

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

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 1999-036 and
No. 2000-103

FINAL DECISION

██████████ Deputy Chairman:

This is a proceeding under section 1552 of title 10 and section 425 of title 14, United States Code. These applications are being consolidated for judicial economy and because they arise out of a common set of facts.

BCMR No. 1999-036 was docketed by the Board on December 16, 1998, but the Board did not receive the applicant's military record until February 28, 2000. BCMR No. 2000-103 was docketed by the Board on March 28, 2000.

This final decision, dated February 28, 2001, is signed by three duly appointed members who were designated to serve as the Board in this case.

The applicant, a former boatswain's mate second class (BM2; pay grade E-5), asked the Board, in Docket No. 1999-036, to correct his record by changing the reason for his honorable discharge from misconduct to convenience of the government. He further requested, in Docket No. 2000-103, that his performance evaluation marks for the period ending November 24, 1997 be removed from his record.

The applicant was discharged from the Coast Guard on March 6, 1998, with an honorable discharge, by reason of misconduct, with a HKL separation code (sexual perversion (indecent acts)), and an RE-4 (not eligible for reenlistment) reenlistment code.

SUMMARY OF RECORD AND SUBMISSIONS

Allegations

The applicant alleged that his discharge by reason of misconduct due to sexual perversion (indecent acts) is in error because he never engaged in indecent acts or acts of sexual perversion as defined in Article 12-B-18 of the Personnel Manual. He stated that he received non-judicial punishment (NJP) on November 24, 1997, for providing alcohol to underage members, but he denied that he had any sexual activity with the 17-year-old female, an SA (seaman apprentice (pay grade E-2)), even though he was alleged to have engaged in such misconduct. He claimed that the specification alleging sexual contact with the SA was dismissed and he was only punished for providing alcohol to minors.

The applicant also alleged that the performance marks he received for the period ending November 24, 1997, do not accurately reflect his performance. He claimed that he was not counseled on these performance marks by an individual who was a member of his rating chain, but by an officer at his temporary additional duty (TAD) command, who signed the performance evaluation as the marking official. The applicant stated that he appealed his performance marks, but the appeal authority never acted on his appeal. Therefore, these marks should be removed from his record.

Background

The applicant's NJP, relief for cause, and administrative discharge grew out of an incident that occurred in July 1997. On or about July 27 and 28, 1997, the applicant, then a 35-year-old married BMI, and two junior enlisted members of the unit, the aforementioned 17-year-old female SA (hereinafter SA), and a male fireman apprentice (FA), went on an overnight camping trip. The applicant purchased and took along a bottle of 80-proof hard liquor called "Aftershock" (hereinafter alcohol). During the daytime hours of the first day, the applicant and the SA were away from camp alone for quite a while. The FA stated that he became concerned and went and found them. After determining that they were all right, the FA returned to camp. After dinner that evening while around the campfire, the FA stated that the applicant brought out the alcohol and passed it to him and the SA, encouraging them to drink. Each of them consumed some of the alcohol and the FA stated that he thought the SA became drunk.

According to the FA, later that night the applicant coaxed the SA into going swimming with him. At some point the FA became concerned and decided to check on the applicant and the SA. He stated that he had a lantern and as he approached the beach, he saw the applicant "naked standing behind the sailboat [that the trio had taken with them] and [the SA] . . . was still in the water." Both the applicant and the SA stated that they were fine and the FA returned to the camp.

The FA stated that when the applicant and SA returned to camp he was pretending to be asleep in his tent. He saw their shadows through the tent and he saw the shadow of the SA putting on her underwear and the shadow of the applicant watching her. He stated that the next morning the applicant was lying next to the SA with his arm around her. He stated that the SA denied having sex with the applicant when he questioned her about it.

Several weeks after the camping trip, on or about September 24, 1997, the applicant's officer-in-charge (OINC) was informed by SA #2, a female friend of the SA's and a member of her unit, that the SA had attempted suicide a day or two earlier. When questioned by the OINC, the SA stated that she made the suicide gesture because of the teasing from the crew about her weight. Upon further questioning by the OINC, the SA stated "that [the applicant] during a camping trip . . . had gotten her drunk and raped her."

