DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 2000-003

FINAL DECISION

[redacted] 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. The application was filed on October 5, 1999, and completed on December 15, 1999, upon receipt of the applicant's military records.

This final decision, dated September 7, 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 seaman apprentice (SA; pay grade E-2), asked the Board to correct his military record by changing his reenlistment code from RE-4 (ineligible for reenlistment) to RE-1 (eligible for reenlistment) or RE-3 (eligible for reenlistment except for disqualifying factor).

ALLEGATIONS OF THE APPLICANT

The applicant alleged that he was wrongly discharged and assigned an RE-4 reenlistment code because the Coast Guard decided that his enlistment was fraudulent. He alleged that he never intended to lie on his enlistment forms and that the erroneous information on them was the result of his own and his recruiter's misunderstanding of or lack of attention to the forms. He also alleged that his discharge was approved before his statement in appeal was ever received by the Commandant's office.

SUMMARY OF THE APPLICANT'S MILITARY RECORD

On September 20, 1995, prior to his enlistment, the applicant signed a Report of Medical History. The report shows that he broke his fifth metacarpal nine years previously at age 17 and that he wore glasses for nearsightedness. The applicant answered "no" to the questions "Have you ever been a patient in any type of hospital?"; "Have

you ever had any illness or injury other than those already noted?"; and "Have you ever received, is there pending, or have you applied for pension or compensation for existing disability?" He also denied ever having any back trouble or impairment of his limbs. He was examined and found fit for enlistment.

On November 6, 1995, the applicant enlisted in the Coast Guard for a term of four years. On that day, he signed a DD Form 1966/2. In block 24.a. of the form, he indicated that he had dependents (his wife and one child). In block 24.b., he checked "no" in answer to the question "Are you now or have you ever been divorced or legally separated?" The DD Form 1966/2 also indicates that the applicant was a naturalized citizen and that his recruiter had seen his "naturalization certificate."

On the same day, the applicant also signed a DD Form 398-2, which requires the applicant to "list ALL arrest information regardless of whether you have previously listed or disclosed this information or whether the record in your case has been 'sealed,' expunged, or otherwise stricken from the court record." It further asks, "Have you ever been arrested, charged, cited, held, or detained by Federal, State, or other law enforcement or juvenile authorities regardless of whether the charge was dropped or dismissed or you were found not guilty?" The form shows that he revealed a May 1991 arrest for "driving under the influence" and driving without a license and a September 1991 arrest for contempt of court. Under "Remarks," the form states, "D.U.I. in May 1991. Clean record since." The applicant also signed a CG-3307 form with the following statement:

> I hereby certify that all information on my enlistment documents is current and accurate. I have not had any involvement with the police or had any changes in dependency unless noted on those documents. I understand withholding information is punishable under the Uniform Code of Military Justice and may result in less than honorable discharge for fraudulent enlistment.

On September 27, 1996, the applicant's command made two negative administrative entries in his record. The first documented unauthorized phone calls, which, upon inquiry, the applicant alleged were made for official business but which investigation revealed to be of a personal nature. The second stated that he had been assigned a mark of 2 (on a scale of 1 to 7) for integrity and that his eligibility for a good conduct award was terminated.

On October 23, 1996, the Commander of the Thirteenth Coast Guard District notified the applicant that he was being recommended for an honorable discharge due to his "procurement of a fraudulent enlistment through omission or concealment of deliberate material which if known at the time would have resulted in rejection."

On October 31, 1996, the applicant signed the District Commander's notice, indicating that he objected to the recommended discharge and had attached a statement in his own behalf to the recommendation. In his statement, the applicant asked to remain on active duty. He stated that he had joined the Coast Guard upon the recommendation of the District Court Judge of the State of [redacted] He stated that he had told his recruiter about his record of driving "under the influence," driving without a license, and contempt of court for missing a court date, but he did not mention his arrests for

theft and trespass because his attorney had told him they "were to be expunged." He stated that he never intended to defraud the government about his "legal past." The applicant attached to his statement a copy of his "conviction-only" criminal record in Hawaii, which shows the following:

- On May 17, 1991, he was arrested for driving under the influence of an intoxicating substance and for driving without a license, both misdemeanors in [redacted] He was found guilty and fined $225 and his license was suspended for 90 days.
- On January 20, 1992, he was arrested for criminal contempt of court, a misdemeanor. He was found guilty and fined $25.
- On July 11, 1993, he was again arrested for criminal contempt of court, for which he was fined another $25.
- On October 21, 1993, he was arrested a third time for criminal contempt of court, for which he was fined $50.

