

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-021

FINAL DECISION

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. After receiving the applicant's completed application on December 12, 2013, the Chair docketed the case and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 19, 2014, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, an [REDACTED] /E-6) when he was honorably discharged for "miscellaneous/general reasons" on July 25, 2011, asked the Board to void his discharge; reinstate him on active duty at the rank of [REDACTED] /E-7; award him all due back pay and allowances; reimburse him for selective reenlistment bonus (SRB) payments that were recouped when he was discharged; reimburse him for legal fees he incurred while fighting for custody of his son; and remove all negative administrative information from his record.

The applicant stated that five months before his discharge, in February 2011, the Coast Guard violated its regulations when it refused to grant him a humanitarian assignment. He explained that under Chapter B.11. of COMDTINST M1000.8, in situations "when the member's presence is essential to alleviate a hardship the family has encountered which other Coast Guard members do not normally encounter," the Coast Guard authorizes special assignments to particular geographical locations to alleviate a hardship so severe that it cannot be resolved with a period of emergency leave. The applicant stated that his family situation clearly met these threshold criteria for a humanitarian assignment in February 2011 because he was engaged in a divorce and child custody proceedings with his now ex-wife. He was surprised when his wife, who was living in [REDACTED] submitted a motion to the court asking that the marital home in [REDACTED], where the applicant was living, be sold because the applicant was about to be deployed. The applicant stated that only he and his chain of command should have been privy to his transfer orders, but a Reserve Commander serving as a Coast Guard Family Advocacy Advi-

sor improperly informed the applicant's wife that the applicant had orders to transfer from a shore unit [REDACTED] the Coast Guard advisor did so without the applicant's permission in violation of the Coast Guard's personnel records release regulation [REDACTED]

The applicant argued that under COMDTINST M1000.8, he should have received a humanitarian assignment, known as HUMS, to a shore unit, instead of orders to a cutter, because he was undergoing a divorce and seeking custody of his son. Accepting the transfer orders would have required him to obligate additional service [REDACTED] he refused to obligate the additional service so that he could stay ashore and fight for custody of his son. His refusal to obligate sufficient additional service to accept the transfer orders and the Coast Guard's erroneous and unjust refusal to issue him orders to remain at a shore unit on HUMS resulted in his discharge from active duty on July 26, 2011, as well as, he alleged, his loss of custody of his son. The applicant stated that the final billet he was offered was to a shore unit in [REDACTED] which he could not accept either. Therefore, he had to accept discharge [REDACTED] even years of honorable service. At the time, his name was above the cut on an advancement list to advance to chief, so in giving up his career and accepting discharge, he forfeited advancement to [REDACTED]/E-7 as well. The applicant alleged that if he had received a humanitarian assignment, he would have stayed in the Service and would have advanced to [REDACTED] in July 2011. Moreover, he would have remained on active duty as a "life [REDACTED] he was forced to retire. [REDACTED]

The applicant argued that the Coast Guard violated its own regulations, which it is legally required to follow, when it refused to grant him a humanitarian assignment. However, he noted, the Board may also exercise its authority to grant relief on solely equitable grounds because he "has suffered extreme prejudice based on the actions of the United States Coast Guard." First, he alleged, the family advocacy advisor impermissibly revealed the applicant's orders to a cutter to the applicant's wife, without the applicant's consent. The applicant stated that this was a clear violation of record release policy and "had a detrimental effect on his ability to gain custody of his son" because his impermissible transfer to the cutter affected the court's decision to grant his wife sole custody of their son. Second, the Coast Guard failed to grant him a humanitarian assignment to a local shore unit, which forced him to cut his career short so that he could responsibly handle his family circumstances.

In support of these allegations, the applicant submitted copies of regulations and the following documents:

- In a "Motion for Temporary Orders," dated March 15, 2011, the [REDACTED] wife asked a [REDACTED] State court to issue temporary orders requiring, *inter alia*, that the applicant allow his wife to remove her own and their child's property from the marital home and that the home be sold. The alleged basis for these requests was that although the wife had physical custody of the child, the applicant had not allowed her to remove her own or the child's property from the home, and that the applicant "is in the military and expected to be deployed out of state in the near future," which would leave the home vacant for extended periods of time.
- A citation for an Achievement Medal that [REDACTED] the applicant for his service at the LORAN station [REDACTED], from April 2009 [REDACTED] August 2010.