SA #2 told the OINC that she had gone on a similar camping trip with applicant a week earlier. The applicant took alcohol on that trip also and encouraged her to drink,

although she was under age. On September 29, 1997, at the CO's request, CGIS began an investigation into the allegations against the applicant.

According to the investigative report, on the day that the SA returned from the July trip she told her friend, SA #2, about the incident. SA #2 stated that the SA told her that she and the applicant went skinny dipping, but she kept on her bra and panties. The SA told SA #2 that she was drunk and could not remember everything, but that she remembered the applicant having sex with her in the water. According to SA #2, the SA stated that when she awakened the next morning, the applicant had his arm around her.

According to the investigative report, the SA also told an MK3 about the incident. The MK3 stated that the night after the SA returned from the camping trip, he asked her what was wrong. She told him about the alcohol and the skinny dipping. The SA told the MK3 that the while she and the applicant were in the water, the applicant removed her panties and started having sex with her. The MK3 stated that he promised the SA that he would not tell anyone about the incident, and he did not until questioned by CGIS.

The CGIS investigation also contains another statement from a male seaman (SN). He stated that around the middle of August 1997 the SA told him that the applicant had gotten her drunk and while they were swimming, he began to have sex with her until she pushed him away.

On October 3, 1997, the applicant was relieved of his duties as executive petty officer (XPO) of the Coast Guard station. On October 20, 1997, the investigative report was completed.

The NJP Process

On November 24, 1997, the applicant was punished at NJP for several violations of Article 134 (conduct prejudicial to the good order and discipline of the service) and one violation of Article 92 (disobeying a general order) of the Uniform Code of Military Justice (UCMJ). The Article 134 offenses included having wrongful sexual intercourse with a seaman apprentice (SA) not his wife; having wrongful sexual intercourse with a person junior to him in his chain of command; and several specifications of providing alcohol to minors, in violation of the law of Michigan. He was also punished for violating Chapter 8-H (sexual harassment) of the Personnel Manual by having sexual intercourse with the SA, an Article 92 UCMJ offense.

The applicant's punishment consisted of reduction of one pay grade (from E-6 to E-5) and restriction to the Coast Guard station for 60 days.

On November 26, 1997, the applicant appealed the NJP on the ground that there was a lack of evidence establishing that he had engaged in sexual misconduct. Specifically, he denied that any sexual act occurred between the SA and himself. He also challenged the credibility of the SA.

On November 30, 1997, the CO addressed the applicant's NJP appeal. He stated that he found the SA to be truthful as to the allegations. He further stated that "[he had] no doubts after hearing verbatim the witnesses and evaluating all the evidence that [the applicant] provided . . . three junior people alcohol and that he had sexual intercourse with [the] SA. . . ."

On December 2, 1997, the Commander, Ninth Coast Guard District denied the applicant's appeal, although he determined that the violation of Article 92 (disobeying a general order) was legally insufficient. He stated that "[e]ven though your behavior with [the] SA . . . may not have constituted a violation of a lawful general order, . . . it does constitute a serious breach of good order and discipline and was properly charged as a violation of Article 134 [conduct prejudicial to good order and discipline]." The commander found the punishment awarded at the NJP to be fair and just after reassessing the sentence in light of his decision to dismiss the Article 92 violation. He stated that "[a]ny of the four remaining violations could have resulted in a punishment greater than that imposed by the commanding officer (CO)."

The Administrative Separation

On December 19, 1997, the applicant was informed by his CO that he was recommending that the applicant be discharged from the Coast Guard with an other than honorable discharge due to misconduct. The basis for the misconduct discharge was "sexual perversion, other indecent acts or offenses." The applicant was advised that he had the right to appear before an administrative discharge board (ADB) and to be represented by counsel. He was further told that with the advice of counsel he could waive, in writing, any of his rights relating to the administrative discharge board.

In recommending a discharge by reason of misconduct, the CO wrote:

While [the applicant] had an exemplary record prior to these incidents, the magnitude and devastating impact of his actions cannot be dismissed. Abrogating his responsibility as XPO for the welfare of his people, he displayed a pattern of predatory behavior designed to weaken resolve through alcohol, with an ultimate goal obtaining sexual favors. While his first attempt was rebuffed, he unfortunately was successful the second time. In using his positional power for personal gain, [the applicant] showed that he no longer possesses the level of integrity and loyalty required by members of the Coast Guard to adhere to our core values. The statements he made in his appeals of his mast and relief for cause, as well as his statement addressing his discharge, show a total lack of remorse or acceptance of responsibility for his actions. . . .