In his statement, the applicant also wrote that he had no intention of misleading the government about his previous divorce. He stated that his recruiter only asked him if he had any dependents from a previous marriage and he because there were none, he said "no." He indicated that he had assumed the recruiter knew he was divorced because of the question and because the recruiter saw his Certificate of Citizenship, which shows his divorce.

In his statement, the applicant also wrote that he had not intended to defraud the government by failing to mention a previous back injury. He stated that he did not mention it when he enlisted because he had "no recurring problems" and his doctor told him he was fit for military duty. He stated that his doctor's letter to the recruiter and three physical examinations he had undergone since enlisting also proved he was fit for duty.

Finally, the applicant wrote that "[d]uring the enlistment process, [he], to the best of [his] knowledge, answered all questions truthfully and willingly with no intent to lie." He asked that, if he had to be discharged, he be assigned an RE-1 or RE-3E (erroneous enlistment) reenlistment code.

The applicant attached to his statement appealing his recommended discharge an affidavit from the Officer in Charge (OIC) of the recruiting office where he enlisted. The OIC stated that the applicant had disclosed during his initial interview his arrest for driving under the influence and, perhaps, his arrest for trespassing. The OIC stated that the offenses did not disqualify the applicant from enlisting under COMDTINST M1100.2C. He did not indicate why the trespassing charge, if disclosed, was omitted from the applicant's DD Form 398-2, while the other offense was listed. The OIC stated that the recruiters did not remember discussing the applicant's divorce in the interview and that no one noticed the word "divorced" on his naturalization certificate because the certificate is not reviewed for that information. However, he stated, the applicant "had nothing to gain by withholding this information" and the divorce "could have been easily overlooked by him or the recruiter." He further stated that the applicant did not disclose a previous back injury and that, if he had, "he would have been required to provide medical documents for the MEPS Doctor to review." The OIC also stated the following in support of the applicant:

> The week prior to shipping off to basic training, the applicant is required to come in to read and sign all of the documents pertaining to his enlistment, most forms are required to be done in triplicate with original signatures. This process can take up to an hour and a half. It is not uncommon for the applicant to become overwhelmed with what they are reading and signing. The possibility of a person misreading or leaving out an important item is very probable. Most often important issues have been dealt with during the enlistment process.
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> [The applicant] had nothing to gain by withholding information on the above issues. None of them would have prevented his enlistment into the Coast Guard. The DUI was within the required timeframe. Being divorced is not disqualifying. The back problem would have probably required a consult which would more than likely have been favorable since he has already passed three medical exams. The trespassing was a minor offense that was dismissed and not of a continuing nature, so it required no action.

On November 8, 1996, the District Commander asked the Coast Guard Personnel Command (CGPC) to discharge the applicant for misconduct due to his "procurement of a fraudulent enlistment through deliberate omission or concealment of facts which, if known at the time, would have resulted in rejection of his application." He stated that an investigation had revealed that the applicant had failed to disclose a May 1992 arrest for vehicle larceny, for which he was fined $500 and placed on probation for one year; and an August 1992 arrest for trespassing, for which he as fined $50. The investigation also revealed that the applicant had failed to disclose a previous divorce and work injuries to his back, neck, and legs in June 1993. The injuries were found to be 17 percent disabling, and he received almost $40,000 in settlement. He also stated that the applicant had placed two personal, unauthorized calls on a government phone and, upon inquiry, stated that they were placed for official business.

