

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1999-163

FINAL DECISION

Attorney-Advisor:

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on September 14, 1999, upon the BCMR's receipt of the applicant's completed application.

This final decision, dated May 18, 2000, 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 [REDACTED] pay grade E-3), asked the Board to correct his military record by changing his reenlistment code from RE-4 (ineligible for reenlistment) to RE-3 (eligible for reenlistment except for disqualifying factor) so that he can enlist in the Army.

ALLEGATIONS OF THE APPLICANT

The applicant alleged that he was discharged on July 28, 1998, because he had an "inappropriate relationship" with a female member at their duty station. He admitted that he had made a mistake but argued that he should be given another chance to serve his country. He pointed out that both he and the female member were unmarried, so no adultery was committed. The applicant alleged that he has spoken with Army recruiters who would like to enlist him. He alleged that if his reenlistment code were RE-3, the Army would grant him a waiver to allow him to reenlist.

SUMMARY OF THE RECORD

On April 30, 1996, the applicant enlisted in the Coast Guard for a term of four years. One year later, he was advanced from seaman (pay grade E-3) to [REDACTED]; pay grade E-4). He was stationed in [REDACTED]

On March 25, 1998, the officer-in-charge (OIC) at Station [REDACTED] made an administrative (page 7) entry in the applicant's record indicating that he had failed to qualify as a boat engineer for the 41-foot UTB. The OIC wrote that the applicant "worked on the vessel on two separate occasions, and has failed to take the extra time to complete the most basic of engineering qualifications: the system drawings." The OIC also faulted him for not seeking assistance or additional time to qualify. He also noted that the applicant's failure to qualify "prohibited this station [from meeting] its operational commitments" because it left the station with only two qualified boat engineers to run the station that spring.

On April 1, 1998, the OIC and the acting Group Commander signed a page 7 entry for the applicant's record indicating that he had received a mark of 3, meaning "not recommended," for the evaluation period. The page 7 notes that he could not be advanced to [REDACTED] 2 until his marks improved.

On April 20, 1998, the OIC made another page 7 entry in the applicant's record indicating that he had failed to submit a progress report that he had been assigned to complete on April 10, 1998. The page 7 indicates that the applicant "did not have a good reason" for failing to complete the report and that any further failures would result in disciplinary action.

On May 6, 1998, the OIC made another page 7 entry in the applicant's record documenting counseling concerning the applicant's "negative attitude, disparaging remarks about the Coast Guard including this unit, and lack of leadership." The page 7 documented two occasions upon which the applicant made very negative comments about the station and the Service to subordinates. He was warned that "[a]ny further actions along this same course will result in disciplinary action."

On May 18, 1998, the OIC made another page 7 entry in the applicant's record. The page 7 states that he was seen driving without a seatbelt. It also states that the applicant had "received several negative [page 7s] over the last couple of months and this is another indication that [the applicant is] unwilling to abide by Coast Guard rules and regulations including the Standing Orders of this station. Any further disregard for rules and regulations will result in disciplinary action."

On May 26, 1998, the applicant appeared before a captain's mast. He was charged with and found guilty of two violations of Article 92 of the Uniform Code of Military Justice (UCMJ) for engaging in prohibited sexual activity and for dereliction of duty because he had engaged in sex with a female seaman apprentice while on duty at the station between March 16, 1998, and May 8, 1998. He was also found guilty of committing sodomy with her, a violation of Article 125 of the UCMJ, while in a privately owned vehicle. The applicant was demoted to [REDACTED] (pay grade E-3).

On June 18, 1998, the commander of Group [REDACTED] notified the applicant that he was being recommended for an honorable discharge due to misconduct. The basis for the discharge was cited as "misconduct—sexual perversion, other indecent acts or offenses; specifically, that you performed sodomy with a female member of the crew of Station [REDACTED] in an automobile in a public place and because you had sexual intercourse with the same female aboard station grounds in a duty room while in a duty

status." The applicant signed a statement indicating that he had been notified of this recommendation and did not object to it or wish to submit a statement on his own behalf.

