

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2015-025**



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**FINAL DECISION**

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case upon receipt of the applicant's completed application on February 10, 2015,<sup>1</sup> 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 December 18, 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, a former [REDACTED] (E-5), who received an honorable discharge with a separation code of GKA (pattern of misconduct) and a reentry code of RE-4, asked the Board to correct his DD 214 by changing the separation and reentry codes. The applicant also asked to be reinstated in the Coast Guard in his former position.

The applicant, who is Hispanic/Latino, alleged he was discriminated against based on his race, ethnicity, and country of origin when he was reduced in rank after being falsely charged with intentionally contaminating food and transferred from his cutter to a shore unit. Furthermore, the applicant alleged that he was harassed, and other members of the crew, who were not Hispanic, did not receive the same punishments for the same alleged offenses that the applicant was accused of.

The applicant alleged that he was discriminated against due to his race by his Commanding Officer (CO) and Executive Officer, who held a personal grudge against the applicant.

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<sup>1</sup> The BCMR received the application on January 3, 2012. The Chair reviewed it, noted the applicant's reference to an EEO investigation, and sent the applicant a letter asking him to advise her when he had exhausted his potential administrative remedy in the EEO process or, if his case had been closed, to provide the Board with a copy of the decision. No response to this letter was received, and the applicant did not respond to a follow-up phone call in July 2014. However, the applicant did respond to an email in February 2015, stating that he had never received a decision on his EEO complaint but that he wanted his BCMR application to be processed.

He stated that he was also discriminated against when he was forced to sign an untimely set of evaluations and told that failure to do so would result in a negative CG-3307 (Administrative Remarks; "Page 7") being entered into his file.

In support of his allegations, the applicant submitted copies of documents in the investigation of his discrimination complaint, which is summarized below, and a statement signed by a chief petty officer (CPO) aboard the cutter, who served as Chief of the cutter's Main Propulsion Division from September 2008 through May 2011. The CPO stated that racial tensions existed aboard the cutter, and the command cadre did not mitigate them. The CPO stated that the CO of the cutter should not have conducted the mast himself because the CO was an alleged victim of the applicant's misconduct, and so it was impossible for the CO to be fair and objective. The CPO stated that the CO had a "voice of anger and ... demeanor of revenge" at the end of the mast, when he ordered the applicant to leave the cutter immediately, without gathering his belongings. The CPO stated that he had witnessed other masts for serious misconduct but had never seen the CO "lash out" in this way. The CPO stated that the applicant was treated unfairly and differently at mast because of his race and racial tension on the cutter. The CPO noted that he himself had filed a discrimination complaint with a positive resolution. He also supported the applicant's claim that he was manipulated into signing a Page 7 for his performance evaluation. The CPO alleged that there is no evidence to substantiate the claims that the applicant demonstrated "a pattern of misconduct."

### SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on February 11, 2002; trained as a food service specialist (FS); and earned advancement to FS1/E-6 in just seven years.

On his Enlisted Employee Review (EER) dated November 30, 2009, the applicant received mostly mediocre marks and was not recommended for advancement. The cutter's Supply Officer presented the applicant with a Page 7 with a list of tasks he needed to accomplish to help him acquire the skills needed to become a chief petty officer (FSC/E-7).

On February 9, 2010, the CO initiated an investigation to look into allegations that the applicant violated the Uniform Code of Military Justice (UCMJ) by intentionally contaminating food served in the officers' wardroom on his cutter. The applicant was informed of his rights and of the charges against him. He declined to answer questions or make a statement and asked to consult a lawyer. The investigator interviewed many crewmembers, including three who worked in the mess with the applicant and reported that they had seen him intentionally contaminate the food served to the officers. The three crewmembers reported the following incidents of misconduct:

- In December of 2009, FS3 K claimed, the applicant ordered him to return food dropped on the galley floor to a serving platter that would then be served in the wardroom. FS3 K thought the applicant was joking, but the applicant repeated the order and the FS3 K did as he was told and the food was served in the wardroom. Additionally, in December 2009, FS3 K witnessed the applicant spit into a serving bowl of soup and another food dish that was to be served in the wardroom. FS3 K stated that the applicant asked an

MK3 to block the security camera with his hand while the applicant contaminated the food and the MK3 complied. Finally, FS3 K witnessed the applicant contaminate a set of serving tongs by placing them down his pants and then giving them to the wardroom mess cook to use in the wardroom. FS3 K claimed that after every incident, the applicant would say that he did not care because he hated officers.