The District Commander attached to his request a copy of the applicant's statement dated October 31, 1996, his arrest reports, other documents substantiating allegations in the request, and statements by the applicant indicating that he did not include the omitted information because he was in a hurry and he did not believe it was necessary. The District Commander also attached a new statement from the OIC at the recruiting office. The OIC stated that he had written his first statement based on what the applicant had revealed to him in a telephone conversation on October 30, 1996. However, when contacted by the applicant's command on November 4, 1996, he learned the "more alarming details" of the applicant's criminal and medical histories, which the applicant had failed to mention. The OIC stated that the history of arrests and disabling nature of the applicant's injuries would have made his enlistment papers subject to further review and would likely have precluded his enlistment.

The District Commander's request also included a copy of a January 1995 settlement agreement between the applicant and his employer for disability compensation. The agreement states that he sustained injuries to his neck, back, and both legs on June 7, 1993. It also states that a chiropractor had found him 9 percent permanently disabled by his "back complaints" and 4.5 percent impaired by his "cervical complaints." Under the agreement, his employer paid over $30,500 for his medical bills and some $40,000 in disability payments, "representing seventeen percent (17%) disability of the whole person . . . ."

On November 15, 1996, CGPC issued orders for the applicant to be discharged no later than December 16, 1996 by reason of misconduct due to fraudulent enlistment with a JDA separation code.

On December 16, 1996, the applicant was honorably discharged. His separation code was JDA, the narrative reason for separation was "fraudulent entry into military service," and his reenlistment code was RE-4.

SUMMARY OF EVIDENCE SUBMITTED BY THE APPLICANT

The applicant submitted copies of all the documents summarized above. He also submitted a letter dated February 20, 1997, from the Attorney General of the State of [redacted] certifying that his arrest for criminal trespass on January 20, 1992, had been expunged. The letter states that, "[u]nder the provisions of [redacted] Revised Statutes, this certificate authorizes you to state in response to any question or inquiry, whether or not under oath, that you have no record regarding the specific arrest listed above." The letter does indicate the exact date of the expungement.

The applicant also submitted a copy of a [redacted] statute, which states that "[u]pon the issuance of the expungement certificate, the person applying for the order shall be treated as not having been arrested in all respects not otherwise provided for in this section." [redacted] However, the statute also indicates that records of an expunged arrest will be divulged upon inquiry by "[a]n agency of the federal government which is considering the subject person for a position immediately and directly affecting the national security." [redacted]

The applicant submitted a copy of a judgment of the United States District Court for the District of [redacted] indicating that he had been arrested for vehicle theft on May 23, 1992, and pled guilty to "theft of personal property" on October 27, 1993. He was fined $500 and place on probation for one year.

The applicant submitted a copy of a decree by the United States District Court for the District of [redacted] dated November 7, 1995. It states that he had "complied with the condition of probation imposed by the order of the Court" and that, therefore, he was discharged from probation and the proceedings were terminated.

The applicant also submitted a copy of a divorce decree dated February 4, 1994. The decree indicates that there were on children of that marriage. In addition, he submitted a copy of his Certificate of Citizenship, dated May 22, 1995, which indicates that his marital status was "divorced."

VIEWS OF THE COAST GUARD

On June 19, 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 was not denied any due process rights during his prior to his discharge. He stated that, with less than eight years of active service, the applicant was only entitled to notice of the reason for his pending dis-

charge and an opportunity to submit a statement in his own behalf. He alleged that the applicant received proper notice and availed himself of the opportunity to submit a statement in his own behalf. The Chief Counsel stated that the applicant was not entitled to counsel because his discharge was "honorable." He said the applicant's complaint that his discharge happened too quickly is "unfounded" because he had no right to a probationary period and he has not provided any evidence to "overcome the strong presumption that Coast Guard officials carried out their duties correctly, lawfully, and in good faith in discharging their responsibilities in this case." *Arens v. United States*, 969 F.2d 1034, 1037 (1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

The Chief Counsel alleged that the wording on the enlistment forms the applicant signed clearly required him to disclose the omitted information concerning his arrests and injuries. The wording on DD Form 398-2 regarding arrests, he argued, "is unambiguous and brooks no other interpretation or explanation" but that the omitted information should have been disclosed. Moreover, he argued, on the CG-3307 the applicant signed, he denied any arrests other than those shown on the DD Form 398-2.