On June 24, 1998, the commander of Group Detroit recommended to the Coast Guard Personnel Command (CGPC) that the applicant be honorably discharged "by reason of misconduct for indecent acts or offenses." The group commander described the applicant's offenses and wrote that he "has shown a complete disregard for Coast Guard regulations and a total lack of judgment and professionalism. Additionally, he has exhibited a serious lack of leadership skills."

On June 29, 1998, CGPC ordered that the applicant be honorably discharged by July 28, 1998, by reason of misconduct due to sexual perversion under Article 12.B.18 of the Personnel Manual with a separation code of JKL. This separation code means "involuntary discharged directed by established directive (no board entitlement) when a member has engaged in sexual perversion including but not limited to (1) lewd and lascivious acts, (2) sodomy, (3) indecent exposure, (4) indecent acts with or assault upon a child, (5) other indecent acts or offenses."

On July 28, 1997, the applicant was honorably discharged. His separation code was JKL, the narrative reason for separation was "misconduct," and his reenlistment code was RE-4.

IEWS OF THE COAST GUARD

On April 5, 2000, the Chief Counsel of the Coast Guard submitted an advisory opinion recommending that the Board deny relief for lack of merit.

The Chief Counsel alleged that the applicant's discharge was proper and that no injustice or procedural or substantive errors were committed. With less than eight years of active service, he argued, the applicant was not entitled to an administrative discharge board. He was entitled to submit a statement on his own behalf, but he chose not to do so or to object to his discharge.

The Chief Counsel argued that the applicant failed to prove that his commanding officer erred or committed any injustice in assigning him the RE-4 reenlistment code. The RE-4 is the only reenlistment code permitted for members discharged due to misconduct. Moreover, the Chief Counsel argued, "[a]bsent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (9th Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 6, 2000, the BCMR sent a copy of the Chief Counsel's advisory opinion to the applicant with an invitation to respond within fifteen days. On April 25, 2000, the applicant responded. He asked the Board to give him a second chance to serve his country by serving in the Army. He stated that he is married now, with children, and that he is a hard worker with a steady job. He alleged that he would not make the same

mistakes again if he were allowed to join the Army. He also alleged that he was never informed of his right to appeal his conviction at mast or of his right to submit a statement protesting his discharge. He argued that his demotion in rank from [REDACTED] to [REDACTED] was sufficient punishment for his mistakes and that he should not have been discharged.

APPLICABLE REGULATIONS

Article 1-G-5 of the Coast Guard Personnel Manual (COMDTINST M1000.6) sets as one requirement for reenlistment that the officer effecting discharge recommend the member for reenlistment.

Article 2-C-4 of the Coast Guard Manual for Preparing the Certificate of Release of Discharge from Active Duty, DD Form 214 (COMDTINST M1900.4C) requires officers effecting the discharge of a member for misconduct to assign the member an RE-4 reenlistment code (not eligible for reenlistment). RE-3 codes, which permit members to be reenlisted if the disqualifying factors that caused their discharge no longer exist,¹ are not authorized for anyone discharged by reason of misconduct.

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, United States Code. The application was timely.
2. The Board finds that the applicant's record of poor performance and misconduct adequately supports his discharge by reason of misconduct and the JKL separation code he was assigned.
3. The applicant alleged that he was not told of his right to appeal his conviction at mast or of his right to submit a statement on his own behalf when he was recommended for discharge. However, the applicant has not contested the result of his mast (demotion to [REDACTED] and indicated that he considered his demotion due punishment. In addition, his record contains a form with his signature showing that he waived his right to submit a statement and did not object to his discharge.
4. The RE-4 reenlistment code is the only reenlistment code authorized for members discharged by reason of misconduct. Although the applicant admirably wishes to serve his country again by joining the Army, he has failed to prove that the Coast Guard committed an error or injustice by assigning him an RE-4 reenlistment code.
5. Accordingly, the applicant's request for relief should be denied.

¹ Examples of RE-3 codes are the RE-3Y, for unsatisfactory performance; the RE-3X, for non-swimmers; and the RE-3U, for minors.

ORDER

The application of
correction of his military record is hereby denied.

USCG, for