The citation highly praises the applicant's superior performance, professional competence, proficiency, diligence, perseverance, mentoring of subordinates, and willingness to give informed historical tours of the battleships.

VIEWS OF THE COAST GUARD

On April 24, 2014, the Judge Advocate General (JAG) submitted an advisory opinion recommending that the Board deny relief in this case in accordance with the findings and analysis provided in a memorandum submitted by the Commanding Officer, Coast Guard Personnel Service Center (PSC).

PSC stated that in January 2011, the applicant received orders to transfer to an E-7 billet on a local cutter because of his upcoming advancement. On January 28, 2011, the applicant submitted a HUMS request to remain at his current unit past his normal duty station based on his pending divorce and child custody dispute. PSC stated that although the applicant's situation was unfortunate, it would likely not have qualified him for HUMS. PSC noted that the applicant's command had positively endorsed his request but that the HUMS coordinator had recommended disapproval. However, PSC alleged, before the final decision on his HUMS request was made, the applicant withdrew his request for HUMS in an email dated February 25, 2011. Therefore, the applicant's claim that he was refused HUMS is clearly without merit. PSC noted that after the applicant withdrew his HUMS request, PSC nonetheless changed his orders from the first cutter to a newly open billet on another cutter home-ported closer to the applicant's home.

Moreover, PSC noted, the applicant's email shows that the court made its determination about temporary custody in February 2011, long before the applicant chose to refuse to obligate additional service so that he could advance to E-7 and accept transfer orders in July 2011. PSC noted that a transfer to the [redacted] would not have prevented the applicant from continuing his divorce proceedings and fighting for custody through his attorney. PSC also noted that "military members often are involved in divorce and child custody disputes throughout their careers."

Regarding the applicant's claim that a Coast Guard family advocacy advisor "leaked" his assignment transfer information to his wife and that this disclosure should entitle him to relief, PSC stated that there is no proof supporting this allegation. In addition, PSC alleged, "[i]n general, courts normally will look into military members' assignments when making 'best interest of the child' custody determinations. The applicant would have had to disclose all relevant assignment information to the court regardless of what [his] assignment(s) are/was at the time of the hearing." PSC stated that "even assuming *arguendo* that the applicant's wife had obtain[ed] his transfer information from CG sources – this information is highly probative, relevant and would have come out during the court's child custody proceedings/determinations irrespective of how the information was obtained."

In support of these allegations, PSC submitted the following documents:

- In a request for HUMS dated January 28, 2011, the applicant stated that his wife suffers from depression and that she had moved to [redacted] in November

2010 to be closer to her family; that his son was going to live with the applicant's parents in [REDACTED] until her return; that on January 1, 2011, his wife had told him she wanted a divorce; that he had just filed for divorce in [REDACTED] that his parents had returned his son on January 13, 2011; that his son would be living with him until the court made a custody determination; and that because he was advancing to E-7, on January 14, 2011, he had received orders to transfer to a local cutter in the summer. The applicant stated that he needed to remain at his unit on a HUMS assignment, instead of transferring, because his son had to remain in [REDACTED] unless the court issued a temporary custody order, he had no nearby family members who could care for his son, his wife's mental health was uncertain, his house was "under water," and he "need[ed] to be on land to be able to care for my son until final custody is determined." He noted that he had considered declining advancement to chief so that he would not be transferred, but he did not want to make himself ineligible for transfer for three years. [REDACTED] noted that even if his HUMS request was denied, he would [REDACTED] a hardship discharge. The applicant attached to his HUMS request (1) a dependency form showing his wife and son; (2) a medical record showing that his wife was discharged from o[REDACTED] patient care at a psychiatric unit at a hospital with prescriptions for Prozac and Alprazolam for anxiety on January 14, 2011; (3) an email st[REDACTED] dated January 31, 2014, in which she admitted she was unsure of [REDACTED] mental health, could not handle the applicant's long deployment [REDACTED] [REDACTED] were falling apart in front of their son again, offered to let the applicant have custody if she could have visitation rights, and would send money when she got a job; and (4) documents from the applicant's attorney showing that the applicant had filed for divorce on January 20, 2011, and that his divorce was expected to take fourteen months to resolve.

