

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2012-055**

**XXXXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXXXX**

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**FINAL DECISION**

This proceeding was conducted 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 upon receiving the completed application, including the applicant's military and medical records, on January 9, 2012, 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 September 7, 2012, 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, who was honorably discharged for misconduct on June 15, 200X, asked the Board to correct her record to reflect a medical retirement instead. The applicant submitted the following claims supporting her request for a medical retirement:

1. Her misconduct discharge was not processed in accordance with regulations.
2. She was being evaluated by a medical board when she was discharged prematurely.
3. Her disabilities are a direct result of an assault by a member of the Coast Guard.
4. She continues to suffer from these long-term service-connected disabilities.

The applicant initially provided no further explanation of these claims. She alleged that she discovered the error in her record on March 15, 2011, because before that date she "was not aware that her discharge involved regulatory violations until she spoke with an advocate."

**SUMMARY OF THE RECORD**

On August 9, 200X, the applicant enlisted on active duty for four years. After completing boot camp, she was assigned to Xxxx XXXXXXXX, a part of Sector XXXXXXXX. While stationed there, her commanding officer, a captain who was the Sector Commander, entered the following undated Page 7 (counseling form CG-3307) in her record, which she signed:

On this date you were formally counseled regarding your failure to comply with COMDTINST 1000.6A, Personnel Manual, Interpersonal Relationships within the Coast Guard, in that you were engaged in an inappropriate relationship from November 200X through December 200X. This relationship was deemed unacceptable because you were involved in a romantic relationship with your direct supervisor, an E-4 at Xxxx XXXXXXXX, which was a violation of Chapter 8.H.2.f. of the Personnel Manual, Unacceptable Romantic Relationships.

Furthermore, it was later discovered through investigation by Coast Guard Investigative Services, that you were involved in yet another inappropriate relationship with an E-3 assigned to Xxxx XXXXXXXX. You were in violation of the COMDT's Unacceptable Romantic Relationships policy, in that for a period of time, you maintained a romantic relationship with the E-3 at XXXXXXXX, a unit of less than 60 members in size.

Although you were the junior member in at least one of these relationships, you are reminded that this behavior is unacceptable and is a violation of COMDT's policy and a disruption of good order and discipline of the CG unit. You shall become adeptly familiar with policy and the standards that govern your actions within the U.S. Coast Guard. Keep in mind that any further violations of this policy may lead to further administrative actions.

On March 20, 200X, the applicant sought counseling. She reported to the counselor that she had been assigned to Xxxx XXXXXXXX for about 6 or 7 months and that a month after she arrived at the xxxx, she began experiencing difficulties with her supervisor, PO X, who yelled and cussed at her, grabbed her behind, tried to kiss her, entered her room, slammed her up against the wall, and smacked her across the face. She told the counselor that a higher ranking officer witnessed this incident and talked to PO X and that PO X then threatened to kill her. She alleged that her coworkers encouraged her to flirt with PO X "so we can all have a good day." As a result of the incident, PO X had been reassigned to another unit. However, the applicant told the counselor that she was still afraid of him and was sleeping with a knife under her pillow. The counselor noted that the applicant's possible diagnoses were Post-Traumatic Stress Disorder (PTSD) and Adjustment Disorder with Mixed Emotions.

On April 13, 200X, the applicant was referred for a psychological evaluation because she was complaining of past verbal and physical harassment by a Coast Guard member and had been diagnosed with possible PTSD, and her "chain of command reported concern that the patient was experiencing paranoid ideation with regard to the alleged abuse." The applicant complained to the doctor of crying and having sleeping and eating problems. She stated that PO X had "forced her to touch his genitalia" and hit her when she refused, knocked her over by thrusting his pelvis into her from behind, yelled in her face at the top of his lungs, called her "bitch" and "piece of shit," had the keys to her room and would enter her room announced, and told her she had "no fuckin' core values" when she refused to go to bed with him. The applicant told the doctor that she had not reported these incidents because she did not want to ruin anyone's career. However, she told the doctor, PO X's harassment became known because someone reported it when she was going to be transferred after PO X had reported her for having a romantic relationship with another male colleague. The applicant told the doctor that her transfer fell through because PO X's harassment was investigated and he was transferred. Nevertheless, she told the doctor, she was still afraid of PO X and was being blamed and taunted by her coworkers. The applicant was diagnosed with PTSD. The psychologist recommended that she be transferred to a new unit and that a medical board be convened.

The applicant was transferred to Xxxx XXXXXXXXXXXX, and a doctor prepared a medical board report. The applicant told the doctor that she had been having nightly nightmares and had not been sleeping or eating well for several months because her supervisor had sexually harassed her and hit her and she had initiated an investigation that had caused trouble for other members. She stated that other members of the command continued to harass her, and her new female supervisor would not leave her alone. She no longer socialized with anyone and had decided to avoid men and Coast Guard members in general. She said that she experienced headaches and chest pain whenever a man wanted to talk to her. After a few weeks, the applicant was transferred again to Sector Xxxx in XXXXXXXX.

