

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:



BCMR Docket
No. 1997-174

DECISION OF THE DEPUTY GENERAL COUNSEL

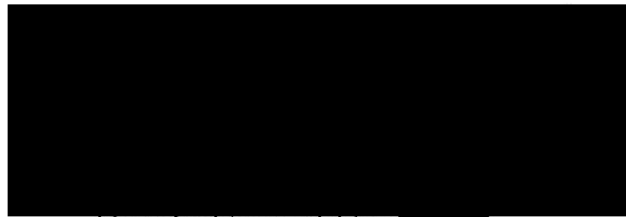
_____ I approve the recommended Order of the Board.

_____ I disapprove the recommended Order of the Board.

I concur in the relief recommended by the Board.

DATE:

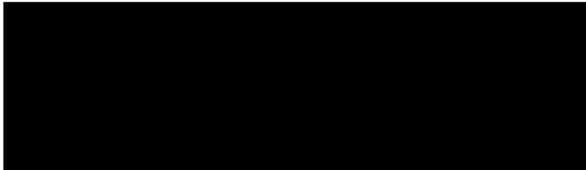
May 4, 1999



Deputy General Counsel
Delegate of the Secretary
Department of Transportation

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:



BCMR Docket No. 1997-174

FINAL DECISION



Attorney-Advisor:

This proceeding was conducted according to the provisions of section 1552 of title 10 of the United States Code. It was commenced upon the BCMR's receipt of the applicant's application on September 2, 1997.

This final decision, dated February 11, 1999, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, a former storekeeper first class (SK1; pay grade E-6) in the Coast Guard, asked the Board to correct his record by returning him to active duty or, in the alternative, by making him eligible for separation pay.

APPLICANT'S ALLEGATIONS

The applicant alleged that he was discharged on September 30, 1995, after serving 16 years in the military, because of one mistake in judgment, and because the Coast Guard was downsizing at the time he was awarded nonjudicial punishment (NJP) for that mistake. At the time of his discharge, the applicant was serving as a storekeeper aboard the USCGC [REDACTED]. He described his work and the incident that led to his discharge as follows:

Procurement of material, research of requested material, balancing the unit's ledger against that of the Finance Center, running the ship's office, taking care [of] and managing property. I have gone above and beyond the call of duty as far as doing my job and helping out the other divisions during underway times. I always felt that if my ship got underway without a necessary part or couldn't get a part before it sailed, I haven't done my job. I was a good storekeeper I did bend the rules to accomplish this task on occasion, but when you are at an operational unit you have to bend the rules now and then to get the mission completed. I was always successful in having the material for the ship before we

got underway or had it waiting for us when the ship was to hit its first port. This practice is not new. I was taught it. I added a rotary tool kit and two pairs of camouflage trousers to an order in November 1994. The rotary tool kit was for a fellow storekeeper for his help in obtaining log sheets for the QM's before we got underway, and various other times he and others provided me with material that was urgently needed. There was a three month backlog on this item and we were getting underway in 4 days when they discovered they were out. We had a lighthouse reconditioning trip coming up and there was to be large amounts of brush cutting to be done and that's what the pants were for. The old adage of you scratch my back and I'll scratch yours is as alive today as it ever was. It's a part of the unofficial supply system. I was the Operations MAA and placed a separate order in March for a funnel, wire ties and more trousers. I sent a cancellation on the trousers because I felt it was wrong. I did receive the funnel and wire ties. I had contracting authority at this time. . . .

. . . By the letter of the law I was wrong, but by the responsibility placed on me by being an independent duty storekeeper, if the material was not there when the ship takes in that last line, the command, and our mission will suffer. My performance evaluations for November 1994 was a total of 119 points. My evaluation for May 95 only dropped 10 points which was still higher than most of the "perfect" storekeepers. . . . My command sent a letter to headquarters stating the facts, and that not only did they recommend my retention, but they didn't want me transferred off the ship.

