

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 1999-063

FINAL DECISION ON RECONSIDERATION

██████████ Deputy Chairman:

This is a proceeding for reconsideration of a final decision issued under the provisions of sections 1552 of title 10 and 425 of title 14, United States Code. The decision to be reconsidered, BCMR No. 1997-137, was issued by the Board for Correction of Military Records on November 21, 1997. The request for reconsideration has been docketed as BCMR No. 1999-063.

This final decision on reconsideration, dated February 24, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

Applicant's Request for Relief

The applicant, a ██████████ (pay grade E-5) in the Coast Guard Reserve, asked the Board, as she did in BCMR Docket No. 1997-137, to reinstate her to active duty. She also requested that the Board upgrade her RE-4 (not eligible for reenlistment) reenlistment code. The applicant further requested, in her present application, that in the alternative, the Board correct her record to show that she earned an active duty retirement.

The applicant enlisted in the Coast Guard on November 2, 1981, and was discharged from active duty on December 31, 1996. She served a total of 15 years, one month, and 28 days on active duty in the Coast Guard. She enlisted in the Coast Guard Reserve on January 1, 1997, for a four-year term.

BCMR Docket No. 1997-137 (prior case)

On September 19, 1995, the applicant was informed by her commanding officer (CO) that she would not be recommended for reenlistment. Since she had more than eight years of military service, she was entitled to a reenlistment board. That Board considered the applicant's case on November 15-17, 1995.

The applicant asserted that in 1995, the "Reenlistment Board had recommended that [she] be reenlisted" in the active duty Coast Guard. She asserted that after receiving her marks in April, 1996, her commanding officer (CO) recommended, on her performance evaluation, that she sit for the Servicewide Examination (SWE) for advancement to [REDACTED]. Subsequent to the CO's recommendation, the final reviewing authority of the reenlistment board disapproved the reenlistment board's recommendation for her reenlistment. The applicant asserted that the CO revoked his recommendation for her to take the SWE after he learned of the reviewing authority's decision.

Military Record

The applicant's record contains several page 7s with respect to her alcohol related problems. A page 7 entry dated January 9, 1995, stated that the applicant successfully completed inpatient treatment for alcohol dependency. This counseling entry also advised the applicant of her aftercare requirements. One of the requirements was to abstain from the use of alcohol. A page 7 entry dated February 24, 1995, documented the applicant's first alcohol-related incident, which occurred on November 4, 1994. On that date the applicant was arrested for driving while intoxicated with a blood alcohol content of .277. On January 17, 1996, the applicant was congratulated on successfully completing her first year of aftercare. The applicant was advised that she was no longer required to participate in a formalized aftercare program.

The applicant's record contains a page 7 entry addressing "performance and discipline" dated October 31, 1995. This entry explained the marks of 2 (on a scale of 1 to 7) that the applicant had received on her performance evaluation for the period ending October 31, 1995. This page 7 entry documented seven marks of 2 (out of 20 marks) that the applicant had received in the Professional, Quality of Work, Monitoring Work, Using Resources, Directing Others, Working with Others, and Setting an Example dimensions. Each explanation described significant deficiencies in the applicant's performance in those areas.

In addition to the page 7 entry dated October 31, 1995, there are several other page 7 entries in the applicant's record documenting her unsatisfactory performance in the [REDACTED] rate. She was placed on performance probation in 1989 and 1994. Also, she was counseled regarding poor or below average performance in page 7 entries dated January 23, 1983, December 28, 1988, April 14, 1989, August 11, 1989, March 13, 1992, June 5, 1992, November 10, 1993, and November 18, 1994.

The applicant's military record also contains a page 7 entry completed by her CO, dated September 19, 1995. The page 7 entry addressed the applicant's reenlistment interview conducted on that date. The CO stated that the applicant was not recommended for reenlistment "because [of] unsatisfactory performance during the current enlistment." The CO stated that the applicant "had an unsatisfactory tour of duty at [her duty station]," and that "[h]er performance as the [REDACTED] needed improvement."

The CO explained that the applicant had been moved to another division within her duty station where she could work with other [REDACTED]. She was also placed on performance probation at that time, during which she was expected to improve her performance. Despite the additional supervision and performance probation, the applicant's performance remained unsatisfactory.

The CO stated that the applicant had received negative administrative remarks for poor performance from her previous command. The CO also stated that the applicant had financial difficulties that resulted in letters of indebtedness which were sent to her command.

The applicant signed the bottom of that page 7 entry, indicating that she understood she was not being recommended for reenlistment. She stated that she understood she had a right to appear in person before a reenlistment board to present her case, and that she had a right to be represented by counsel.