- In an endorsement of the applicant's HUMS request dated February 7, 2011, his commanding officer (CO) offered her "absolute strongest recommendation for approval." She stated that the applicant's situation was one that "Coast Guard members normally do not encounter. Although [REDACTED] understand that divorce and single parenthood are all too common ..., the rapid onset and unpredictable circumstances of this situation certainly make it unique and more extenuating" because in a single month the applicant had discovered that his wife was leaving him, took on full custody of his three-year-old son, and learned that he would be advanced and transferred. She argued that "this constitutes a perfect storm of events and is more than anyone can reasonably be expected to handle." She stated that his upcoming transfer "does not provide him reasonable time to complete his custody settlement and make arrangements for his son's care while underway." She stated that both the applicant and his son had to reside in [REDACTED] so that the [REDACTED] custody could be finalized, at which point the applicant could be transferred and "develop a care plan for his son."
- An email string dated February 7, 2011, shows that a Special Needs Program Manager also supported the applicant's HUMS request.
- A HUMS form shows that the coordinator recommended disapproval because, he wrote, "[h]owever unfortunate, a lot of mbrs in the CG get divorced and are single parents. Being divorced and a single parent does n[REDACTED] mbr from an underway assignment. There i[REDACTED] r located closer to [REDACTED] applicant's home]

due to a recent CWO appointment. Suggest canceling orders to [the first cutter] and reissuing [redacted] and cutter] to alleviate mbr having to relocate during divorce proceedings.” [redacted]

- A tracking sheet shows that the applicant’s HUMS request passed through various Headquarters personnel but never got as far as the final decisionmaking authority.
- In an email dated February 25, 2011, the applicant [redacted] regarding the upcoming summer transfer season, “The judge has submitted her decision for temporary custody in favor of my wife. Although the divorce will still not be complete until around December, I no longer have any need for a HUMS assignment. I greatly appreciate your patience and assistance.”

PSC stated that the applicant likely should have remained on active duty so that he could support his child, but the Coast Guard is not responsible for his imprudent decisions to refuse to obligate sufficient service to accept advancement to E-7 and transfer orders. PSC concluded that the applicant’s claims are meritless and that his requests for relief should be denied.

APPLICANT [redacted] RESPONSE TO THE VIEWS OF THE COAST GUARD [redacted]

On April 25, 2014, the Chair of the BCMR sent the applicant a copy of the Coast Guard’s views and invited him to submit a written response within thirty days. The applicant received and was granted an extension and submitted his response on August 8, 2014.

The applicant claimed that “the evidence is clear” that the Coast Guard’s family advocacy advisor disclosed the nature of the applicant’s transfer orders to his wife in February 2011 because his wife’s counsel told the court so during an emergency custody hearing on February 18, 2011. In response to [redacted] that information about the applicant’s transfer orders would have been disclosed in the course of the custody proceedings anyway, the applicant argued that but for the advisor’s improper disclosure, the court would not have held an emergency hearing and he would not have lost custody of his son. The applicant also argued that PSC’s claim that the court would have learned the information and taken it into consideration in deciding his son’s custody even if the advisor had not leaked the information was “pure speculation and conjecture.”

The applicant argued that PSC’s claims that his decisions about [redacted] in the service were void [redacted] the fact that but for the improper disclosure of his transfer orders, there would have been no emergency hearing, he would not have lost custody of his son on the court’s temporary orders, he would not have withdrawn his HUMS request, and he could have remained on active duty and accepted his advancement to E-7.