The applicant submitted as evidence (see below) copies of the following: a letter sent by his command to the Military Personnel Command (MPC) reporting his NJP and recommending his retention; a letter from the applicant to MPC requesting a waiver of his discharge pursuant to Article 4.A.14.(d) of the Personnel Manual; a letter from the applicant's command endorsing his letter to MPC; a letter from the applicant's district commander endorsing his letter to MPC; a response from MPC to the applicant's command refusing to waive the applicant's discharge; his last two performance evaluations; and two affidavits, including one from the Executive Officer he served under on the USCGC [REDACTED]

The applicant further stated that he would not mind being placed in a lower pay grade and/or different rating than those he held at the time of his discharge.

VIEWES OF THE COAST GUARD

Advisory Opinion of the Chief Counsel

On January 13, 1999, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request for relief because the applicant had failed to prove that the Coast Guard had committed an error or injustice with respect to his discharge. The Chief Counsel stated the following:

The Commandant's regulations and policy, issued pursuant to authority delegated by the Secretary bind the Board. Moreover, the Board must give deference to the Coast Guard's interpretation of laws that it is entrusted to administer, as well as to its implementing regulations. Therefore, absent proof that the Com-

mandant's decision was arbitrary or capricious, the Board should defer to the decision made in this case. [citation omitted]

The Chief Counsel attached to his advisory opinion a memorandum he received from the Commander of the Personnel Command on August 25, 1998, regarding the applicant's case (see below).

Memorandum of the Commander of the Personnel Command

On August 25, 1998, the Commander of the MPC recommended to the Chief Counsel that no relief should be granted. The Commander explained that the applicant was not retained because of "security" concerns:

Members serving in Logistics, Procurement, and Financial Management programs occupy positions of special trust which frequently require them to control, secure, and issue a wide variety of valuable government property, cash, accountable forms (e.g., credit cards, SF-44s, etc.) and sensitive financial information. The Commanding Officer shall handle all cases of a member's financial impropriety as a security breach.

The Commander stated that the applicant had received all due process during his discharge. Members being downsized "for the convenience of the government" were not entitled to a review by an Administrative Discharge Board (ADB) in 1995, although they are so entitled today.

The Commander explained the applicant's failure to receive separation pay as follows:

[F]ull and half-separation pay is only authorized to members who are involuntarily separated from the service and enter into a written agreement to serve in the Coast Guard Ready Reserve for a period of no less than three years. Members that are not recommended for retention for one of the following conditions (security, homosexuality, alcohol abuse, and expiration of enlistment) can receive half separation pay. No separation pay is authorized for members who request separation, and for those who are separated for unsatisfactory performance, unsuitability, or misconduct. . . .

The applicant is not entitled to full or half-separation pay because he did not enter into a written agreement to serve in the Coast Guard Ready Reserve for a period of not less than 3 years following separation from active duty. This was not possible due to the RE-4 that he received, due to the nature of his discharge and the NJP that he was awarded because of embezzlement.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 19, 1999, the Chairman sent the applicant copies of the advisory opinion and the memorandum from MPC and invited the applicant to respond within 15 days. The applicant did not respond.

SUMMARY OF THE RECORD

On October 5, 1978, the applicant enlisted for six years in the Navy Reserve, where he served as a storekeeper. On October 5, 1983, he was discharged in order to enlist in the Coast Guard as a storekeeper third class.

On December 1, 1993, the applicant attended a one-hour class on ethics covering standards of conduct and the Procurement Integrity Act. In November 1994, the applicant received a performance evaluation in which he received an average score of 5.41 (on a scale of 1 to 7, with 7 being highest) and was recommended for advancement. He received marks of 7 for "professional/specialty knowledge" and "working with others."

On May 10, 1995, the applicant's commanding officer entered a Page 7 in his record which stated as follows:

... [On] 27NOV94 and 11MAR95 [the applicant] violated a direct order given to him by the Executive Officer by purchasing items without the Executive Officer's approval. He violated this order by adding on unauthorized items to the bottom of an already approved SURF order in an attempt to embezzle said items from the U.S. Government for personal gain and use. He also placed an entirely separate order that was also an attempt to embezzle said items from the U.S. Government for personal gain and use on a separate SURF sheet that was not signed or approved by the Executive Officer. The total cost for all items was \$354.00. For these offenses you were placed on report by the Executive Officer. You were taken to Captain's Mast and found guilty . . . and awarded punishment. Based on this incident and the lies that you told in an attempt to cover up this incident, you have earned a mark of 2 in the INTEGRITY dimension. . . . Your performance, with the above stated exception, has been outstanding. . . .

