


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

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 168-96

FINAL DECISION

 Attorney-Advisor:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on September 23, 1996, upon the receipt of an application for relief with the BCMR.

This final decision, dated October 10, 1997, 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 subsistence specialist, third class (SS3, pay grade E-4) asked the BCMR to correct his record by changing his narrative reason for separation (Block 28) on his Certificate of Release or Discharge from Active Duty (DD Form 214). He stated he wanted Block 28 to read "failure to meet medical standards," and that he wanted the separation code JKL (misconduct - sexual perversion) to be removed from the DD Form 214. He also asked for his discharge to be upgraded from "general under honorable conditions" to "honorable."

The applicant stated that on October 26, 1995, while he was serving on active duty, he was arrested in Massachusetts by police officials and extradited to Key West, Florida. He was accused of eight counts of lewd and lascivious behavior, but the police had only one "victim" named in the arrest warrant. He also alleged that he waited "for more than forty days in jail before any representatives from the Coast Guard came to see [him], or even make any form of contact with [him]."

The applicant stated that the Coast Guard station in Key West did not send a Coast Guard representative to the jail in Key West to visit him and explain the charges. He also alleged that the Coast Guard did not offer him legal

representation. He stated that he had to hire a private attorney to represent him at the trial.

He asserted that at the time of trial, seven of the eight counts against him had been dropped. He was discharged on February 28, 1996, and on February 29, 1996, the remaining charges against him were dropped. He stated that he was never convicted of a felony because he "pled to a misdemeanor charge and the conviction was withheld."

The applicant asserted that he wants his record corrected because "the grounds for discharge were never proven, either in court, or by Courts-Martial [sic]. . . ." He also stated that since "no felony was committed, and [the] final [criminal] charge was different from the charges reflected in [his] DD 214, and also different from the charges [he] was arrested for," he was seeking reimbursement of all back pay dating from the date of his arrest to February 2, 1996.

The applicant also asked for his car, or the full cash value for the car, to be sent to him, and that model-building supplies he had in Florida be shipped to him. Finally, the applicant asked the Board to require the Coast Guard to provide him a complete pre-discharge physical, which he was allegedly denied at the time of his discharge.

Views of the Coast Guard

On August 25, 1997, the Coast Guard recommended that the applicant's request for relief be denied.

The Chief Counsel of the Coast Guard recommended denial because the applicant "has not proved error or injustice entitling him to relief." The Chief Counsel stated that "Coast Guard discharge regulations provide the discharge authority with considerable fact-finding and discretionary decision-making powers in determining whether the member should be discharged, and the type of discharge to be awarded." The Chief Counsel asserted that management of "Coast Guard force strength is crucial to accomplishing Coast Guard missions with . . . limited resources, and has been committed to the discretion of the Coast Guard." It is the duty of Coast Guard discharge authorities to separate Coast Guard members who, according to evidence, have shown that they are unsuitable for continued duty, or where members have shown that their retention on duty would be detrimental to the service.

The Chief Counsel stated that the applicant has not proven that his "discharge resulted from a clear violation of a substantial procedural right, a

clear error of material fact, or a clear abuse of the broad discretion accorded by law to the discharge authority."

The Chief Counsel stated that the applicant was discharged for sexual perversion in accordance with the provisions of Article 12-B-18(b)6) of the Coast Guard Personnel Manual (COMDTINST M1000.6A). The Coast Guard determined that the applicant had engaged in sexual perversion based on an "extensive joint investigation by Coast Guard Investigations (CGI) and Florida law enforcement officials." The applicant was charged by the state of Florida with "lewd and lascivious acts upon a child under sixteen" The Chief Counsel stated that extensive evidence had been compiled regarding the applicant's indecent acts with teenage boys, and police officials obtained statements from several alleged victims.

The Chief Counsel stated that while the applicant "generally denied the allegations against him in his statement in response to the notification of discharge, he offered no evidence or even an explanation of the evidence against him, and he agreed with the recommendation that he be discharged with a general discharge." The Chief Counsel stated that a "reasonable fact-finder could certainly conclude, by a preponderance of the evidence, that Applicant had engaged in lewd and lascivious acts, sodomy, indecent exposure, or indecent acts upon a child, thus meeting the definition of sexual perversion" in Article 12-B-18.b(6) of the Personnel Manual. The Chief Counsel asserted that there had been no factual error the applicant's case.

The Chief Counsel stated that the applicant's procedural rights in his discharge were delineated in Article 12-B-18.e of the Personnel Manual. He also stated that the applicant's "claim that he was 'denied Coast Guard counsel' is without merit because he had no right to Coast Guard counsel." Article 12-B-18.e(1)(c) of the Personnel Manual provides that members with less than eight years of service, and who are to receive general discharges, are afforded an opportunity to consult with a lawyer. It is not required that Coast Guard counsel be provided. The Chief Counsel asserted that the applicant was provided a qualified Navy attorney, who counseled the applicant on his rights prior to his discharge.