On May 15, 200X, the applicant underwent psychological testing. A Personality Assessment Inventory revealed a significantly unhappy, moody, tense, suspicious, and pessimistic person who was depressed, discouraged, and withdrawn. Her responses indicated she had decreased energy, appetite, sleep, and sexual interest. In addition, she "is likely to be a socially isolated individual," she may have "particularly difficulty interpreting the normal nuances of interpersonal behavior that provide the meaning to personal relationships," and she "demonstrates an unusual degree of concern about physical functioning and health matters" and "reports symptoms consistent with both conversion and somatization disorders." Regarding the validity of the testing, the report notes that certain responses indicated that the applicant was defensive, that she "may not have answered in a completely forthright manner," and that she portrayed herself as being "relatively free of shortcomings to which most individuals will admit, and she appears somewhat reluctant to recognize faults or problems in herself." The test resulted in "diagnostic considerations" of PTSD and major depression and possibly one or more of the following: panic disorder without agoraphobia, generalized anxiety disorder, somatization disorder, undifferentiated somatoform disorder, and mixed personality disorder with borderline, paranoid, dependent, and passive-aggressive features.

On June 9, 200X, the applicant underwent a psychiatric evaluation pursuant to the medical board. The applicant told the doctor that PO X would drink excessively, harass her, and try to arrange circumstances so that they would be alone together. This behavior angered and scared her. PO X also brushed against her a lot, grabbed her, and became jealous whenever he saw her interacting with other men. She began to sleep with a knife under her bed because he had the keys to her room, and she had become afraid and anxious of all men. The applicant reported that her symptoms had improved with medication, her sleep had improved, and she was beginning to enjoy recreational activities. However, the psychiatrist noted that she "still does not feel safe around Coast Guard males and she still wants out of the Coast Guard." The psychiatrist noted her prior diagnoses but diagnosed the applicant with only an anxiety disorder.

On July 20, 200X, the applicant underwent a psychological evaluation pursuant to the medical board. She told the doctor that she was again being harassed at her new xxxx because her new section leader was married to someone who had been stationed at her prior xxxx. Her new section leader would not leave her alone. The applicant reported having headaches, continuing nightmares about PO X, crying bouts, and difficulty concentrating. She told the doctor that she was avoiding men and Coast Guard people in particular and felt panicky, breathless, and nauseous when approached by Coast Guard males. The doctor diagnosed her with PTSD and

possible Histrionic Personality Disorder and noted that the applicant was “very emotionally responsive” and could

become severely depressed. She may seek out situations in which she can be aroused, even if the emotion she experiences is unpleasant. The depression she experiences may become so pervasive and overwhelming that she may attempt to harm herself. She is attention-seeking, concerned with social acceptance, nurturance and may try to seek a response from others. There is a longing to have close relationships, but relationships are conflictual, frustrating and fall short of her expectations.

A “Narrative Summary in Support of Medical Board” dated August 3, 200X, states that the applicant’s diagnoses were PTSD and major depression. The doctor reported the history of these conditions as follows:

2. History: [The applicant] had no apparent history of mental health problems until she began facing apparent sexual harassment at the hands of one of her supervisors soon after arriving at her first duty station, around November 200X. The situation progressed to the point that she now becomes extremely anxious around men and avoids people associated with the Coast Guard as much as possible. She was administratively reassigned to a different unit but continues to feel isolated and depressed.

She was seen by psychology at Naval Hospital XXXXXXXX and given a diagnosis of [PTSD], resulting from sexual harassment (Atch 1). No allegations of rape have been made. A second psychological evaluation concurred with PTSD (Atch 2a).

An initial personality profile (MMPI) was found to be “invalid.” This can result when a person tries to create a certain outcome on the test; this test in her case is not available for review. An alternate personality profile, the Personality Assessment Inventory (PAI), was given. Her results on PAI were not “invalid,” though it was noted that “the respondent many not have answered in a completely forthright manner” and that she “appears somewhat reluctant to recognize faults or problems in herself.” Still, there was “no evidence to suggest that the respondent was motivated to portray herself in a more negative or pathological light than the clinical picture would warrant” (Atch 4). No diagnosis of personality disorder was made.

Finally, she was seen by psychiatry at NHGL and given the diagnoses of anxiety and depression; though perceived sexual harassment was noted, PTSD was not specifically included in listed diagnoses (Atch 3). Psychiatrist did recommend a trial of medications, fluoxetine and seroquel, which she is currently taking.

To this point, she still suffers her major symptoms, with little change noted on follow-up psychological evaluation (Atch 2b). She continues to be seen for therapeutic counseling weekly. She denies alcohol or drug use, and denies any thoughts of suicide.