On February 10, 1998, with the advice of counsel, the applicant waived his right to a hearing before an administrative discharge board on the condition that he receive an honorable discharge. However, the applicant submitted a statement in his own behalf. The applicant denied that he was sexually involved with the SA and claimed that the only evidence of such involvement consisted of the SA's assertions. He stated that the SA "is

of dubious credibility, and possesses a questionable mental state. She herself is being separated from the Coast Guard due to reasons of unsuitability."

The applicant stated that even if the allegations regarding sexual misconduct were true, they do not amount to indecent acts. According to the Manual for Courts-martial, an indecent act is "a form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations." The applicant claimed that he was never charged with, nor did he commit, an indecent act. To support this contention, the applicant submitted with his BCMR application a copy of United States v. Carr, 28 M.J. 661 (NMCMR 1989). He quoted the following from that case:

Act of sexual intercourse consummated on public beach that occurred after midnight in unlighted area where visibility was poor and occurred where act was unlikely to be seen by others did not constitute a public act of sexual intercourse so as to support conviction for committing indecent act by fornicating in public under UCMJ article proscribing conduct of nature to bring discredit upon armed forces.

On February 28, 1998, the Commandant directed that the applicant be honorably discharged due to misconduct no later than March 26, 1998. The applicant was discharged on March 6, 1998.

Performance Evaluation

On January 15, 1998, the applicant stated that he received the performance evaluation for the period ending November 24, 1997. He claimed that the page 7 entries that document the marks do not contain specific examples of performance that clearly demonstrate how he failed to meet the prewritten standards for higher marks. The applicant received marks of 1 in responsibility, setting an example, integrity, loyalty, respecting others, and human relations. He was given a two in health and well being and marks of 3 in monitoring work, evaluations, and work-life sensitivity/expertise. The remainder of the applicant's marks were 4s, 5s, and a single mark of 6 in quality or work. On January 22, 1998, the applicant appealed the performance marks, but did not receive a reply to his appeal.

The July 27/28, 1997 camping trip incident had an impact on many of the applicant's marks for the period under review. The following are excerpts from the page 7 entry:

Responsibility: You are counseled this date concerning a mark of "1" in this category. During this marking period you were involved in inappropriate situations, by your actions you demonstrated a lack of willingness to enforce standard on yourself and subordinates. Your actions were unacceptable, you violated military rules and regulations in which it was your duty and responsibility to conform to and enforce.

Health and well being: You are counseled this date concerning a mark of "2" in this category. During this marking period your consumption of alcohol greatly affected your ability to use proper judgement and led to you making bad decisions. Your lack of commitment to setting an example, meeting minimum standards of sobriety and exercising moderation in the use of alcohol was irresponsible as a senior Petty Officer in the U.S. Coast Guard. Additionally, during this marking [period] you provided and consumed alcohol with underage non-rates. This is unacceptable! As a first class petty officer it is your responsibility to look out for the health and well-being of your subordinates on and off duty."

Views of the Coast Guard

On September 22, 2000, the Board received an advisory opinion from the Chief Counsel of the Coast Guard with respect to the applicant's discharge (Docket No. 1999-036). He recommended that the Board deny relief in this case. He stated that as a service member, the applicant had no absolute right to remain in the service until the end of his enlistment period. He could be administratively discharged prior to the end of his enlistment as long as he was provided with the necessary due process. Giglio v. United States, 17 Cl. Ct. 160, 166 (1989). As a member with more than eight years of military service who was being separated for misconduct, the applicant had a right to an administrative discharge board. With the assistance of counsel, he waived that right in exchange for an honorable discharge.

The Chief Counsel stated that since the applicant refutes that his acts constituted sexual perversion, the issue is whether the HKL (sexual perversion) separation code is accurate. The HKL separation code requires the assignment of an RE-4 reenlistment code and is defined in the Separation Program Designator (SPD) Handbook as an [I]nvoluntary discharge directed in lieu of further processing or convening of a board . . . 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 on a child, (5) other acts or offenses." See also Article 12.B.18.b.6, Personnel Manual. The Chief Counsel stated that the Commandant "need only have reasonably concluded that Applicant's conduct met one of the factors listed in the SPD Handbook."