The Chief Counsel also pointed out that the certificate of expungement submitted by the applicant does not prove that his conviction for trespass was expunged prior to his discharge. Moreover, he submitted nothing to prove that his conviction for larceny had been expunged.

The Chief Counsel alleged that there is no evidence the Coast Guard treated the applicant unjustly. He alleged that, "once it was determined Applicant committed misconduct by procuring a fraudulent enlistment, he could only be assigned a JDA separation code and a RE-4 reenlistment code. Therefore, there was no error or abuse of discretion in the assignment of his separation and reenlistment codes." He also argued that an RE-1 or RE-3 would not help the applicant because he would have to disclose the information he hid from the Coast Guard to any other military service to which he applied, and "[s]uch information would prohibit his enlistment."

Finally, the Chief Counsel stated that the case involves a significant issue of Coast Guard policy. Therefore, any grant of relief by the Board would be subject to final action by the delegate of the Secretary, under 33 C.F.R. § 52.64(b).

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 20, 2000, the BCMR sent a copy of the Chief Counsel's advisory opinion to the applicant with an invitation to respond within fifteen days. The applicant requested an extension and responded on July 27, 2000.

The applicant stated that he did not agree with the Chief Counsel's recommendation. He said that all of the enlistment papers he signed were typed by the recruiter after his interview and before the day he went to the recruiting office to sign them. On that day, he said, the recruiter "vaguely explained" the documents before he signed them. Moreover, he stated, to the best of his recollection, he did discuss his arrests and divorce with the recruiter during the interview.

The applicant further stated that prior to his discharge, he had requested a hearing or captain's mast, but his request was denied.

APPLICABLE REGULATIONS

Article 12.B.18.b.(2) of the Personnel Manual authorizes the Commander of the Military Personnel Command to discharge an enlisted member for misconduct upon discovery that the member "[p]rocure[d] a fraudulent enlistment, induction, or period of active service through any deliberate material misrepresentation, omission or concealment which if known at the time might have resulted in rejection."

Article 12.B.18.e. states that members whose commands recommend that they be discharged for misconduct are entitled to be notified and to submit a statement on their own behalf. They are only entitled to counsel if their commands seek a general, rather than honorable, discharge.

Article 12.B.5. states that members being discharged who are not recommended for reenlistment have a right to a hearing before an Administrative Discharge Board (ADB) only if they have eight or more years of "total active and/or Reserve military service." Members with less than eight years of service have the right to submit a statement appealing their commanding officer's decision.

The Separation Program Designator (SPD) Handbook states that members with no entitlement to an ADB who are involuntarily discharged because they have "procured a fraudulent enlistment, induction, or period of military service through deliberate material misrepresentation, omission or concealment" shall be assigned a JDA separation code, an RE-4 reenlistment code, and "fraudulent entry into military service" as the narrative reason for separation shown on their discharge forms.

The SPD Handbook also states that members may be assigned either an RE-4 or an RE-3E reenlistment code if they are involuntarily discharged (with no entitlement to an ADB) because they "erroneously enlisted, reenlisted, extended or [were] inducted into a Service component." Such members are assigned a JFC separation code and "erroneous entry (other)" as a narrative reason for separation.

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 evidence in the record proves that when he enlisted in 1995, the applicant signed forms that omitted information concerning his prior arrests for larceny and trespass in 1992 and concerning serious injuries to his back, neck, and legs in June 1993. The language on the DD Form 398-2 and on the Report of Medical History, which he

his discharge orders on November 15, 1996, does not prove that his statement was not properly considered or that CGPC's decision was unjust or erroneous. Therefore, the applicant has failed to prove by a preponderance of the evidence that he was denied due process with respect to his discharge.

8. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of [redacted] USCG, for correction of his military record is hereby denied.

[redacted]