A reenlistment board reviewed the applicant's request for reenlistment in 1995. During the original proceedings, the applicant did not supply the Board with a copy of the reenlistment board's decision, and a copy of the decision was not in her record. The evidence of the final reviewing authority's decision confirms that her request was reviewed by a reenlistment board.

Findings in BCMR Docket No. 1997-137

The Board entered the following findings in BCMR Docket No. 1997-137.

The applicant asked to be reenlisted in the active duty Coast Guard. The final reviewing authority of the reenlistment board disapproved the applicant's request for reenlistment. However, the applicant made no allegation of error or injustice by the final reviewing authority. She only alleged that she had been approved for advancement, but that the approval was retracted by her CO.

On her performance evaluation for the period ending April 30, 1996, the applicant had been erroneously marked "recommended" for reenlistment. Her CO did not abuse his authority by changing the "recommended" category to read "progressing." Under Article 10-B-4 of the Personnel Manual, the approving official has the authority to change a member's performance evaluation marks if he or she feels that the marks do not accurately reflect the performance of the member in that marking period. The applicant's CO was the approving official on her performance evaluation for the period ending April 30, 1996. . . .

Paragraph 3 of Article 1-G-5 (Eligibility for Regular Reenlistment) of the Coast Guard Personnel Manual states that in order for an enlisted member to be eligible for reenlistment, he or she must be

recommended for reenlistment by the officer effecting discharge. The applicant's record showed that she had a history of poor performance at the yeoman rate. She received several page 7 entries documenting deficiencies in her performance as a yeoman. Also, she was twice placed on performance probation and given an opportunity to improve her performance.

Under the authority of Article 1-G-5 of the Personnel Manual, the applicant's CO was the officer authorized to "effect" her discharge. After her last period of performance probation, the applicant's CO determined that the applicant had not improved enough to be retained in the active duty Coast Guard, and did not recommend her for advancement. Following the order of the final reviewing authority of the reenlistment board, the CO processed the applicant for discharge.

* * *

She also has not shown that the action of her CO in revoking his recommendation that she sit for the SWE was in error. The applicant has not provided any evidence to prove that her CO's revocation of his recommendation was an abuse of discretion or unjustified. The applicant's performance documented in her military record supports the CO's decision not to recommend her for advancement or reenlistment.

Docket No. 199-063 (Current Case)

On February 23, 1999, the Chairman accepted and docketed the applicant's request for reconsideration. He found that the submission of the record of the applicant's reenlistment board amounted to new evidence. He accepted the applicant's explanation that she could not have submitted the record of the reenlistment board prior to the original proceedings because she did not have a copy of it at that time.

The applicant requested the same relief on reconsideration as she did in the original proceeding. She also requested an alternative new relief, that her record be corrected to show that she was retired from active duty.

The Board did not have the record of the applicant's reenlistment board when it considered her case in the original proceeding. The record of that proceeding shows that the applicant had a hearing covering a period of two days, was represented by a lawyer, and had the opportunity to call and cross-examine witnesses. Some of the pertinent entries from the applicant's military record that were considered by the reenlistment board are discussed above.

In her request for reconsideration, the applicant argued that the final reviewing authority acted improperly when he ordered her to be discharged

notwithstanding the fact that the reenlistment board made the following recommendation to the Commandant:

"(1) That the respondent be authorized to reenlist for the minimum time, that is, not to exceed three years. This is to preclude a six year reenlistment and immediate tenure at 18 years without adequate opportunity for possible future performance scrutiny.

"(2) That the respondent remain in her current position, as practicable, until completion of the mandatory aftercare program, to provide her a more potentially successful environment in which to perform."

In addition to the recommendation that she be allowed to reenlist for a limited period of time, the reenlistment board stated its opinion that the applicant's "performance level is less than that expected of a senior second class yeoman, but that her potential has not been adequately maximized." It further stated its opinion that the applicant has not been "afforded the opportunity to complete the aftercare IAW (in accordance with) CG (Coast Guard) Instructions despite improved work performance and superb aftercare results and that her performance difficulties will be more accurately diagnosed once the alcoholism is under abeyance."

The applicant's CO, in his memorandum to the Final Reviewing authority (Commander, Coast Guard Personnel Command (CGPC)) disagreed that the applicant should be allowed to reenlist for a limited period of time. He stated that the applicant had served more than 14 years on active duty with marginal performance. He stated that it was highly unlikely that she was going to demonstrate any significant improvement in the future.

On April 11, 1996, the Chief Counsel of the Coast Guard reviewed the reenlistment board proceedings and found them to be in substantial compliance with the Personnel Manual and the Administrative Investigations Manual. The Chief Counsel advised the Commandant to independently weight the evidence to determine if he agrees with the reenlistment board or the CO. He also advised the Commandant to take into consideration the letter from the applicant's attorney, in which he challenged some of the conclusions of the CO's memorandum.