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5. Diagnoses:     a) anxiety disorder NOS (ICD-9: 300.00)  
                      b) major depression, single episode (ICD-9: 296.2)  
                      [c] post-traumatic stress disorder (ICD-9: 309.81)]

6. Recommendations: [The applicant] is currently “not fit for full duty” (NFFFD). She has a recent diagnosis of anxiety disorder and depression, and these symptoms appear to be caused by sexual harassment suffered at the hand of a Coast Guard superior. In addition, transfer away from the unit has not improved her condition, and she continues to be severely affected despite on-going counseling. She was recently begun on medications to help with her mood and anxiety, but since the entire Coast Guard environment seems to be exacerbating the post-traumatic elements of her condition, *separation from the service altogether may offer the best chances of full recovery.*

She would, of course, need to continue in therapeutic medications and counseling into the foreseeable future. These services are readily available from civilian sources. She does not suffer any disability.

I would recommend she be separated from service now, to continue in treatment in a civilian or VA setting.

On August 3, 200X, the applicant was advised that a medical board had found that she was not fit for duty based on diagnoses of Anxiety Disorder, Major Depression, and PTSD.

Sanitized trial records in the applicant's military records show that on August 30, 200X, someone, presumably PO X, was tried by summary court-martial. He pled guilty to a charge of violating regulations by "wrongfully engaging in sexually intimate behavior" by having an inappropriate relationship with someone, presumably the applicant, in violation of Article 8.H.2.g. of the Personnel Manual, at Xxxx XXXXXXXX from November to December 200X. He was found not guilty of one charge of assault ("striking her face with his open hand") and two charges of indecent assault ("placing her hand against his groin" and "grinding his hips and groin against her buttocks"), but was found guilty of a lesser included offense of committing "indecent acts with another" by positioning himself behind her and bumping (rather than grinding) his hips and groin against her buttocks. His punishment was reduction in rank to E-3 and one month's restriction to base.

On September 13, 200X, the psychiatrist reported that the applicant's mood and anxiety symptoms were stable but that she was upset because she thought the punishment PO X had received at court-martial was too lenient.

In October 200X, the applicant began treatment for temporomandibular joint disease (known as TMJ or TMD) with pain, which she said had begun when PO X hit her in December 200X. A dentist reported that she needed physical therapy and was a candidate for oral surgery. The applicant began physical therapy (PT) for TMJ and received a "splint" to wear in her mouth.

In early December 200X, the applicant was transferred back to Xxxx XXXXXXXXXXXX. On December 20, 200X, she was evaluated by an orofacial pain consultant at the Naval Institute for Dental and Biomedical Research in XXXXXXXX. He prescribed a treatment plan including patient education and self-care, psychological counseling, and chronic pain management. He also wrote that there was no orofacial pain specialist at the hospital and recommended that the applicant be returned to XXXXXXXX for treatment.

On January 3, 200X, the applicant underwent examination for TMJ by a dentist and oral surgeon at Xxxx XXXX Oral and Maxillofacial Surgery. The doctor advised her command that her medical records and x-rays were consistent with mild left TMJ synovitis, intermittent mild right TMJ synovitis, myositis and myalgia of the muscles of mastication, guarding trismus (lockjaw), and headaches. In addition, he noted her condition could stem from the injury she sustained in December 200X or from clenching her jaw as "most of her trismus is muscular in origin." He recommended that she take anti-inflammatory medications, in lieu of narcotics, and have PT at a facility in nearby XXXXXXXXXXXX, XXXX.

On January 23, 200X, a doctor advised the applicant's command that although a medical board report had been completed, it was not processed "in part due to perceived improvement of member's condition." However, the doctor stated that the applicant was "seeing PT 3 – 4 times a week, not sleeping well, having nightmares," and had not been fit for duty for some time. The doctor said that the medical board process should be completed. He also noted that because the applicant had been taking Vicodin for several months, she should not be standing watch.

On February 23, 200X, the Executive Petty Officer of the xxxx entered the following Page 7 in her record, which she signed:

23FEB07: On this date, you notified your Command that you have been involved in an unacceptable romantic relationship with [a BM3]. You state that your relationship is very serious and will lead to marriage in the near future. As per Section 8-H, Personnel Manual, COMDTINST M1000.6 (series), you are prohibited from having a romantic relationship when assigned to a command with less than 60 members. In addition, the Coast Guard is not obligated to reassign personnel due to members' desires or based solely on a relationship. When reassignment is not an option, members may be directed to end a relationship.

You stated your intention to marry [the BM3]; the intent of marriage does not relieve you of your obligation and responsibility to abide by Section 8-H, Personnel Manual, COMDTINST M1000.6 (series).

You have been counseled on the policies pertaining to Interpersonal Relationships within the Coast Guard [in accordance with] Section 8-H, Personnel Manual, COMDTINST M1000.6 (series).