The Chief Counsel asserted that "[t]here was no requirement for the Coast Guard to provide counsel to assist or represent a member at a civilian criminal prosecution, regardless of whether the Coast Guard participated in the investigation." Also, there are no Coast Guard regulations requiring visitation of Coast Guard members who are confined by civilian authorities. There was therefore no duty of the Coast Guard to send someone to visit the applicant while he was detained in Key West, Florida.

The Chief Counsel stated that the applicant's discharge was not reviewed by an administrative discharge board because he had less than eight years of military service. Additionally, the applicant was not given a pre-discharge physical because under Article 12-B-1.e of the Personnel Manual, "processing for disciplinary separations, which include separations for misconduct . . . take precedence over, and suspend, processing for disability separation or retirement." The Chief Counsel therefore asserted that there was no error in discharging the applicant without providing a pre-discharge physical.

The Chief Counsel stated that "[w]here evidence of misconduct meriting discharge exists, there is no requirement that the member be retained in the Coast Guard until convicted of an offense." The applicant had not proven that he was prejudiced by an error in his discharge.

SUMMARY OF RECORD AND SUBMISSIONS

Military Record

The applicant's military record contains a report describing the investigation into his alleged acts of sexual perversion. The report shows that the investigation began in July 1995. It was prompted by the claims of an alleged witness to the applicant's indecent acts with a child. The interview with the witness was documented in May, 1995, and the witness' account described acts allegedly committed by the applicant in early 1995.

The record contains additional investigative reports, and statements that were collected by the Key West Police Department from eight alleged victims. Some of the alleged victims' accounts described encounters with the applicant since 1992.

Based on the statements from the alleged victims, the Key West Police Department detectives determined that the applicant was "an active pedophile" and "possible child molester."

The military record also contains a copy of the discharge documents prepared by the applicant's commanding officer (CO) at Coast Guard Group Key West and the commander of the Seventh Coast Guard District in which they requested authority to discharge the applicant by reason of misconduct. The documents were addressed to the commander of Coast Guard Personnel Command (CGPC).

The letter from the applicant's CO, dated February 14, 1996, asked for the applicant to be "immediately dismissed . . . with a General discharge in accordance with [Article 12-B-18 of the Coast Guard Personnel Manual] for

misconduct." The CO stated that the applicant's misconduct was "specific to sexual perversion," and included lewd and lascivious acts, sodomy, and indecent acts with or upon a child. The CO asked for the applicant's discharge to "be expedited by all possible means."

Attached to the CO's letter was a copy of a letter he sent to the applicant, dated February 9, 1996, which advised the applicant that he was recommended for discharge by reason of misconduct "specific to sexual perversion" The letter informed the applicant that he had a right to submit a written statement on his behalf in which he could agree or disagree with the recommendation. The letter also told the applicant he had the right to consult with an attorney.

The military record included a statement submitted by the applicant, dated February 13, 1996, in which he denied the allegations of sexual perversion contained in the commander's letter. He stated that he had not pled guilty to the charges and was not guilty of the charges.

In paragraph three, the applicant stated that he felt that it "may be in [his] best interest to agree with the recommendation of discharge, and for that reason alone, [he did] agree [with the recommendation of discharge]." In paragraph four, the applicant stated that he understood his discharge would be a general discharge, and not a dishonorable discharge. He signed the bottom of the statement.

In a letter dated March 6, 1996, the commander of the Seventh Coast Guard District endorsed the CO's recommendation for discharge to CGPC. In his letter, the commander stated that the applicant was under state court-ordered house arrest and awaiting trial. The commander stated that "because of the nature of the charges [against the applicant], it is in the best interest of the Coast Guard that [the applicant] be a civilian when he actually goes to trial."

The commander stated that the evidence and facts found in the investigation against the applicant supported the decision to separate the applicant. He stated that "[c]onviction in a criminal court using a reasonable doubt standard is **not** required for administrative separation based on Article 12-B-18.b of [the Personnel Manual], sexual perversion." (Emphasis in original).

On March 20, 1996, CGPC approved the applicant's discharge. The applicant received a general discharge by reason of misconduct through sexual perversion, according to Article 12-B-18 of the Personnel Manual.

Applicant's Submissions

The applicant submitted letters from the minister of his church, a church member, a personal friend, and the minister of a church he attended in Florida. Each letter attests to the applicant's good character, and regular church attendance. The letters express doubt about the applicant having engaged in the alleged sexually perverse behavior.

RELEVANT REGULATIONS

Article 12-B-18 for the Coast Guard Personnel Manual (COMDTINST M1000.6A) addresses procedures for the discharge of enlisted personnel by reason of misconduct.

Article 12-B-18.b(6) provides that the commander of CGPC "may direct the discharge of a member for misconduct in any of the following cases:

- (6) sexual perversion including but not limited to:
 - (a) Lewd and lascivious acts;
 - (b) Sodomy;
 - (c) Indecent exposure;
 - (d) Indecent acts with or upon a child; or,
 - (e) Other indecent acts or offenses.