Also on May 10, 1995, the applicant's command issued a disciplinary performance evaluation. The applicant received a mark of 2 for "integrity" and marks of 3 for "monitoring work," "responsibility," "setting an example," and "loyalty." The remaining marks were seven 5s and ten 6s; the average mark was 4.95.

On May 11, 1995, the applicant's commanding officer notified the MPC of his offenses and NJP in accordance with Article 4-A-14 of the Personnel Manual. In his letter to the MPC, the commanding officer stated the following:

[The applicant] is in an independent duty billet where he serves in a position of special trust and responsibility. He has day to day contact with custody and issuance of a wide variety of Government property But all access to such items is constantly under the direct supervision of the Executive Officer. . . . When the Supply Petty Officer was balancing all SURF orders he came across one SURF sheet with items added on and another without a signature and he reported it to the command. . . .

[The applicant's] performance, with the above exception, has been outstanding throughout his entire tour. Upon his reporting he discovered over \$90,000 worth of unaccounted for funds that were improperly handled but the previous SK1. [He] has also saved this unit money in many other ways He continually looks out for all crewmembers aboard and their families. He constantly looks for

new and better ways to improve his job performance and that of his subordinates. Being the senior person in the ship's office, he has taken on the role of being in charge of the division. Most administrative and personal problems and situations are now handled at his level and are not even brought up to the Executive Officer level. . . . For the above stated reasons I not only recommend [the applicant] for retention in the Coast Guard and Storekeeper rating, but I also do not want him transferred off of [redacted] until he is tour complete. I feel it would do a great disservice to CGC [redacted] the Coast Guard, and the Storekeeper rate to reassign [the applicant].

On August 15, 1995, the MPC sent a message ordering the applicant's discharge for the "convenience of the government for good and sufficient reasons." The message also stated that the applicant was not entitled to an ADB. It did not mention his reenlistment code.

On August 15, 1995, the applicant wrote to the MPC acknowledging his mistakes and requesting a waiver of his discharge pursuant to Article 4-A-14(d) of the Personnel Manual.

On August 17, 1995, the applicant's commanding officer wrote an endorsement to his request for a waiver. The commanding officer described the punishment that had been ordered, including a fine of \$354 (the value of the property), reduction in rate to an E-5, and restrictions. He stated that the punishment already ordered (some of which was suspended) was appropriate and in line with a first offense after many years of outstanding performance.

On September 12, 1995, the Commander of the Seventeenth Coast Guard District sent to MPC an endorsement of the applicant's request for a waiver. The endorsement stated as follows:

1. The Commanding Officer's favorable recommendation should carry great weight and certainly deserves careful consideration. There is every indication that [the applicant] has learned a valuable lesson from a mistake which he is not likely to repeat.
2. The misappropriations appear to be primarily a misguided attempt at "payback" of other storekeepers or units for past favors. The reference to "good intentions" is apparently a misguided notion rooted in supposed "cumshaw" morals of days gone by. Everyone understands what was wrong about this, and punishment has been imposed.
3. Obviously, the Commanding Officer did not view this as an offense warranting punitive discharge; hence, the case was handled at NJP. The Commanding Officer having already made that disciplinary judgment, a subsequent discharge action—against his recommendation—seems ill-advised. Such action could discourage commanders from taking prompt action if administrative outcomes are perceived as disproportionate or beyond their control.
4. Members of our finance staff, who have worked with [the applicant], share the Commanding Officer's confidence in him and urge his retention. This confidence warrants consideration of [the applicant's] retention in the SK rating; and, at the very least, a chance to retrain in a new rating in order to continue his sixteen year Coast Guard career.