On February 26, 200X, the applicant was charged with failing to obey an order or regulation in violation of Article 92 of the Uniform Code of Military Justice for having an unacceptable relationship in violation of Article 8.H. of the Personnel Manual. The command convened an investigation and the applicant was advised of her rights in writing. The applicant submitted a written statement for the investigation in which she explained that she had met the BM3 upon her return to Xxxx XXXXXXXXXXXX in early December 200X. At first, he had a girlfriend and she had a fiancé (a Coast Guardsman stationed in XXXXXXXX), so they were merely friends. However, "feelings began to take over," and by early February 200X, they "knew that [they] were going to get married and be together forever." The applicant noted that when she signed the first Page 7 in her record about inappropriate relationships while at Sector XXXXXXXX, she was told that her signature was only an acknowledgement of receipt and not an indication of agreement, but the Officer in Charge (OIC) of Xxxx XXXXXXXXXXXX believed that a signature on a Page 7 indicated agreement. She stated that the OIC's belief was "making it more difficult for me to be with my future husband," but she would be a "supportive, loving coastie wife" if the medical board process resulted in her being discharged.

On April 4, 200X, the OIC entered the following Page 7 in the applicant's record, which she signed:

04APR07: This is to inform you that you have failed to uphold the Coast Guard's standards of behavior regarding interpersonal relationships within the workplace. As a result of your three incidents of inappropriate romantic relationships as documented on CG 3307s, one undated from Sector XXXXXXXX, another dated 23 Feb 07 from Xxxx XXXXXXXXXXXX, you are being placed on six months probation. This probationary period can be terminated at any time during the next six

months if you do not correct your behavior. You must immediately cease your inappropriate relationship or you will be processed for discharge.

On April 10, 200X, the OIC entered the following Page 7 in the applicant's record, which she signed:

10APR07: On 04APR07 you were placed on performance probation for engaging in an inappropriate romantic relationship at STA XXXXXXXXXX, a unit with less than 60 members. A condition of this probation was that you immediately terminate your inappropriate relationship. You have stated your intention not to terminate your inappropriate relationship. This failure to terminate the inappropriate relationship is a violation of the terms of your probation, and subsequently, the probation is rescinded. In accordance with [Article 12.B.18. of the Personnel Manual], you will be processed for discharge.

The OIC also notified the applicant by memorandum that he was initiating her discharge:

1. This is to inform you I have initiated action to discharge you from the U.S. Coast Guard pursuant to the provisions of [Articles 12.B.12. (discharges), 12.B.18. (discharges for misconduct), and 8.H.6.f. (unacceptable relationships) of the Personnel Manual]. Your performance marks for this enlistment support an honorable discharge. The reasons for my actions are based upon your failure to refrain from unacceptable romantic relationships.

2. The decision on your discharge and the type of discharge you will receive rest with Commander, ([Personnel Command, Enlisted Personnel Management]).

(a) You may submit a statement on your behalf.

(b) You may disagree with my recommendation; if so, your rebuttal will be forwarded with my recommendation.

Also on April 10, 200X, the applicant acknowledged receiving the notification of her pending discharge for misconduct. She waived her right to submit a statement regarding the discharge, waived her right to request a Second Chance Discharge Waiver, and indicated that she did not object to being discharged.

On April 10, 200X, the OIC submitted a recommendation that the applicant be honorably discharged for misconduct and wrote the following in pertinent part:

2. While assigned to CG XXXX XXXXXXXXXX, MI from November 200X thru December 200X, [the applicant] engaged in two inappropriate romantic relationships, one with a supervisor, and another with a member of the same pay grade. The second relationship was discovered by a CGIS agent during an investigation on her behalf. Enclosure (1).

3. While assigned TAD to Sector XXXX, [the applicant] was involved in a romantic relationship with a coworker, to the point of being engaged to be married. [She] volunteered this information upon her check-in at XXXX XXXXXXXXXX. While not specifically inappropriate, it does help establish a pattern of workplace relationships that are questionable at best.

4. After reporting to XXXX XXXXXXXXXX in December 200X, [the applicant] became engaged in an unacceptable romantic relationship with an E-4, her direct supervisor. [She] notified this command of her relationship with another member of the crew on 23FEB07 (Enclosure 2). By her own admission, [she] had been engaging in this inappropriate romantic relationship for over two months prior to notifying the command.

5. [The applicant's] apparent inability to refrain from unacceptable romantic relationships leads me to believe she will continue this pattern throughout her career. [She] has shown a lack of responsibility and leadership to abstain from having romantic relationships with Coast Guard members. Her actions violate the Coast Guard's Core values and have undermined both Xxx XXXXXXXX's and the Coast Guard's good order and military discipline.

On April 11, 200X, the Sector Commander endorsed the OIC's recommendation and forwarded it to the Personnel Command with the following comments in pertinent part:

2. [The applicant] has had three documented unacceptable romantic relationships. The first two incidents (enclosure 1) occurred from November 200X through December 200X when she was involved in a romantic relationship with her direct supervisor, an E-4 at Xxx XXXXXXXX. In addition, it was discovered during a CGIS investigation that during this same period she again violated Article 8.H. of the Personnel Manual by maintaining a prohibited romantic relationship with an E-3 at Xxx XXXXXXXX. She was formally counseled that this behavior is unacceptable and in violation of Commandant Policy in the same enclosure that delineated the violations.