The Chief Counsel stated that the applicant's CO articulated the basis for assigning the applicant an HKL separation code in his letter of February 19, 1998. In that letter, the CO described the applicant's behavior as predatory and "designed to weaken the resolve through alcohol, with an ultimate goal of obtaining sexual favors." The Chief Counsel stressed that the CO is the finder of fact, and he stated in his letter addressing the applicant's NJP appeal that he was convinced by the SA's testimony that the applicant's had sexual relations with her. The CO further stated that "[D]espite [the SA's] alcohol and medical history, [he] found her to be truthful as to both [of] the major allegations. . . . [He had] no doubts after hearing verbatim the witnesses and evaluating all the evidence, that [the Applicant] provided those junior people alcohol and that he had sexual intercourse with the SA."

The Chief Counsel stated that the applicant's assertion that the allegation of sexual contact with the SA was dismissed for legal insufficiency is inaccurate. Although the District Commander dismissed the Article 92 offense (an orders violation) for legal insufficiency in reviewing the applicant's NJP appeal, he determined that the specification alleging that the applicant had wrongful sexual intercourse with a woman not his wife (under Article 134 of the UCMJ) to be legally sufficient. (The applicant was also charged with and punished for another violation of an article 134, engaging in sexually intimate behavior with a person junior to himself and in his direct chain of command.)

The Chief Counsel stated that the applicant has failed to prove that either his HKL separation code or his RE-4 reenlistment code is in error or unjust. He stated that absent 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 (D. C. Cir. 1992).

On November 22, 2000, the Board received an advisory opinion from the Chief Counsel with respect to the disputed performance marks, which were the subject of Docket No. 2000-103. He recommended that the Board deny relief for lack of merit, under the strong presumption of regularity afforded the government officials. Id.

The Chief Counsel stated that the performance marks for the period ending November 24, 1997 were a fair and accurate evaluation of the applicant's performance. The performance evaluation is factually accurate and represents the honest professional judgment of the rating chain. The Chief Counsel stated that the marking officials properly assessed and accounted for the applicant's sexual perversion in the evaluation of his performance.

The Chief Counsel stated that the Coast Guard properly abandoned the applicant's marks appeal after the Commander, Coast Guard Personnel Command (CGPC) ordered his discharge for sexual misconduct. He stated that the applicant's CO chose not to forward the appeal because of the pending discharge. He suggested that a marks appeal submitted by a member facing a contemporaneous involuntary discharge action is moot where, as here, the member's discharge is not predicated on the performance evaluation. He quoted CGPC in enclosure (1) to the advisory opinion:

[C]ompleting the appeal process, whether it would lead to relief or not, will not change member's current status or the characterization of his discharge. To compel the unit at this time to comply with this administrative process would give unwarranted credence to the essentially frivolous nature of applicant's complaint.

In addition to denying the applicant's request with respect to the performance marks for lack of merit, the Chief Counsel recommended that the Board should also deny the case for lack of an appropriate remedy, even though he stated that the Coast Guard would not contest any order from the Board directing it to act de novo on the applicant's appeal.

The Chief Counsel stated that the applicant has failed to show that he has suffered an injustice with respect to the challenged performance marks. In this regard the Chief Counsel stated that "[the applicant's] actions could reasonably be expected to bring discredit upon the Coast Guard and had a significant and adverse impact within the performance marking categories noted by the applicant's performance marking officials." This case manifestly does not constitute "treatment by the military authorities that shocks the sense of justice." See Sawyer v. United States, 18 Cl. Ct. 860, 868 (1989) rev'd on other grounds, 930 F.2d 1577 (citing Reale v. United States, 208 Ct. Cl. 1010, 1011 (1976))."

Applicant's Response to the Views of the Coast Guard

On October 26, 2000, the Board received the applicant's response to the views of the Coast Guard. He refuted the Chief Counsel's comment that the Coast Guard properly followed its own regulations when it discharged him. He denied that he committed adultery, but argued even that if he did the act would not amount to sexual perversion as defined in the Personnel Manual.