On September 22, 1995, the Commander of the MPC responded to the applicant's request and accompanying waivers. He stated that after careful consideration of the letters, he was nevertheless denying the waiver for the following reasons:

... [The Coast Guard's] success ... depends on our members abiding by a strict code of conduct and adherence to our core values; honor respect, and devotion to duty. These are unwaiverable. ... As an E-6 with the very important duties as your unit's Supply Petty Officer, [the applicant's] integrity must be above reproach. This is why special requirements exist for those members in rates which must be entrusted with property In today's austere budget and personnel climate, such unethical behavior cannot and will not be tolerated. With significant downsizing efforts planned for the very near future, the [MPC] must carefully weigh each personnel action against our Service needs, ensuring we remain in line with the Commandant's direction. Although I recognize his 16 years of service to the Coast Guard, to approve a waiver for [the applicant] would not be aligned with our organizational goals.

On September 30, 1995, the applicant was honorably discharged "for the convenience of the government," with a separation code of JND (separation for miscellaneous/general reasons) and a reenlistment code of RE-4 (not eligible for reenlistment).

SUMMARY OF AFFIDAVITS

The lieutenant who served as the Executive Officer on the CGC [REDACTED] during the applicant's entire tour submitted the following signed statements:

... During the entire time I have known [the applicant] I have witnessed him perform many exceptional things as a person and as a petty officer. He always made his time available to help others aboard the cutter. If someone needed his services as an SK they were taken care of immediately. It was obvious that customer satisfaction was the number one priority of [the applicant]. ...

As the senior enlisted person in my ship's office he served as my office manager. . . . And he not only earned this added responsibility, but did an exceptional job at it.

[The applicant made a mistake, a big mistake. And as a command we handled it. . . . I feel [the applicant] learned from his mistake and nothing of this nature would ever take place again. Anything that can be done to help out [the applicant] would be a step in the right direction. . . .

A chief electrician's mate, who was the applicant's Command Enlisted Advisor when he was assigned to the USCGC [REDACTED] signed the following statements on the applicant's behalf:

... [The applicant] was an exceptional storekeeper. When ever we ran into a problem with supply he was always there for us. . . . He always had a can do attitude that could turn a bad situation into a not so bad one. . . . I know I was sure glad when he came aboard the [REDACTED].

APPLICABLE REGULATIONS*Personnel Manual (COMDTINST M1000.6A)*

According to Article 12-B-1.a. of the Personnel Manual, the "Commandant is the Discharge Authority in all cases of administrative separation"

According to Article 12-B-1.d.(2), "When a record of nonjudicial punishment imposed during a current enlistment . . . is considered, isolated incidents . . . shall have minimal influence on the determination [of whether a member shall be separated]."

According to Article 12-B-4.a., "In general, a member who meets the standards for reenlistment set forth in Article 1-G-5 should be eligible for reenlistment, except where the reason for discharge precludes reenlistment, such as physical disqualification, disability, unsuitability, misconduct, . . . or when not recommended by the commanding officer."

According to Article 1-G-5, to be eligible for reenlistment, the applicant had to meet certain minimum performance marks, be physically qualified, and be recommended for reenlistment by the officer effecting discharge.

According to Article 4-A-14, "all cases of financial impropriety . . . by [personnel serving in the Logistics, Procurement, and Financial Management programs] shall be handled as a breach of security."

According to Article 4-A-14.a., "[e]nlisted personnel who are required by Commandant to be removed from the SK or SS ratings, but not the Service, shall be offered a change in rating."

According to Article 4-A-14.d., "Logistics/Financial support personnel . . . who have a past history of financial improprieties . . . shall have an opportunity to be considered for a onetime waiver of this policy for past offenses or circumstances, provided that the individual's command concurs and so recommends"

Eligibility of Personnel for Separation Pay (COMDTINST 1910.1)

According to Articles 3.b. of COMDTINST 1910.1, "[t]his instruction precludes separation pay to any member separated for substandard performance, unsuitability, or misconduct."

Article 4.a. states the following requirements for payment of full separation pay:

Full payment of non-disability separation pay . . . is authorized to enlisted members . . . involuntarily separated from active duty who meet each of the following four conditions:

(1) The member . . . has completed at least 6 years, but less than 20 years, of active duty

(2) The member's separation is characterized as "Honorable"

(3) The member is being involuntarily separated because of not being recommended for retention or continuation on active duty under one of the following specific conditions:

(a) The member is fully qualified for retention but is not recommended for retention or continuation.