Article 12-B-18.(e) provides the following, in part:

(e) Members with less than 8 years of total active and/or inactive military service, recommended for discharge by reason of misconduct[,] and an honorable or general discharge is contemplated[,] shall be processed as follows:

- (1) The member shall:
 - (a) Be informed in writing of the reason(s) for being considered for discharge. . . .
 - (b) Be afforded an opportunity to make a statement in writing. . . .
 - (c) If a general discharge is contemplated, be afforded an opportunity to consult with a lawyer. . . .

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 submission, 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 applicant asked the Board to change his narrative reason for separation from "misconduct" to "failure to meet medical standards." He asked for the correction his separation code to correspond with the change in his narrative reason. He also asked for back pay, a complete physical, and for delivery of personal items to his current home address.

3. The applicant claimed that because the charges against him were dismissed, he should not have been discharged by reason of misconduct through sexual perversion. This claim is without merit.

The Coast Guard and the Key West Police Department had amassed extensive evidence in an investigation against the applicant, including statements from alleged victims and witnesses. The statements and evidence supported allegations that the applicant had engaged in lewd and lascivious behavior with teenage boys under sixteen. The evidence was sufficient to support a finding that the applicant was a possible pedophile and child molester.

4. The Coast Guard is given broad authority in determining the suitability of an individual to be a military officer. See Wronke v. Marsh, 787 F.2d 1569, 1576 (Fed. Cir. 1986). Based on the evidence collected, the Coast Guard determined that the applicant was unsuitable for continued duty, and that his retention would be detrimental to the Service. The Service's decision to discharge the applicant was purely within its discretion, and was not a violation of the applicant's procedural rights. No one has a right to remain in the armed forces unless a specific statute or regulation grants that right. Dodson v. United States, Department of the Army, 988 F.2d 1199, 1203-1204 (Fed. Cir. 1993). There is no statute or regulation in existence which required the Coast Guard to retain the applicant, regardless of his pending trial.

5. The applicant has the burden of proving that the Coast Guard was in error in discharging him. He must overcome the rebuttable presumption that the "administrators of the military, like other public officers, discharge[d] their duties correctly, lawfully, and in good faith." Arens v. United States, 969 F.2d 1034, 1037 (Fed. Cir. 1992), quoting from Sanders v. United States, 594 F.2d 804, 813 (Ct. Cl. 1979).

The applicant has not satisfied this burden of proof. He has not proven that the Service failed to follow applicable procedure when he was discharged. He has not proven that the grounds for his discharge, sexual perversion, were false. He made no indication that he contested his discharge.

6. The applicant submitted a statement to his command in which he asserted that he understood he would receive a general discharge by reason of misconduct - sexual perversion. He also acknowledged his right to consult with an attorney. Although he stated that the criminal allegations against him were untrue, he did not assert that his discharge, which was motivated by those allegations, was unfair or improper. In fact, in his statement, he agreed that it would be in his best interest to be discharged.

The applicant's statement indicated that he was fully aware of the nature of his discharge. Therefore, his separation code, the reason for his discharge, and the general discharge he received will remain unchanged.

7. The applicant alleged that the Coast Guard did not provide him with any counseling while he was detained in Key West, Florida. The Board has not found any Coast Guard regulation which requires the Coast Guard to provide counsel to a member who is detained by civilian authorities. The Coast Guard was under no obligation to send a representative to the applicant while he was under arrest. It is evident from the applicant's submissions that he had secured a civilian attorney to represent him in his trial in Key West, so he did have legal counsel available to him.

8. The Coast Guard properly discharged the applicant under Article 12-B-18 of the Coast Guard Personnel Manual. There was sufficient evidence to support a finding by the Service that the applicant had engaged in indecent behavior. Such behavior warranted assignment of a general discharge by reason of misconduct through sexual perversion, and the nature of his behavior warranted assignment of an RE-4 reenlistment code. The applicant had no express right to be retained on active duty while awaiting his trial.

9. The applicant also alleged that he was denied a pre-discharge physical. The applicant's record does not contain documentation to indicate he received a discharge physical. A pre-discharge physical is conducted to determine if the exiting member is physically qualified for separation, or in the case of immediate reenlistment, for retention. See Article 12-B-6 of the Personnel Manual.

The applicant has not shown that he was unqualified for separation due to medical problems and there is no indication in his records that he suffered from debilitating medical problems. There is no documentation in his record to show that he contested his discharge because of the alleged omission of the discharge

physical. Finally, in his application before the Board, the applicant made no allegations of medical problems resulting from his period of service in the Coast Guard. Therefore, the Board finds that the failure to administer a pre-discharge physical to the applicant was harmless error by the Coast Guard.

10. The applicant also asked the Board to grant him back pay and allowances, and to order the Coast Guard to return some personal effects to his current address. Since the Board found that the applicant's claim was without merit, it is unnecessary to address those requests.

11. Accordingly, the application should be denied.

Final Decision: BCMR No. 168-96

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ORDER

The application for correction of the military record of
ISCG, is denied.

