

DEPARTMENT TRANSPORTATION  
BOARD FOR CORRECTION OF MILITARY RECORDS

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Application for Correction  
of Coast Guard Record of:

BCMR Docket  
No. 14-96

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**FINAL DECISION**

█ Chairman:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on October 26, 1995, upon the BCMR's receipt of the applicant's request for correction of his military record.

The final decision, dated November 8, 1996, 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 former █ pay grade E-7), asked the BCMR (1) to reinstate him in the Coast Guard at the same grade he had when he was discharged, with back pay and allowances for the period of dismissal; (2) to give him "promotion consideration" as if there were no time lost; and (3) to have all documents concerning his discharge expunged from his military record.

He was discharged from the Coast Guard under honorable conditions on October 29, 1993, by reason of misconduct. According to the applicant, he was discharged from the Coast Guard after 9 years of active duty. His discharge followed his arrest by the local police department for disorderly conduct. The local case was dismissed, for failure to prosecute, but the applicant's commanding officer (CO) initiated discharge proceedings against him on the basis of this arrest.

In February 1993, according to the applicant, an Administrative Discharge Board (ADB) was held to consider if the applicant should be "discharged by reason of misconduct due to dressing as a female, entering the women's restroom and looking at a woman in the next stall with a mirror." The ADB found that the action of the applicant did not amount to "lewd or lascivious behavior" and that he should therefore be retained in the Coast Guard.

The applicant's CO disagreed with the findings of the ADB and recommended

that the applicant be discharged from the Coast Guard notwithstanding the ADB's recommendation.

The applicant disagreed with the CO's conclusion and maintained that the ADB "was in the best position to evaluate the witnesses and hear all of the evidence as independent fact finders ." The applicant said that the Commandant of the Coast Guard is the "discharge authority" for misconduct cases, but that the decision disapproving the ADB's findings and recommendations was made by the Military Personnel Command rather than by the Commandant.

### **Views of the Coast Guard**

On October 9, 1996, the BCMR received the views of the Coast Guard on this application. The Chief Counsel of the Coast Guard sent the Board, in addition to an advisory opinion, a copy of the transcript of the administrative discharge board's hearing on the matter.

The Coast Guard summarized the evidence and concluded that no relief is recommended. The applicant was arrested on October 29, 1992, after he was found leaving a ladies restroom wearing women's clothes, including a dress, heels, and a wig. He had been reported to security police by a woman who had reported that he was in the adjoining stall "ogling her" with a mirror.

According to the Chief Counsel, "No one has a right to remain in the Armed Forces unless a specific statute or regulation grants that right. . . . No statute or regulation entitles [the applicant] to remain in the Coast Guard under the circumstances of this case." He also said that Coast Guard authorities "would be violating the trust placed in them by Congress and the public if they allowed members such as the Applicant to remain in the Coast Guard when the evidence is that they are not suitable for continued service because of misconduct." The Chief Counsel said that the BCMR should find that the Coast Guard committed error or injustice only if the Personnel Command's decision to discharge the applicant "amounted to a clear abuse of discretion" or a violation of a "substantial procedural right."

The Coast Guard took issue with the applicant's allegations that the Service violated its own regulations and/or abused its discretion in overruling the ADB. The Service pointed out that Article 12-B-18 (Misconduct) of the Personnel Manual provides that an enlisted member may be separated from the Service in any case of sexual perversion. The Service also pointed out that Article 12-B-31d. (Administrative Discharge Board and Final Action of Discharge Authority) provides that "the Commandant is the discharge authority in all cases of administrative separations." ADBs, according to the Chief Counsel, "do not make decisions; the discharge authority is the decision maker and may independently evaluate the

evidence." The Coast Guard submitted that the Commandant had delegated this authority to the Chief, Office of Personnel and Training, and that this office had redelegated the authority to the prospective commander of the Military Personnel Command.

The Coast Guard concluded that the discharge authority had sufficient evidence to reject the conclusion of the ADB and to issue the applicant a general rather than an honorable discharge.

### **Response of the Applicant**

On October 11, 1996, the BCMR sent a copy of the views of the Coast Guard to the applicant's attorney. It told the attorney that if his client desired to submit a response to the views of the Coast Guard, they should be submitted to the Board within 15 days. No such response was ever received.

### **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 application pursuant to section 1552 of title 10, United States Code.

2. The Chairman, pursuant to 33 CFR § 52.31 (1996), has recommended disposition of the case without a hearing. The Board concurs in that determination.

3. The applicant was arrested for disorderly conduct by the Biloxi police department. The charges were dropped because the alleged victim declined to testify against the applicant, but the applicant's Coast Guard commanding officer (CO) initiated discharge proceedings based on the alleged misconduct.

4. On February 4, 1993, an Administrative Discharge Board (ADB) was convened in [REDACTED] to consider if the applicant should be discharged by reason of misconduct due to dressing as a female, entering the ladies restroom, and looking at a women in the next stall with a mirror. The ADB, after hearing two days of testimony, found that the applicant had not engaged in "lewd and lascivious behavior."

5. ADBs are fact finding bodies, but the findings of ADBs shall be reviewed by the by "discharge authority," who is the Commandant. Art. 12-B-31d., Personnel Manual. "The Commandant will review the record of the [ADB], and take action to approve or disapprove the board's findings of fact, opinions, and recommendations

in whole, or in part." Id. Under that article, the Commandant may "[d]isapprove the recommendation for retention and direct discharge under honorable conditions . . ." Art. 12-B-31e. The discharge authority may be delegated in according with regulations. In this case, the Military Personnel Authority performed the discharge function under authority delegated to it by the Commandant via the Chief, Office of Personnel and Training pursuant to Sec. 1-C-1. HQINST M5402.3D.

6. The discharge authority disapproved the findings of fact, opinions and recommendations of the ADB because the board did not make any findings of fact in support of its opinion and recommendations. The authority found that the conclusion that the applicant was not involved in lewd and lascivious acts or other indecent acts was contrary to the weight of the evidence and clearly in error.

7. The applicant has not established that the Coast Guard committed an error or injustice in evaluating his conduct. His assertion that his conduct was just a practical joke is not supported by the facts; the testimony of the woman who observed him negates the possibility that he was merely picking up a mirror he had dropped; and the assertion that his conduct was excusable because it happened "two days before Halloween" and that "many popular entertainers have successfully played women characters" is without merit.

8. The applicant has not established that the Coast Guard committed any error or injustice in directing that he be discharged by reason of misconduct due to lewd and lascivious behavior.

9. Accordingly, the application should be denied.

**ORDER**

The application to correct the military record of former  
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