The applicant's attorney stated that the applicant's substandard performance was caused by the symptoms of alcohol withdrawal. He pointed to the testimony of several witnesses who stated that they believed that the applicant could be a productive member of the Coast Guard, if given proper leadership and supervision. The applicant's attorney stated that at the time the applicant was transferred to the [REDACTED] her personal life had disintegrated. Likewise, he stated that the applicant's job at the [REDACTED] center required her to handle emotionally distraught people, while she was trying to handle her own difficult personal problems at the same time. He argued that her performance had improved and she should be allowed to reenlist.

The Chief Counsel advised the CGPC that he could approve the reenlistment board's recommendation; he could disapprove the reenlistment board's recommendation for reenlistment, but approve a probationary extension of the current enlistment for a specified period; or he could disapprove the reenlistment board's recommendation for reenlistment, and discharge applicant upon completion of enlistment with a discharge warranted by her record and deny reenlistment.

On June 21, 1996, CGPC disapproved the opinions and recommendations of the reenlistment board. CGPC stated that the applicant had been given adequate opportunity to demonstrate an improvement in work performance. CGPC further stated that she had been informally and formally counseled on several occasions about her unsatisfactory performance throughout her current enlistment. CGPC directed that the applicant be discharged at the end of her current enlistment with the type of discharge consistent with her performance marks and with an RE-4 (not eligible for reenlistment) reenlistment code.

The applicant contended, in her current application, that her supervisor at the [REDACTED] unfairly transferred her because of problems that were present in her personal life. She alleged that the supervisor "used his personal beliefs to make a professional judgment." The applicant stated that subsequent to her transfer two other females were also transferred.

One of the enclosures to the reenlistment board report was a statement from the applicant's [REDACTED] supervisor. He stated that he directly supervised the applicant for 11 months. With respect to the applicant's performance while he worked for him, the supervisor stated as follows:

I believe [the applicant] was performing at the third class level. She did not display any of the usual qualities displayed of a [REDACTED] with over 12 years of service; such as knowing the personnel manual, correspondence manual, SSIC manual, directives manual, etc. Based upon [the applicant's] performance, I could not recommend her for First Class. This was part of the reasoning behind her transfer to the PERSRU [Personnel Reporting Unit] to allow [the applicant] to be evaluated by rating-specific managers and to aid in upward mobility and professional development issues.

With regard to the [reenlistment board], [the applicant] certainly has "potential" to have a productive career. Everyone has potential, but in the eleven months I supervised [the applicant], I have not seen it. If the decision were left to me, I would not recommend her for reenlistment. My decision would be based upon her performance and other issues that have had a combined effect on her performance.

In a September 10, 1998 submission, the applicant stated that her CO also had an alcohol dependency problem. Nevertheless, he was permitted to retire despite having three DUIs. (No evidence was submitted to support this allegation.) The applicant contended that she should also be allowed to retire. The applicant stated that her command had approved a retirement request for her. (No evidence in the record supports this allegation.)

Views of the Coast Guard

On November 3, 1999, the Board received an advisory opinion from the Chief Counsel of the Coast Guard. He objected to the fact that the Chairman accepted this case for reconsideration, in view of the fact that the applicant's request did not meet the regulatory criteria for reconsideration. The Chief Counsel further stated:

[The] Applicant states that application for reconsideration complies with 33 CFR § 52.67(a)(1) in that "[s]he did not have it (report of reenlistment board)," 33 CFR § 52.7(a)(1) requires that "Evidence or information may only be considered if it could not have been presented to the Board prior to its original determination if the applicant had exercised reasonable diligence." In the instant case, the applicant has failed to prove that this evidence could not have been provided by due diligence in the first instance.

The Chief Counsel stated that no one has a right to remain in the armed forces unless a specific statute or regulation grants that right. He said that the applicant was accorded all of the rights to which she was entitled. "The decision of who to discharge is ultimately the Coast Guard's. . . . Coast Guard discharge authorities would violate the trust placed in them by Congress and the public if they allowed members to remain in the Coast Guard when the evidence shows that they are not suitable for continued service."

The Chief Counsel stated that Article 12-B-31.d(1) of the Personnel Manual authorizes the Commandant (or his delegate) to take final action other than that recommended by the reenlistment board, so long as that action is supported by evidence and the reasons set forth in the final action. The reenlistment proceeding was properly reviewed and acted on by the Commandant's authorized delegate.

With respect to the applicant's allegation that the CO was alcohol dependent and vindictive toward the applicant because she was also alcohol dependent, the Chief Counsel stated that the applicant provided no evidence to support that allegation. The Chief Counsel stated that even if the applicant could prove the allegation, there has been no showing that such an alleged error affected her CO's ability to objectively review the findings of the reenlistment board.