The applicant stated that although he waived the ADB on condition that he receive an honorable discharge, he did write a statement in his behalf wherein he challenged the misconduct discharge due to sexual perversion. He noted in that statement that there were other separation codes that he thought were more appropriate for his situation.

The applicant stated that the chief witnesses against him at the NJP had previously engaged in drinking and this was known to the OINC. He stated that the OINC did nothing about their drinking and did not inform him of it. The applicant stated that "this lack of timely corrective action [by the OINC] contributed to the incident for which [he has] been solely accused of being responsible for." He stated that the SA's past history of alcohol consumption and mental illness seems to have been overlooked by the Chief Counsel.

The applicant disagreed with the Chief Counsel, who adopted a quote from the CO's letter, that the applicant displayed "a pattern of predatory behavior." He stated there is no evidence to support any such pattern. He stated that there were only two camping trips and the first one was not alleged to have involved sex but underage drinking. He stated that although the alcohol was furnished by someone other than himself on the first camping trip, he was punished for it.

The applicant concluded his statement with the following:

The Coast Guard needed a scapegoat to take the blame for the Coast Guard's failure to detect the mental instability displayed by [the SA] and has refused to look to any of the other personnel . . . I tried to bring violations of the U.C.M.J. as well as U.S.C. to the attention of the District Commander by way of placing certain individuals on report. . . . The District Commander ignored or failed to follow up on my charges as I was never contacted by anyone for a statement or advised of the outcome of the allegations.

On December 8, 2000, the Board received the applicant's reply to the Chief Counsel's comments with respect to the challenged performance marks. He stated that the Chief Counsel agreed that his appeal was submitted timely, although the Coast Guard failed to act on the appeal. He stated that waiving the evaluation period as requested in his appeal would be the most logical and easiest way to remedy this error. He stated that such a remedy should not be challenged by the Coast Guard, since the Chief Counsel stated that "whether [acting on the appeal] would lead to relief or not, will not change [the applicant's] current status or characterization of his discharge."

In response to CGPC's comments in enclosure (1) to the advisory opinion, the applicant stated the following:

Chief Counsel stated I failed to follow procedures by circumventing the chain of command by directly submitting my appeal to the group commander. This again is not true. My supervisor, BMC . . . was away TAD for two months. . . . I was discharged before he returned. I expressed my intent to appeal the marks to LCDR . . . who counseled me on the marks with no resolution. I submitted my appeal to the district via the group and placed my appeal in the hands of the deputy group commander. . . . I did not feel it was proper to give my appeal to [the] LCDR . . . as he was not part of my rating chain and did not have a waiver as required by Article 10.B.3.a of [the Personnel Manual].

The applicant stated that the Coast Guard improperly abandoned his marks appeal, denying him the opportunity to receive an accurate evaluation, which is in conflict with Article 10.B.10.b.2 of the Personnel Manual. He stated that in light of this oversight, the performance marks for the period under review should be waived.

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, the CGIS investigation and applicable law:

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10 United States Code. The application was timely.
2. The Chairman has recommended disposition of the case without a hearing. 33 CFR 52.31. The Board concurs in that determination.
3. The Board finds that the applicant's discharge by reason of misconduct due to sexual perversion (indecent acts) was not in error or unjust. Article 12.B.18.a. of the Personnel Manual authorizes a misconduct discharge for sexual perversion (indecent acts). Administratively discharging the applicant for this reason is not dependent on the NJP punishment. Nothing in the regulation makes NJP a prerequisite for a misconduct discharge due to sexual perversion (indecent acts). The Board notes that although entitled to an administrative discharge board (ADB) hearing where his disagreement with the proposed discharge could have been debated, the applicant waived this right in

exchange for an honorable discharge. The Board finds that unless the applicant was somehow misled into waiving his right to the ADB or there is clear evidence that the Coast Guard committed an error or injustice, it will not act to disturb the reason for the applicant's discharge from the Coast Guard.

4. The Board finds that the applicant was not misled into waiving his right to an ADB hearing, but did so with the advice of counsel. He was afforded all of the due process required for an administrative discharge.