3. [The applicant] notified her command on 23 February 200X that she was again involved in an unacceptable romantic relationship with a petty officer at her unit, Xxx XXXXXXXX, a Small Shore Unit as defined in 8.H. of the Coast Guard Personnel Manual (enclosure 2). She stated this relationship was very serious and will lead to marriage in the near future. She was counseled that the intent to marry does not relieve her of her responsibility to adhere to regulations, nor is the Coast Guard obligated to reassign her based solely on this relationship.

4. [The applicant] was placed on probation 4 April 200X and was informed that the probationary period could be terminated at any time if she did not end her inappropriate relationship immediately. She was informed 10 April 200X that her probationary period was terminated and that the command would initiate action to discharge her from the Coast Guard. She completed Enclosure (1) to CGD9INST 1910.1 in which she waived her right to submit a statement, did not request a Second Chance Discharge Waiver, acknowledged the opportunity to consult with a lawyer, and did not object to discharge from the Coast Guard. Indeed, she expressed a desire to be discharged.

The record shows that the applicant married the BM3 after her discharge was initiated but before she was discharged.

On April 20, 200X, the applicant's dentist in Xxx reported that the applicant told her she had received "no active TMJ treatment other than palliative care" since transferring back to Xxx XXXXXXXX in December 200X and that her TMJ had worsened to the point that she needed surgery. The dentist asked the Coast Guard to return the applicant to Xxx so that she could undergo surgery.

On May 16, 200X, the oral surgeon at Xxx Xxx Oral & Maxillofacial Surgery wrote to her command that although the applicant's TMJ trismus continued, significant progress had been made through her continuing PT. He recommended that she continue aggressive PT and take anti-inflammatory medications instead of narcotics.

On May 17, 200X, the Personnel Command issued separation orders directing the applicant's command to discharge her on June 15, 200X for misconduct due to inappropriate relationships in accordance with Article 12.B.18. of the Personnel Manual. The applicant underwent a pre-discharge physical examination and was found fit for separation pursuant to Chapter 3.C. of

the Medical Manual. The doctor also noted that she was not fit for duty with diagnoses of “TMJ syndrome requiring chronic controlled medication use [and] specialty care” and “PTSD – partial remission; depression remission” and that a medical board report had not been submitted due to the administrative separation proceedings. On May 18, 200X, the applicant signed a form CG-4057 on which she agreed that she either was “reasonably able to perform [her] current duties” or had “a high expectation of recovery in the near term from illness, injury, or surgical procedure such that I would again be able to perform my usual duties.”

The applicant was honorably discharged for misconduct on June 15, 200X, with 1 year, 10 months, and 7 days of service. She signed her DD 214 showing that she was discharged for misconduct.

On October 20, 2009, the applicant applied for disability benefits from the Department of Veterans’ Affairs (DVA). According to DVA records, she has claimed service connection and benefits for the following conditions: PTSD, major depression, TMJ, anxiety, disc displacement, olfactory nerve disorder, seizures secondary to TMJ, and hemorrhages secondary to TMJ. According to the DVA’s records, she told the DVA examiner that she “endur[ed] 7 months of sexual harassment, physical abuse, derogatory treatment and finally rape and assault” by her supervisor in the Coast Guard. In addition, she told the DVA examiner that her pain from TMJ required her to take Vicodin two or three times a day. On February 8, 2011, the DVA awarded the applicant a 50% disability rating for PTSD with major depression and a 40% disability rating for TMJ syndrome and denied service connection for the other conditions. Her combined disability rating is 70%, but on July 5, 2011, she was awarded a 100% rating for unemployability retroactive to October 20, 2009. The DVA records also show that the applicant was originally denied disability benefits through the Social Security Administration but contested the denial and won.

### **VIEWS OF THE COAST GUARD**

On March 26, 2012, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny relief in this case.

The JAG stated that the applicant is not timely and should be denied because she knew when she was discharged in 200X that she was being discharged for misconduct and not receiving a medical retirement and because she has not submitted any evidence or a compelling rationale for reviewing her case on the merits. The JAG stated that the application should be denied because the applicant has not submitted evidence or a rationale that warrants waiving the statute of limitations and providing a full review on the merits.

Regarding the merits of the case, the JAG stated that the record shows that the applicant was counseled about her failure to comply with Article 8.H. of the Personnel Manual by engaging in unacceptable relationships when she was assigned to Xxxx XXXXXXXX in 200X. She was also counseled that further violations of the policy might lead to administrative actions. However, the applicant had to be counseled again in February 200X about engaging in an unacceptable relationship and was counseled a third time in April 200X, placed on probation, and warned that continuing the violation of Article 8.H. would result in her being processed for dis-

charge. After the applicant advised her command that she did not intend to end her unacceptable relationship, she was notified that she would be discharged for misconduct. She did not object to the proposed discharge and did not request a second chance waiver.