Also, the Chief Counsel states that the applicant failed to consider that her CO was not the final reviewing authority for the reenlistment board. The Chief Counsel stated that "[u]nder a presumption of regularity, the BCMR should presume that [the final reviewing authority] considered all matters properly before him in this case when he chose to reject the Reenlistment Board's recommendations."

The Chief Counsel recommended that the Chairman dismiss this petition with prejudice on the ground that it does not support a decision granting reconsideration under 33 CFR § 52.67.

Applicant's Reply to the View of the Coast Guard on Reconsideration

The applicant stated that while she failed to produce any direct evidence to corroborate her contention that the CO's abused his discretion in recommending that she not be permitted to reenlist, the record clearly shows that the CO's recommendation was contrary to the findings of the reenlistment board. She further stated that the CO's recommendation against reenlistment was instrumental in the final reviewing authority's decision to disapprove the reenlistment board findings and to discharge her.

In conclusion, the applicant stated that the preponderance of the evidence reflects that she did experience performance problems as detailed in her CO's recommendation but that there were clearly extenuating factors that contributed to her problems as evidenced by the opinions and recommendations of the reenlistment board.

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 BCMR has jurisdiction over this matter pursuant to section 1552 of title 10, United States Code. The request for reconsideration is timely.
2. The applicant's request for an oral hearing was considered by the Chairman under § 52.31 of the Board's rules. The Chairman, finding sufficient documentation in this case, recommended disposition on the merits without a hearing. The Board agreed.
3. The applicant has presented new evidence, not previously considered by the Board, which could result in a different determination than that reached in BCMR Docket No. 1997-137. The Chairman determined that the record of the reenlistment board proceedings could cause the outcome in this case to be different from that in Docket 1997-137. He further determined that the applicant could not have submitted this evidence in Docket No. 1997-137 because it was unavailable to her. Accordingly, he docketed her case for reconsideration.

4. The applicant was not eligible for reenlistment, since she did not have her CO's recommendation for reenlistment. Article I-G, Personnel Manual. However, since the applicant had more than eight years of service, she was entitled to and chose to have an administrative hearing before a reenlistment board, where she was represented by counsel. Although the reenlistment board recommended that the applicant be permitted to reenlist for three years, the final reviewing authority disapproved this recommendation and ordered the applicant to be discharged. In not approving the recommendation of the reenlistment board, the final reviewing authority determined that the applicant had already been given sufficient opportunity to demonstrate improvement in the quality of her performance. The final reviewing authority further stated that she had been counseled about her poor performance throughout her current enlistment, but to no avail. These findings by the final reviewing authority were supported by the record and set forth in CGPC's memorandum of June 21, 1996. Thus, the final reviewing authority's action was consistent with the Personnel Manual.

5. The applicant did have an alcohol dependency, for which she received treatment in January 1995. However, the applicant's military record reveals that she has had performance problems since the early 1980s. As the final reviewing authority stated, the applicant has had sufficient opportunity since her initial enlistment to demonstrate continuous improvement in her performance.

6. The applicant alleged that her [REDACTED] supervisor transferred her unfairly to the [REDACTED] because he permitted his judgment to be influenced by the personal problems that existed in her private life. The applicant presented no evidence to support this allegation. Contrary to the applicant's belief, the supervisor wrote in a statement to the reenlistment board that in his opinion the applicant was performing at the level of a [REDACTED] and therefore he could not recommend her for advancement. He stated that the transfer to the [REDACTED] was to allow the applicant the opportunity to be evaluated by rating-specific managers, whom he hoped, would aid in the applicant's upward mobility. The Board finds no merit in the applicant's allegation with respect to vindictiveness against her by the supervisor.

7. The applicant alleged that her CO was vindictive toward her because he was alcohol dependent, as she was. The applicant failed to present any evidence, except for her own statement, to support this allegation.

8. The applicant alleged that the command had at one point approved a retirement request for her. The applicant did not present any evidence to support this allegation; nor did she state what the retirement authority would have been, since she did not have 20 years of active duty service.

9. The applicant has failed to prove that the Coast Guard committed an error or injustice by assigning her an RE-4 reenlistment code upon her discharge.

from active duty. She was not recommended for reenlistment by her CO, and the final reviewing authority concurred, that she should be discharged with an RE-4 reenlistment code. The applicant's record supports the determination by the final reviewing authority. The applicant's military record is replete with entries about her "poor" performance. The applicant's discharge from active duty and the RE-4 reenlistment code were appropriate in this case.

10. Accordingly, the applicant's request for relief upon reconsideration should be denied.

ORDER

The application of [REDACTED]
[REDACTED] SCGR, for the correction of her military record is denied.