5. On the second issue, the Board is persuaded that there was sufficient evidence for the Coast Guard to discharge the applicant by reason of misconduct (indecent acts). First, there is the SAs testimony that the applicant enticed her to go swimming after providing her with alcohol, although she was underage for drinking. She stated that the applicant had non-consensual sex with her while in the water. Second, the FA stated that using a lantern (which the SA described as a flashlight), he went looking for them during their swim and found the applicant naked and the SA still in the water. Third, the FA also stated that when the SA and applicant returned to camp he saw from the inside of his tent the shadow of the SA putting on her underwear and the applicant watching. Fourth, both the FA and SA stated that the next morning the applicant was lying next to the SA with his arm around her. Fifth, on same day the SA returned from the camping trip, she told her friend (SA #2) that the applicant had had sex with her on the camping trip. The SA also confided in a male friend the next day. During the investigation of the offense, the applicant denied that he had sex with the SA. However, the Board notes that the CO, who had all of the evidence available to him during the NJP process, including the testimony of witnesses, found that the applicant had sex with the SA. The CO stated that he weighed the testimony and credibility of the witnesses and believed that the applicant had sexual intercourse with the SA. The applicant has not submitted sufficient evidence that would cause this Board to reach a different conclusion on this issue. Accordingly, there was sufficient evidence for the Coast Guard to find that the applicant engaged in sexual intercourse with the SA, a person junior to the applicant and in his direct chain of command.

6. Not only was there sufficient evidence for the Coast Guard to find that the applicant had sex with the SA, but there was also sufficient evidence for the Coast Guard to determine that the applicant's conduct with the SA was indecent. In arguing that the misconduct was not indecent, the applicant relied on the case of United States v. Carr, 29 M.J. 661 (NMCMR 1989), wherein the Court determined that a sex act occurring at midnight on a closed public beach behind a tent located on the other side of a picnic table, was not indecent because it was not likely to be seen by others. In Carr, the Court equated indecent or wrongful with "open and notorious." The Court further stated that "an act is 'open and notorious' (and hence criminal) when it is performed in such a place and under such circumstances that it is reasonably likely to be seen by others. Such an analysis, must of necessity, be undertaken on a case by case basis, and must look not only

to the locus of the act itself, but also to the attendant circumstances surrounding its commission." Id. at 665.

7. Moreover, in United States v. Blake, 33 M.J. 923, 925 (ACMR 1991), the Court stated that "[t]he single most common circumstance relied upon by military courts in finding consensual sexual acts indecent, is the public nature of the act. The act is sufficiently public if a 'substantial risk' exists that it could be viewed by others." The Court further stated that the act must be performed in the presence of other persons or in such a place and under such circumstances that it is reasonably likely to be seen by others. Id. In Blake, the Court took note of the fact that an unlocked van, where the sex act occurred, posed a substantial risk that others would observe the act by entering and inadvertently discovering the appellant engaging in sexual intercourse. "Moreover [the Court took] note of the fact that another noncommissioned officer was due to return to the van at any time." The Court stated that taken together, these circumstances were legally and factually sufficient to support the appellant's conviction for committing an indecent act. Id.

8. The Board finds in this case that the sex act between the applicant and the SA was likely to be seen by others. Although the sex act occurred at night, there is no evidence that the beach or that portion of the camping area where the act occurred was closed to the public. Anyone could have come upon the applicant and the SA, as the FA did. The evidence of record is that the FA went looking for the applicant and the SA with a lantern during their swim. He found the applicant naked and the SA still in the water. The applicant should have expected the FA to come looking for them because he had done so earlier in the day. Accordingly, the Board finds that under the circumstances of this case, the sex act was reasonably likely to be seen by others.

9. The Court also recognized in United States v. Blake, 33 M.J. 923, 926 (ACMR 1991) that other circumstances may exist that may render even an arguably private consensual act indecent. See, e.g. United States v. Woodard, 23 M.J. 514, 416 (A.F.C.M.R. 1986), vacated and remanded on other grounds, 23 M.J. 400 (C.M.A.), findings set aside on other grounds, 24 M.J. 514 (A.F.C.M.R. 1987) (private consensual intimate contact between a married officer and a babysitter was, under the circumstances, an indecent act).