(b) The member is fully qualified for retention and is being involuntarily separated under a reduction in force

(4) The member has entered into a written agreement to serve in the Coast Guard Ready Reserve for a period of not less than 3 years following separation from active duty. . . .

(b) A member who enters into this written agreement and who is not qualified for enlistment or appointment in the Ready Reserve need not be enlisted or appointed to be considered to have met this condition of eligibility for separation pay.

Article 4.b. states the following requirements for payment of half separation pay:

Half payment of non-disability separation pay . . . is authorized to members . . . involuntarily separated from active duty who meet each of the following four conditions: (In extraordinary instances, Commandant may award full separation pay to members otherwise eligible for half separation pay when the specific reasons for separation and overall quality of the member's service have been such that denial of such pay would clearly be unjust.)

(1) The member meets one of the criteria for active duty specified in paragraph 4.a.(1) above.

(2) The member's separation is characterized as "Honorable," or "General Under Honorable Conditions"

(3) The member is being involuntarily separated because of not being recommended for retention or continuation on active duty under one of the following specific conditions:

(a) The member is not fully qualified for retention and is not recommended for reenlistment or continuation under any of the following conditions:

1. Expiration of enlistment.
2. Homosexuality.
3. Alcohol abuse rehabilitation failure.
4. Security.

(b) The member is being separated under a Coast Guard specific program established as half payment by the Commandant.

(c) The member, having been not recommended for reenlistment or continuation on active duty accepts an earlier separation.

(4) The member has entered into a written agreement to serve in the Ready Reserve

Article 5.e.(5) states that, "if a member is authorized separation pay, it is noted on the Certificate of Release and Discharge from Active Duty, DD Form 214."

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 applicant alleged that he had been wrongly discharged during downsizing because of one mistake he had made as a storekeeper. He admitted that he had falsified two order forms in order to receive \$354 worth of equipment that other members and units needed for their work. He alleged that this practice was normal and how storekeepers helped each other ensure that equipment needed for a mission was always available. He submitted statements indicating that his command had wanted to retain him as storekeeper despite his error and had considered his NJP to be sufficient punishment.

3. The Chief Counsel recommended that no relief be granted to the applicant. He alleged that the applicant had been properly discharged with all due process. The Commander of the MPC explained that members discharged "for the convenience of the government" in 1995 were not entitled to an ADB.

4. In light of the letter from the Commander of the MPC dated September 22, 1995, the Board finds that the applicant was discharged because of two facts: his embezzlement, which constituted a security breach under Article 4-A-14, and anticipation of a general reduction in force. The applicant's command actively sought and strongly urged his retention. The Personnel Manual provides at least two less harsh alternatives to discharge in such a situation: waiver and a change of rating. Therefore, the Board is persuaded that neither the embezzlement nor the anticipated downsizing alone would have resulted in the applicant's discharge.

5. Although the applicant's command strongly urged his retention and considered the NJP sufficient punishment, the Commandant acted within his discretion in discharging the applicant. Discharging a member who has falsified documents, committed embezzlement, and tried to cover it up by lying cannot be considered an arbitrary and capricious act even if it is true that the member's actions were common practice among storekeepers and in some way helped the supply system work. The applicant has not proved by a preponderance of the

evidence that the Commandant committed error or injustice is choosing to discharge him.

6. The Commandant could have, but chose not to, discharge the applicant by reason of "misconduct." Instead, he discharged the applicant "for the convenience of the government for good and sufficient reasons." In making this choice, the Commandant denied the applicant the right to an ADB, which was an entitlement for members with over 8 years of service who were being discharged for "misconduct." In 1995, members who were discharged "for the convenience of the government" did not have the right to an ADB. Although a "misconduct" discharge would have entitled the applicant to an ADB, the Board does not believe that the Commandant committed an injustice in choosing the lesser discharge. An ADB would only have concluded that the applicant's embezzlement justified the Commandant's decision.