In support of his allegations, the applicant submitted a transcript of the Emergency Custody Hearing dated February 18, 2011. According to the transcript, in mid January, the applicant’s wife told the applicant that she was ready to resume taking care of their son and would pick him up from the applicant’s parents’ house in [redacted]. The next day, he had his parents return his son to [redacted] the child in daycare where [redacted] worked. The

applicant's attorney stated that the evidence showed that the wife needed more time to become stable and [REDACTED] there was no need for an emergency hearing. The judge replied, "I don't know whether it's an emergency, but we need to figure out w[REDACTED]"

During the hearing, the judge asked questions about whether the applicant's wife had schizophrenia or something "treatable," whether the child's time in daycare would be lessened if one or the other parent had custody, and whether the applicant or his wife had familial support to help care for the child if he or she got sick. The testimony [REDACTED] at the applicant's wife had been diagnosed with anxiety and mild depression that would not pose a risk to the child, that the wife was living with her father and stepmother and had three other female family members nearby to help care for the child, and that she had no job but was job hunting. The testimony also showed that the applicant was currently bringing his child to his office every morning until the daycare opened at 7:00 a.m. and that if he got sick he would rely on his col[REDACTED] or neighbors to care for his son or have his parents come up from [REDACTED].

The testimony further showed that the applicant had been deployed out[REDACTED]ate for many months of his son's life and that the wife, who had left active duty when she gave birth, had been the child's primary caregiver until her pa[REDACTED]ttack in November 2010, after which she moved to her parent's house in [REDACTED] and the applicant's parents began caring for his son in [REDACTED]

Toward the end of the hearing, the wife's attorney stated that the Coast Guard family advocacy advisor had showed him that the applicant received orders to a cutter on January 14, 2011, that were canceled on February 15, 2011, but argued that, "at some point, if he's going to succeed in his career, and he's told my client he wants to be a career man in the Coast Guard, he's going to have extended duties, your Honor." The applicant's attorney responded by pointing out that on January 31, 2014, the wife had stated in an email that she thought that the applicant should maintain custody [REDACTED] continued to work on her mental health.

The applicant also submitted a copy of a memorandum to the Coast Guard Investigative Service dated March 21, 2011, and signed by his Executive Officer (XO). The XO stated that court documents indicated that the family advocacy advisor had repeatedly revealed the nature of the applicant's transfer orders to the applicant's wife.

APPLICABLE LAW AND POLICY

[REDACTED] of COMDTINST M1000.A, the Coast Guard Personnel Manual, which was still in effect in February 2011, provides the Coast Guard's policy for humanitarian assignments (HUMS). Paragraph a. states that HUMS are "authorized to alleviate a hardship so severe an emergency leave cannot fully resolve it." Paragraph b. states that while military service sometimes involves forced, prolonged absences from family, "[o]ccasionally, situations arise when the member's presence is essential to alleviate a hardship the family has encountered which other Coast Guard members do not normally encounter." Article c. states that for HUMS, PSC "normally authorizes no-cost TDY [temporary duty] orders for a maximum of six months for a HUMS because the situation involved is usual [REDACTED]" HUMS orders may extend for up to two years, but "[REDACTED]" be available for u[REDACTED] reassignment

on completing the HUMS, [PSC] considers the hardship a permanent situation and normally will initiate discharge by reason of hardship.” Paragraph d. provides the following criteria for requesting a HUMS:

1. The member has encountered a severe hardship other Coast Guard members normally do not.
2. The hardship has arisen or deteriorated excessively since the member entered his or her current enlistment and the cause is beyond the member's control.
3. The problem affects the Servicemember's immediate family, i.e., husband, wife, son, daughter, step-child, parent, step-parent, or other person acting in loco parentis, or any bona fide dependents. Normally, this definition does not include in-laws unless they are bona fide dependents, but selected cases may be considered individually.
4. No other relatives capable of providing the necessary assistance are nearby.
5. The member's presence is essential to alleviate the hardship.
6. In addition to meeting these criteria, a Service need normally must exist before a permanent change of station will be authorized; i.e., the receiving unit should have a current or projected billet vacancy. ...

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 10 U.S.C. § 1552. The application was timely filed within three years of the applicant's separation.¹
2. The applicant requested an oral hearing before the Board. Pursuant to 33 C.F.R. § 52.31, “[t]he Chair shall decide in appropriate cases whether to grant a hearing or to recommend disposition on the merits without a hearing.” The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.²
3. The applicant alleged that his discharge and lack of advancement to E-7 in July 2011 were the unjust result of illegal action by a Reserve officer serving as a family advocacy advisor who leaked the applicant's private information to his wife. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.³ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”⁴

¹10 U.S.C. § 1552(b).

