

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-196



FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on September 30, 2014, upon receipt of the completed application, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated July 10, 2015, 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 asked the Board to upgrade her RE-4 reentry code on her DD 214, which makes her ineligible to reenlist. She was separated on December 5, 2012, with a general discharge under honorable conditions after less than 2 years of service. The narrative reason for separation shown on her DD 214 is "misconduct" pursuant to COMDTINST M1000.4, Ch. 1.B.17., which authorizes discharge following the commission of a serious offense under civil or military law.

The applicant alleged that she was discharged because of an altercation with an ex-girlfriend that resulted in police involvement. She claimed that the "case went to trial and the bases of the case or abuse were never found and found to be fabricated in the story told to police." She alleged that during a captain's mast at which she received a non-judicial punishment (NJP) for absence without leave, her CO did not mention a possible discharge for the alleged assault charges.

The applicant alleged that she was told by superiors that if she were charged with a felony an automatic discharge would result. She alleged that she was charged with a "misdemeanor that wasn't based on physical assault but simply on an argument and the fact that we once dated." The applicant alleged that on the last day of her trial her Senior Chief approached her and informed her that she would be discharged. The applicant argued that the case was essentially a case of revenge by her ex-girlfriend.

The applicant alleged that when she received the paper work for her discharge, she was supposed to be given time to appeal. She alleged that she received the paperwork at 3:30 pm and was told to return it by 7 am the following morning.

The applicant alleged that her Senior Chief harassed her because of her sexual orientation and that he had it out for her. She claimed that multiple times the Senior Chief misinformed the main office that she was charged with a Felony Class 2. She alleged that the Senior Chief verbally sexual harassed her and another fireman and verbally harassed her while she was in jail and being visited by her girlfriend.

In support of her allegations, the applicant submitted two letters of recommendation—one from a fellow fireman and another from a Damage Controlman 1st Class, who had been her superior in the Coast Guard. Both highly praise her performance and work ethic but neither mentions any harassment or sheds any light on the applicant's alleged misconduct.

SUMMARY OF THE APPLICANT'S MILITARY RECORDS

The applicant enlisted in the Reserve under the Delayed Enlistment Program on December 16, 2010. She enlisted in the regular Coast Guard on January 25, 2011, as a fireman (FN/E-3).

On March 5, 2011, the police were called to the applicant's residence for a reported "cold assault." At the time, the applicant co-habited her apartment with an ex-girlfriend. When the police arrived 35 minutes after the 911 call was placed by her ex-girlfriend, the applicant had left the scene. The police interviewed the ex-girlfriend and produced the following Incident Report:

[The ex-girlfriend] specified that she and [the applicant] ended their romantic relationship in July of 2011 but decided to remain in their shared residence together. ... On the date in question, [the ex-girlfriend] said that [the applicant] grew upset with her upon learning that she is dating someone new. Following a brief argument in their apartment, [the ex-girlfriend] decided to go outside (complex parking lot/carport) to smoke a cigarette and call a friend on her cell phone. While conversing on her phone, [the ex-girlfriend] said that [the applicant] followed her outside and approached while crying. [The ex-girlfriend] next stated that [the applicant] (without provocation) began to punch her repeatedly in her head/face using a closed fist. [The ex-girlfriend] said that [the applicant's] punches/attack caused her to drop her cell phone on the ground....

According to [the ex-girlfriend], [the applicant] briefly stopped her assault to ask questions and demand answers from her regarding her new love interest. When [the ex-girlfriend] didn't provide [the applicant] with the response/info she wanted, she continued her assault.

Following her first series of questions [the ex-girlfriend] said that [REDACTED] next grabbed her by her head/hair, [the applicant] then began to repeatedly knee [the ex-girlfriend] in her upper legs/quads.

[The ex-girlfriend] then told [the police] that [the applicant] wrapped her left hand around her neck and began to squeeze (while facing her). [The ex-girlfriend] elaborated, saying that she felt as though she could not breathe because [the applicant] managed to "cut off her airway". [The ex-girlfriend] struggled and was eventually able to escape [the applicant's] grasp. [The ex-girlfriend] estimated that the physical altercation between she and [the applicant] lasted approximately 5 – 10 minutes.

While [the ex-girlfriend] attempted to pick up the phone that [the applicant] knocked out of her hand, [the applicant] (admittedly) took the battery of the phone and threw it across the parking lot. [The ex-girlfriend] also alleged that [the applicant] stepped on the phone while it was on the ground.

[The ex-girlfriend] said that [the applicant] got into her vehicle and fled after [the ex-girlfriend] advised that she was dialing 911 to report the assault.

The ex-girlfriend complained of pain to her upper legs, neck, head, and right hand. The officer also noted some minor marks/redness to her neck. The officer wrote in his report that the applicant was contacted by telephone later that day. He reported that the applicant acknowledged the physical altercation that had taken place in the parking lot. However, the applicant denied starting the incident, claiming it was a mutually instigated altercation. The officer wrote that when he asked to meet in person, the applicant declined, mentioning that she was staying at a friend's place and had work in the morning. The officer informed her that he had probable cause for her arrest, and again the applicant declined to meet. A BOLO was issued for the applicant. The Incident Report cited Assault II – DV Strangulation and Malicious Mischief III – DV under the Offense Information section.

A Supplemental Incident Report dated March 7, 2012, states that at the county jail, after being informed of her rights, the applicant gave the following statement:

[The applicant] stated that she was uninjured with the exception of some minor marks on her right hand. . . . When asked, [the applicant] acknowledged that it was possible her hand had at some point wound up around [her ex-girlfriend's] throat. [The applicant] stated that she never intended to choke/strangle [her ex-girlfriend]. [The applicant] also attributed [the ex-girlfriend's] breathing difficulties to her asthma.