10. There are additional circumstances surrounding the act between the applicant and the SA that make it indecent. First, there was a significant age difference between the applicant (approximately 35) and the SA (approximately 17). Second, the sex act occurred after the SA had consumed alcohol provided by the applicant. Third, the applicant as the executive petty officer was the SA's senior in the chain of command. Fourth, the applicant engaged in such conduct even though another person junior to him could have witnessed the act. Fifth, the applicant engaged in such conduct even though he was married. All of these factors, as discussed above, convince the Board that the applicant's conduct was indecent.

11. The applicant asserted that he was never charged with indecent acts and a discharge for this reason is erroneous. However, the applicant was discharged under Article 12.B.18a.6. of the Personnel Manual. There is nothing in the regulation that requires a person to be charged with an offense under the UCMJ before such underlying misconduct can constitute a basis for an administrative separation. The applicant was given the right to an administrative discharge board hearing where he could have put forth all the challenges he now makes. He waived that right to an administrative discharge board in exchange for an honorable discharge although he had been informed that the reason for the discharge would be misconduct due to sexual perversion. He could have received an other than honorable discharge if he had gone through with the ADB hearing. The applicant received the benefit of his bargain and this Board will not change the reason for the discharge without clear evidence of an error or injustice. Neither of which the Board finds in this case.

12. The applicant has not established that the performance marks that he received for the period ending November 24, 1997 were an inaccurate assessment of his performance. He complained that many of his positive accomplishments during the marking period were overshadowed by a single event, the camping trip. In the judgment of the rating chain, the event was significant enough that even considering the applicant's accomplishments, the applicant only merited marks of 1 or 2 in areas such as leadership and responsibility. The Board notes that in the areas of work performance the applicant was given a 6. The rating chain clearly acknowledged the applicant's skill in performing his duties, while marking him below average in leadership, integrity, loyalty, etc. The Board finds no basis on which to conclude that the rating chain committed either an error or injustice in assigning the applicant the performance marks that it did.

13. The applicant claimed that the marking official was not a proper member of his rating chain. The marking official was an officer at the Group to which the applicant had been assigned after he was relieved of his duties as station XPO. The supervisor and approving official were familiar with the applicant and his performance. Moreover, the supervisor recommends marks to the marking official and the approving official could have changed any mark that he found to be erroneous after receiving the performance evaluation from the marking official. See 10.B.4.d.5. of the Personnel Manual. The Board finds that the applicant has failed to establish that even if the marking official had not been a member of his rating chain that he would have received different marks. This is particularly true in light of the fact, as stated above that both the supervisor and approving official were familiar with the applicant's performance and in light of the fact that the performance evaluation was given to document the applicant's November 24, 1997 NJP. See 10.B.5.b. of the Personnel Manual.

14. The harder question is whether the Coast Guard committed an error or injustice by not processing the applicant's marks appeal even though he was pending an administrative discharge. The Board finds nothing in the regulation that relieves the Coast Guard of the responsibility of processing an applicant's marks appeal while he is

pending an administrative separation. However, the Board finds that the Coast Guard acted reasonably in not processing the applicant's appeal after the applicant waived his right to an ADB hearing in exchange for an honorable discharge. This move by the applicant was a clear indication that he would not fight the pending discharge. Moreover, after he waived his right to an ADB hearing, it was not likely that he would be retained in the Coast Guard. He is no longer in the service where performance marks determine assignments and advancements. Moreover, it is unlikely that with a misconduct discharge and a RE-4 reenlistment code, the applicant would be permitted to join any branch of the service. In addition, there is very little likelihood that even if the Board directed the processing of the appeal, it would be successful. The applicant provided insufficient evidence to prove his allegation that the disputed marks were inaccurate. Therefore, the Board fails to see how the applicant has been prejudiced by the failure of the Coast Guard to process his marks appeal.

15. All of the applicant's contentions and evidence have been considered by the Board. Those contentions not discussed within the findings and conclusions of this decision are not considered relevant to the outcome of this case.

16. Accordingly, the Board finds that the applicant has failed to establish an error or injustice that requires action by this Board. His request for relief should be denied.

[ORDER AND SIGNATURES ON NEXT PAGE]

Final Decision: BCMR No. 1998-036 and No. 2000-103

- 14 -

ORDER

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