²*Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

³33 C.F.R. § 52.24(b).

⁴*Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

4. [REDACTED] alleged that the Coast Guard's family advocacy advisor impermissibly informed his wife of protected, private information—his transfer orders. [REDACTED] PSC did not contest that the applicant's transfer orders were legally protected information but argued that the applicant did not prove that the advisor provided the applicant's wife with the information. Whether a member's future assignment is legally protected, private information is not clear in the record, but because the Coast Guard failed to contest this allegation, for the purposes of this decision, the Board will assume that a member's future assignment is [REDACTED], private information.

5. The applicant has proven by a preponderance of the evidence in the record that the Coast Guard's family advocacy advisor informed the applicant's wife of his transfer orders on at least one occasion. Her attorney mentioned her source of this information during an Emergency Custody Hearing on February 18, 2011, when the source was not a contesting party. [REDACTED]

6. The applicant alleged that his wife initiated the Emergency Custody Hearing because she had learned about his transfer orders. The Board finds that he has not proven this causal connection, however, because her attorney also knew that the orders had been canceled; because the orders, even if not canceled, would not have been executed for many months; and because there are other reasons why his wife might have changed her mind about challenging [REDACTED] of their son. Nor were the applicant's transfer orders raised as an issue when the court was discussing whether an emergency actually existed during the emergency hearing. Therefore, the Board is not persuaded that the hearing resulted from the information about the applicant's transfer orders that his wife learned through the Coast Guard's family advocacy advisor.

7. The applicant alleged that he lost physical custody of his son during the Emergency Custody Hearing because his wife's attorney knew about his transfer orders. The record shows, however, that the attorney admitted during the hearing that the orders had already been canceled. In addition, the transcript of the hearing shows that the court's concerns revolved around whether the applicant's wife had schizophrenia or something more "treatable," whether the child's time in daycare would be lessened if one or the other parent had custody, and whether the applicant or his wife had familial support to help care for the child if he or she got sick. The applicant has not proven by a preponderance of the evidence that he lost custody of his son during the emergency hearing because his wife's attorney mentioned that he had received transfer orders to a cutter that had already been canceled.

8. The applicant alleged that the Coast Guard erroneously refused to grant him a [REDACTED] assignment known as HUMS, which forced him to accept discharge instead of obligating the additional service that was required for him to accept advancement to chief and transfer orders. The record shows that he submitted his request for HUMS on February 7, 2011, and his request was still being processed when the hearing occurred on February 18, 2011. Whether his request would have been granted is unclear because although his command and a Special Needs Program Manager strongly supported his request, a HUMS coordinator at PSC recommended denying it. However, it is clear that the applicant withdrew his request for HUMS on February 25, 2011, and he has not shown that he ever renewed it. Accordingly, the Board finds that the applicant has not proven by a preponderance of the evidence that the Coast Guard ever erroneously [REDACTED] his request for HUMS. [REDACTED]

9. Although the applicant proved by a preponderance of the evidence in the record that a Coast Guard family advocacy advisor informed his wife about his transfer orders in February 2011, he has not proven by a preponderance of the evidence that this “leak” caused his loss of physical custody of his son or his decision to leave active duty in July 2011. The record shows that the applicant voluntarily chose not to obligate additional service in July 2011, presumably so that he could remain close to his son, and this decision caused his discharge in pay grade E-6 on July 26, 2011. He has not proven by a preponderance of the evidence that his discharge as an E-6 was erroneous or unjust or that he should be reimbursed for his legal fees.⁵

10. Accordingly, the applicant’s requests should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁵ 10 U.S.C. § 1552(c)(1) states that the Secretary “may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another’s service.” Therefore, the Board is only authorized to order the Coast Guard to pay amounts that become due to an applicant under other statutes as a result of corrections the Board makes to an applicant’s record.

ORDER

The application of former [REDACTED] [REDACTED] USCG, for correction of his military record is denied.

December 19, 2014

