 6, 1995, does not count as an alcohol incident because there is no documentation of the alcohol screening required under Article 20.B.2.d. His commanding officer advised him in a page 7 on July 22, 2005, that "the omission of an alcohol screening means that the 6 Jun 95 event is not counted as an alcohol incident." Nothing in the Personnel Manual states that conduct can only be considered an alcohol incident if the member later receives alcohol screening. In fact, under Article 12.B.16. of the Personnel Manual, a member may be expeditiously discharged following a second alcohol incident without any screening or treatment. Nor does any part of the Personnel Manual state that an alcohol incident should not be documented pursuant to Article 20.B.2.f. if the command fails to provide alcohol screening or fails to document alcohol screening in accordance with Article 20.B.2.d. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that his command committed an error or injustice in documenting his conduct

on May 6, 1995, as an alcohol incident in accordance with Article 20.B.2.f. of the Personnel Manual then in effect.

4. CGPC pointed out that the page 7 dated June 6, 1995, erroneously states that the incident on May 6, 1995, was the applicant's first alcohol incident when in fact he had already had his first alcohol incident on January 16, 1991. If the applicant asked the Board to remove the word "first" from the page 7, he would be entitled to such a correction since he had a prior alcohol incident. However, removing the word "first" from the page 7 would not clearly be in the applicant's interest, and he did not request this correction or respond to the recommendation in CGPC's memorandum. Therefore, the Board will not order such a correction.

5. The JAG pointed out that the page 7 dated July 22, 2005, erroneously states that "the omission of an alcohol screening means that the 6 Jun 95 event is not counted as an alcohol incident." The JAG recommended that the Board not remove this page 7 from the applicant's record as it protects him from the possibility of being discharged based on his second alcohol incident on May 6, 1995. Because the applicant neither requested removal of the July 22, 2005, page 7 nor responded to the JAG's advisory opinion, the Board will not remove this page 7 from his record.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Elizabeth F. Buchanan

Randall J. Kaplan

Audrey Roh