The JAG argued that the Coast Guard “clearly followed all applicable policy provisions regarding the applicant’s involuntary discharge for misconduct.” The applicant’s continuing pattern of unacceptable relationships in the workplace was “a detriment to the Command’s ability to maintain good order and discipline.” The JAG alleged that the applicant was repeatedly counseled about inappropriate relationships and the consequences thereof, placed on probation, and ordered to cease her then current unacceptable relationship in 200X, but chose to ignore the counseling and to continue violating the regulation.

Regarding the applicant’s claim that she should have been medically retired, the JAG argued that under Article 12.B.1.e. of the Personnel Manual, an administrative discharge for misconduct supersedes processing for a disability separation or retirement. Therefore, if the applicant was being processed for a medical separation at the time of her discharge, that medical separation was properly suspended until final resolution of the pending misconduct discharge. The JAG argued that the applicant’s claim that the Coast Guard did not follow its established policy with regard to her discharge is without merit.

The JAG also noted that the Board has long held that a DVA disability rating does not by itself establish that the Coast Guard committed an error by finding a member fit for separation. The JAG stated that the applicant has not submitted any evidence to rebut the documentation showing that she agreed that she was fit for separation. The JAG also noted that the applicant’s allegation that the misconduct of a fellow member contributed to her DVA-rated, service-connected disability is not evidence that the Coast Guard erred in discharging her for misconduct.

The JAG concluded that given the untimeliness of the application, the lack of an excuse for not applying sooner, and the probable lack of success on the merits of the application, the Board should find that it is not in the interest of justice to waive the statute of limitations.

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

On April 12, 2012, the applicant responded to the views of the Coast Guard. The applicant’s response was submitted by her advocate, who said she is “a nationally recognized Subject Matter Expert on Sexual Trauma.” She stated that the complexities of this case and the totality of the circumstances warrant relief.

Regarding the untimeliness of the application, the advocate stated that the applicant’s condition has declined significantly since her discharge and now includes seizures and anti-seizure medication that makes it difficult for her to “think straight” and prevented her from reviewing her paperwork, forming her arguments, and submitting her application. The advocate also alleged that the applicant could not find an advocate and alleged that she herself is the only advocate who assists service members in discharge appeals. The advocate alleged that before the applicant met her, the applicant was unaware that her discharge was not in accordance with

Coast Guard regulations. Therefore, she argued, the untimeliness of the application should be excused.

The advocate alleged that during the investigation at Xxxx Xxxxxxxx, the applicant told the investigators that PO X had raped her. The statements she made “caused unintended consequences when unit members were punished for inappropriate relationships and in turn provided information to investigators related to rumors surrounding the applicant’s love life.” The applicant was unaware of what others had told the investigators “before being punished for ‘inappropriate relationships.’”<sup>1</sup> She alleged that their statements to the investigators were based only on rumors and speculation, and the applicant signed the Page 7 to acknowledge receipt, not to signify that she agreed with the contents.

The advocate pointed out that when the applicant fell in love with her husband at Xxxx Xxxxxxxx, she demonstrated integrity by informing her chain of command. However, instead of arranging a transfer, as Coast Guard regulations allow, they prohibited the relationship and then discharged her after she married. The advocate argued that the applicant’s relationship with her husband was not sordid or disparaging to the Coast Guard and did not “undermine good order and discipline,” and the Coast Guard lost two motivated and functional members when it could have simply transferred one of them to another unit. She argued that the applicant should not be punished when her only crime was falling in love and being honest about it.

With regard to the Coast Guard’s regulations, the advocate claimed that having an inappropriate relationship is not an offense and so cannot be classified as “misconduct.” Therefore, she argued, the applicant was improperly discharged for “misconduct” that did not exist and was given no right to defend herself at a proceeding.

The advocate also argued that the military is ill-equipped to deal with rape claims and victims, that the public is appalled by its conduct in this regard, and that Congress is deliberating legislation to change how rape claims and victims are handled. She stated that the applicant’s case has become xxxxxxxxxxxxxxxxxx that has shocked and appalled the public because the applicant was discharged but her rapist walked free.

The advocate stated that at a minimum, the term “misconduct” should be removed from the applicant’s discharge and she should receive a medical evaluation to determine her fitness for duty. She requested a hearing so that she would be able “to produce an abundance of witnesses and/or documentation to substantiate” her claims.

### **APPLICABLE REGULATIONS**

Article 12.B.18.b.6.f. of the Personnel Manual in effect in the spring of 200X provided that members could be discharged for misconduct if they engaged in an interpersonal relationship prohibited under Article 8.H. of the manual.

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<sup>1</sup> The Board notes that the applicant’s record contains no evidence of any disciplinary action taken against her at Xxxx Xxxxxxxx.