The applicant was held in jail for 15 days from March 7 to March 22, 2012. The applicant had 12 days of accumulated leave, which her command authorized her to take, but when her leave ran out on March 19, the applicant became absent without leave (AWOL).

On June 12, 2012, the applicant received NJP for being AWOL from March 19 to 22, 2012, pursuant to Article 86 of the UCMJ. She was reduced in rate to fireman apprentice (E-2), but the reduction in rate was suspended on condition of good behavior for six months.

On August 8, 2012, the applicant was convicted of Assault IV-DV in a State Superior Court and sentenced to 15 days' time served.

On October 24, 2012, the applicant acknowledged that she had been notified in writing that she was being considered for a general discharge and that she had the right to consult with a lawyer and should initiate a consultation within five days of receipt of the notification.

On November 5, 2012, Commander, Personnel Service Center, Enlisted Personnel Management, authorized the applicant's separation pursuant to Article 1.B.17 of the Military Separation Manual, for commission of a serious military or civilian offense.

On December 5, 2012, the applicant received a general discharge with an RE-4 reentry code.

APPLICABLE REGULATIONS

Article 1.B.17. of the Military Separations Manual authorizes separations for misconduct. Article 1.B.17.b.(3) states the following:

Commander (CG PSC) may direct discharging a member for misconduct [for the] ... Commission of a Serious Offense. Commission of a serious offense does not require adjudication by non-judicial or judicial proceedings. An acquittal or finding of not guilty at a judicial proceeding or not holding non-judicial punishment proceeding does not prohibit proceedings under this provision. However, the offense must be established by a preponderance of the evidence. Police reports, CGIS reports or investigation, etc. may be used to make the determination that a member committed a serious offense.

Article 1.B.17.b.(3).(a) states that “[m]embers may be separated based on commission of a serious military or civilian offense when: (1) The specific circumstances of the offense warrant separation; and (2) The maximum penalty for the offense or closely related offense under the UCMJ and Manual for Courts-Martial includes a punitive discharge.”

Article 1.B.2.g. of the Military Separations Manual describes the possible reentry codes that may be assigned to a member who has been discharged and their meaning:

- (1) RE-1 Eligible for reenlistment.
- (2) RE-2 Ineligible for reenlistment due to retirement.
- (3) RE-3 Eligible for reenlistment except for a disqualifying factor
- (4) RE-4 Not eligible for reenlistment.

Under the Separation Program Designator Handbook, enlisted members discharged due to misconduct for commission of a serious offense may only be assigned an RE-4 reentry code.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application is timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in his record, as required by 10 U.S.C. § 1552(b).

2. The applicant alleged that her RE-4 reenlistment code, which bars her from reenlisting in any military branch, is erroneous and unjust and should be upgraded because, although she was an excellent FN and a hard worker, her command railroad her discharge because of a false criminal charge and for being a homosexual. In considering allegations of error and injustice, the Board begins its analysis in every case 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.¹ Absent evidence to the contrary, the Board presumes that Coast Guard officials have carried out their duties “correctly, lawfully, and in good faith.”²

3. The applicant alleged that because she was convicted of Assault IV, a misdemeanor, and not a felony, she should not have been discharged. The Board notes that the applicant was initially charged with Assault II – DV Strangulation, a Class B felony, and Malicious Mischief III, a gross misdemeanor. Whether these charges were dropped or the applicant was acquitted is unclear because the record contains no documents relating to the applicant’s trial. However, even assuming that the applicant was acquitted of the felony charge, Article 1.B.17.b.3. of the Military Separations Manual states, “An acquittal or finding of not guilty at a judicial proceeding or not holding non-judicial punishment proceeding does not prohibit proceedings under this provision.” The offense need only be established by a preponderance of the evidence to initiate a discharge.

4. The record shows that on September 10, 2012, the applicant’s CO notified her that he was initiating her discharge pursuant to Article 1.B.17.b.3. of the Military Separations Manual. Under this article, Commander, Personnel Command may discharge a member for misconduct if the member has committed a “serious offense,” which is an offense for which (1) the circumstances warrant separation and (2) the maximum penalty authorized under the UCMJ includes a punitive discharge. The maximum punishment for a violation of Article 128, Assault, includes a bad conduct discharge. The preponderance of the evidence shows that the applicant put her hand around her ex-girlfriend’s neck and choked her outside of their residence. The applicant did not dispute that she put her hand around the ex-girlfriend’s neck but attempted to excuse her actions by denying an intent to strangle the woman and attributing her breathing trouble to asthma. In light of these facts, the Board is persuaded that the circumstances of the applicant’s offense warranted processing her for separation. The applicant received timely notification of the proposed discharge and of her right to consult counsel. Therefore, the Board finds that the applicant’s CO committed no error or injustice in initiating the applicant’s discharge for misconduct in accordance with Article 1.B.17.b.3. of the Military Separations Manual. Because she was discharged for misconduct, under the SPD Handbook, the RE-4 reentry code is the only authorized reentry code.

5. The applicant alleged that she was subject to harassment by her supervisor, a Senior Chief, because of her sexual orientation. Assuming this allegation is true, there is no evidence that it caused or adversely influenced her discharge. The decision to discharge her for misconduct following her conviction for assault was made by her CO, and there is no evidence that her Senior Chief was involved in her discharge in any way.

6. The applicant has not proven by a preponderance of the evidence that her RE-4 reentry code is erroneous or unjust. Accordingly, the applicant’s request should be denied.

¹ 33 C.F.R. § 52.24(b).

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

ORDER

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

July 10, 2015