7. The applicant also alleged that he had been wrongly denied separation pay. The Commander of the MPC stated that the applicant was not eligible for separation pay because he did not enter into a written agreement to serve in the Ready Reserve. He explained that the applicant was not allowed to enter such an agreement "due to the RE-4 that he received, due to the nature of his discharge and the NJP that he was awarded because of embezzlement."

8. Article 3.b. of COMDTINST 1910.1 denies separation pay to those who are separated for "substandard performance, unsuitability, or misconduct." The applicant was separated "for the convenience of the government due to good and sufficient reasons" and for "miscellaneous/general reasons." Therefore, the Board finds that the applicant is not prevented from receiving separation pay under Article 3.b.

9. Article 4.a. of COMDTINST 1910.1 permits full separation pay to be paid to those who, like the applicant, have at least six years of service and an "honorable" discharge if they are involuntarily separated due to a reduction in force or not being recommended for reenlistment and if they sign an agreement to enter the Ready Reserve for 3 years. Article 4.b. permits at least half separation pay to be paid to those members who receive just a "general under honorable conditions" discharge and who are not recommended for reenlistment because of homosexuality, alcohol abuse, and security concerns if they have at least 6 years of service and sign a written agreement to serve in the Ready Reserve.

10. The Commander of the MPC stated in a letter to the applicant's command that he was being discharged because the embezzlement constituted a breach of security and because of an anticipated reduction in force. He also stated that the applicant had not been allowed to enter into a written agreement to join the Ready Reserve because of the RE-4, the nature of his discharge, and the NJP. The Commander did not explain how the applicant's RE code, discharge, or NJP could be distinguished with regard to his entitlement to separation pay from those of homosexuals, alcohol abusers, and security risks, who under Article 4.b.(3), may receive half separation pay even though they must be

assigned RE-4 reenlistment codes and often receive discharges much worse than the applicant's "honorable" discharge "for the convenience of the government" and "for miscellaneous/general reasons."

11. The applicant was discharged in part because of a breach in security. He had served more than 16 years on active duty and received an "honorable" discharge "for the convenience of the government." Therefore, the Board finds that, except for the fact that the applicant was not allowed to sign an agreement to enter the Ready Reserve, the applicant would have qualified for at least half separation pay under Article 4.b. of COMDTINST 1910.1. The reasons cited by the MPC for not allowing the applicant to sign an agreement to enter the Ready Reserve would preclude anyone who met the terms of Article 4.b.(3) paragraphs 2, 3, and 4, from qualifying for half separation pay. By the MPC's reasoning, such members would never be allowed to meet the terms of Article 4.b.(4) by signing an agreement to enter the Ready Reserve. The Board finds that the MPC's interpretation of this regulation in this case would defeat the purpose of Article 4.b. as a whole.

12. Because the applicant asked to be returned to active duty, the Board is convinced that he would have signed an agreement to enter the Ready Reserve for 3 years at the time of his discharge had he been allowed to do so. The Board finds that the Coast Guard committed an injustice in not allowing him to do so and in thereby preventing him from receiving half separation pay. Article 4.b.(4) does not require a member actually to qualify for and serve in the Ready Reserve; it merely requires that they sign an agreement to serve.

13. The applicant's record should be corrected to show that on the date of his discharge he signed an agreement to serve in the Ready Reserve for a period of 3 years. In addition, his DD Form 214 and all other personnel records should be corrected to show that he qualified for half separation pay pursuant to Article 4.b. of COMDTINST 1910.1.

[ORDER AND SIGNATURES APPEAR ON THE NEXT PAGE]

ORDER

The application for correction of the military record of [REDACTED]
[REDACTED] USCG, is hereby granted in part as follows:

The applicant's record shall be corrected to show that on September 30, 1995, he signed an agreement to serve in the Ready Reserve for 3 years.

The applicant's DD Form 214 and any other pertinent personnel records shall be corrected to show that he qualified for half separation pay under Article 4.b. of COMDTINST 1910.1.

The Coast Guard shall pay the applicant the half separation pay he is due pursuant to this order.

No other relief shall be granted.