Under Article 8.H. of the manual, romantic relationships between two members assigned to the same small shore unit (defined as a unit with fewer than 60 personnel) or between supervisors and subordinates are unacceptable and contrary to Service policy. Article 8.H.5.b. states that

[p]ersonnel finding themselves involved in or contemplating unacceptable relationships should report the situation and seek early resolution from their supervisor, commanding officer, officer in charge, command enlisted advisor, or Coast Guard chaplain. Any potential conflict with Coast Guard policy should be addressed promptly. Commands are expected to assist members in understanding Coast Guard policy requirements and resolving conflicts. Bringing an unacceptable relationship to early Command attention will increase the opportunity for early, positive resolution.

Article 8.H.6.c. of the Personnel Manual states that when a command learns of an unacceptable relationship, the parties may be counseled on Page 7s, and “[c]ounseling may include a direct order to terminate a relationship.” Article 8.H.6.d. states that “[m]embers may request or a command may recommend reassignment of a member involved in a questionable relationship. However, reassignment is not a preferred option. The Coast Guard is not obligated to reassign personnel due to members’ desires or based solely on a relationship. When reassignment is not an option, members may be directed to end a relationship.” Under Articles 8.H.6.f. and g., commands may take administrative and disciplinary action against members involved in an unacceptable relationship, including “[a]s warranted, commands may recommend separation.” Exhibit 8.H.1. states that a “prohibited relationship” is one that violates the Uniform Code of Military Justice.

Article 12.B.18.c. of the manual states that a command “must afford a member a reasonable probationary period to overcome deficiencies before initiating administrative discharge” in cases where the member is involved in a romantic relationship prohibited under Article 8.H. However, “commanding officers are authorized to recommend discharge at any time during the probation if the member is not making an effort to overcome the deficiency.”

Article 12.B.18.e. states that a member being administratively discharged for misconduct has a right to receive written notification of the reason for the proposed discharge and to submit a statement regarding the discharge to be forwarded with the

Article 12.B.1.e.1. of the Personnel Manual, entitled “Cases Involving Concurrent Disability Evaluation and Disciplinary Action,” states the following:

Disability statutes do not preclude disciplinary separation. The separations described here supersede disability separation or retirement. If Commander, (CGPC-adm) is processing a member for disability while simultaneously Commander, (CGPC-epm-1) is evaluating him or her for an involuntary administrative separation for misconduct or disciplinary proceedings which could result in a punitive discharge or an unsuspended punitive discharge is pending, Commander, (CGPC-adm) suspends the disability evaluation and Commander, (CGPC-epm-1) considers the disciplinary action. If the action taken does not include punitive or administrative discharge for misconduct, Commander, (CGPC-adm) sends or returns the case to Commander, (CGPC-adm) for processing. If the action includes either a punitive or administrative discharge for misconduct, the medical board report shall be filed in the terminated member’s medical personnel data record (MED PDR).

Article 2.C.11. of the Physical Disability Evaluation System (PDES) Manual in effect in 200X states the following:

- a. Disability statutes do not preclude disciplinary or administrative separation under applicable portions of the Personnel Manual, COMDTINST M100.6 (series). If a member is being processed for a disability retirement or separation, and proceedings to administratively separate the member for misconduct, disciplinary proceedings which could result in a punitive discharge of the member, or an unsuspended punitive discharge of the member is pending, final action on the disability evaluation proceedings will be suspended, and the non-disability action monitored by [CGPC]. ...
- b. If the court martial or administrative process does not result in the execution of a punitive or an administrative discharge, the disability evaluation process will resume. If a punitive or administrative discharge is executed, the disability evaluation case will be closed and the proceedings filed in the member's official medical record.

Article 2.C.2. of the PDES Manual states the following:

Fit For Duty/Unfit for Continued Duty. The following policies relate to fitness for duty:

- a. The sole standard in making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank or rating because of disease or injury incurred or aggravated through military service. ...
- b. The law that provides for disability retirement or separation (10 U.S.C., chapter 61) is designed to compensate a member whose military service is terminated due to a physical disability that has rendered him or her unfit for continued duty. ...

## **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.
2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.<sup>2</sup>
3. Under 10 U.S.C. § 1552(b), an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice in her record. The applicant has alleged that her misconduct discharge and lack of a medical retirement are erroneous and unjust and asked the Board to correct them. She alleged that she did not discover the error and injustice until March 2011. However, she was discharged for misconduct on June 15, 200X, and knew at that time that she had been diagnosed with PTSD and TMJ but was not receiving a medical

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<sup>2</sup> See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at \*21 (Dec. 7, 1977) (holding that "whether to grant such a hearing is a decision entirely within the discretion of the Board"); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) ("The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process."); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

retirement. She signed her DD 214 showing her honorable discharge for misconduct. Therefore, the Board finds that the preponderance of the evidence shows that the applicant knew of her misconduct discharge, her diagnoses, and lack of medical retirement on June 15, 200X, and her application is untimely.

4. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if it is in the interest of justice to do so. In *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that to determine whether the interest of justice supports a waiver of the statute of limitations, the Board “should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review.”<sup>3</sup> The court further instructed that “the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review.”<sup>4</sup>

5. Regarding the delay of her application, the applicant stated that she has been suffering from PTSD and a seizure disorder and could not find an advocate to help her contest her discharge. However, there are many agencies, representatives, and attorneys available to help veterans contest their discharges, and the record shows that the applicant was able to file for and contest her benefits from both the Social Security Administration and the DVA within three years of her discharge. Therefore, the Board finds the applicant’s explanation for her delay in contesting her discharge is neither persuasive nor compelling.

6. Pursuant to the requirement for a cursory review of the potential merits of the case, the Board will briefly address the applicant’s four claims, as listed on page 1 above, in order. Regarding the merits of the applicant’s claim that her misconduct discharge was not processed in accordance with Coast Guard regulations, the Board finds no evidence that the Coast Guard failed to follow its regulations in discharging the applicant for misconduct. Contrary to the applicant’s allegations, her romantic relationship with the BM3 constituted misconduct under Article 8.H. of the Personnel Manual both because he was one of her supervisors and because they were assigned to a small unit with fewer than 60 personnel. The record shows that in accordance with Articles 8.H. and 12.B.18.c. of the Personnel Manual, on April 4, 200X, her command properly ordered her to end the relationship and placed her on probation, but on or before April 10, 200X, the applicant informed her command that she refused to obey the order and abide by the terms of her probation. Because the applicant refused to obey the order to end her unacceptable romantic relationship despite repeated counseling, her command properly initiated her administrative discharge for misconduct in accordance with Articles 8.H.6.f. and 12.B.18.c. The record further shows that the applicant received due process under Article 12.B.18.e., and that she opted not to object to the proposed discharge for misconduct.

7. Regarding the merits of the applicant’s claim that she was entitled to a medical retirement because she was undergoing PDES processing at the time of her discharge, the Board finds that although she had been diagnosed with PTSD and TMJ in 200X, in accordance with Article 12.B.1.e.1. of the Personnel Manual and Article 12.C.11. of the PDES Manual, any

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<sup>3</sup> *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

<sup>4</sup> *Id.* at 164-65; see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

PDES processing she may have been undergoing was properly suspended and ended upon her discharge in 200X. These regulations clearly state that an administrative discharge for misconduct supersedes PDES processing.

8. Regarding the merits of the applicant's claim that she is entitled to a medical retirement because she continues to suffer from disabilities she incurred in the Coast Guard, the Board notes that the DVA exists mainly to provide medical care and disability benefits to veterans who are disabled by service-connected medical conditions whether or not those conditions caused the veterans' discharge, whereas the military awards medical separations only to those whose military service is terminated because of disabilities incurred or aggravated in the line of duty.<sup>5</sup> The record clearly shows that the applicant's military service terminated because of her misconduct, not because of her medical conditions. In addition, the Board notes that DVA ratings are "not determinative of the same issues involved in military disability cases."<sup>6</sup>

9. Regarding the merits of the applicant's claim of injustice based on her allegation that a sexual and physical assault by another member, PO X, in 200X resulted in her PTSD and TMJ, the Board finds that the nature of the applicant's interactions with PO X at Xxxx XXXXXXXX are unclear in the record, which shows that the applicant advised various therapists and doctors beginning in March 200X that PO X had sexually harassed her and once slapped her face but also that an investigation convinced the Sector Commander that they had been engaged in a romantic relationship. Even assuming the applicant's past allegations of sexual harassment and assault and new allegations of rape are true, however, such circumstances would not justify the applicant's misconduct and refusal to obey orders in 200X or render her separation for that misconduct unjust.

10. Based on the record before it, the Board finds that the applicant's claims cannot prevail on the merits. Therefore and in light of the lack of a persuasive explanation for her delay in filing her application, the Board finds that it is not in the interest of justice to excuse the untimeliness of the application in this case.

11. The Board notes that the applicant also complained of a seizure disorder. The date of this diagnosis is not known to the Board and so the timeliness of the applicant's claim regarding the seizure disorder is unclear. However, the DVA found the seizure disorder not to be service connected, and there is no evidence whatsoever that the applicant experienced seizures while on active duty. Therefore, assuming *arguendo* that her claim regarding her seizure disorder is timely, the Board finds that it lacks merit because there is no evidence that any seizure disorder existed prior to her discharge, and because any PDES processing for a seizure disorder would properly have been superseded by her administrative discharge for misconduct.

12. Accordingly, the Board will not excuse the untimeliness of the application. The applicant's request should be denied because it is untimely and lacks merit.

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<sup>5</sup> PDES Manual, Article 2.C.2.b.

<sup>6</sup> *Lord v. United States*, 2 Cl. Ct. 749, 754 (1983); see *Dzialo v. United States*, 5 Cl. Ct. 554, 565 (1984) (holding that a VA disability rating "is in no way determinative on the issue of plaintiff's eligibility for disability retirement pay. A long line of decisions have so held in similar circumstances, because the ratings of the VA and armed forces are made for different purposes.").

**ORDER**

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

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Peter G. Hartman

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Dana Ledger

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Adam V. Loiacono