- Similarly, on at least four occasions in December 2009, SN1 C, while serving as the wardroom's mess cook, witnessed the applicant contaminate silverware and plates used in the wardroom by licking them. SN1 C also witnessed the applicant drink out of water pitchers and spit back into the pitcher two or three times.
- Another witness, an FS3, claimed that on at least three occasions during December 2009 or early January 2010, he witnessed the applicant spit into the hollandaise sauce that was to go out with the eggs benedict requested by an officer. The officer confirmed the food order as per the menu that day.
- The three witnesses stated that they had not reported these incidents at the time because the applicant was verbally abusive and intimidating.
- Several members who worked in the mess denied having seen the applicant contaminate the food.

On February 9, 2010, the investigating officer issued his report and recommended that the charges against the applicant be disposed of at mast, instead of court-martial. The investigator also recommended taking the MK3 to mast although the MK3 strongly denied having ever knowingly blocked the camera so that the applicant could contaminate food. The command did not punish the MK3 at mast apparently because there was only one witness against him and, even if the MK3 had blocked the camera at the applicant's direction, he would have been following the order of a superior petty officer in doing so and did not necessarily know what the applicant intended to do.

On March 3, 2010, the applicant's CO took the applicant to mast and awarded him non-judicial punishment (NJP) for violating Articles 89 (disrespect towards a superior commissioned officer), 91 (disrespect towards an officer), and 92 (dereliction of duty) of the UCMJ. The applicant's punishment as a result of his violations consisted of an oral admonition and reprimand, reduction in grade from FS1/E-6 to FS2/E-5, forfeiture of one-half month's pay for two months, and 60 days' restriction to the base (his next unit). However, the CO suspended the forfeiture of pay for six months and, on March 11, 2010, the applicant requested and the CO approved a deferral of the unserved restriction pending the applicant's appeal, which was decided on March 31, 2010. The reviewing authority rejected the applicant's contention that the punishment imposed was disproportionate to his alleged actions based on the serious nature of the misconduct and denied his appeal.

The NJP was also documented with a disciplinary EER, dated March 3, 2010, on which the applicant received very low marks in most of the performance categories, such as Safety, Directing Others, Responsibility, Setting an Example, Integrity, Loyalty, and Respecting Others; an unsatisfactory conduct mark; and a mark of not recommended for advancement.

On March 5, 2010, the applicant appealed his NJP on the grounds that the punishment was disproportionate to the alleged offenses. He complained that there was no physical evidence of the alleged misconduct; that his CO was an alleged victim but nonetheless awarded him the punishment; and that other members who had committed worse offenses had received less punishment. The applicant stated that the allegations were made against him only because of a disgruntled subordinate he had corrected on a work-related matter.

On March 10, 2010, the CO notified the applicant that he intended to initiate the applicant's discharge for misconduct. The applicant consulted a lawyer, submitted a statement, and requested an Administrative Discharge Board (ADB). In his statement, dated March 13, 2010, the applicant described his hard work and accomplishments at his prior units, his training and enthusiasm for his job, his collateral duties, and his personal sacrifices for his military career. He asked to remain in the Coast Guard for both himself and his family.

On March 31, 2010, the Area Commander denied the applicant's NJP appeal, finding that his punishment was neither unjust nor disproportionate.

While his appeal was pending, the applicant had sent an informal complaint of discrimination and harassment to an EEO counselor. He alleged that he was being discriminated against based on his national origin. Because an informal settlement was not reached, on April 13, 2010, the applicant was issued a Notice of a Right to a File Discrimination Complaint. On April 16, 2010, the applicant filed a formal complaint with the same allegations of discrimination included in his BCMR application. He also alleged that he was not the only person in the mess during the alleged misconduct, but he was the only one punished.

On April 23, 2010, the CO recommended that the applicant be administratively discharged from the Coast Guard for misconduct. The CO described the applicant's alleged offenses, stated that the applicant "is unfit to fulfill his duties and responsibilities" as an FS, and noted that the applicant had a right to a hearing before an Administrative Separation Board (ASB) because he had more than eight years of service.

On July 8, 2010, the ASB convened to hear the applicant's case. The applicant was represented by two military attorneys, but the applicant called no witnesses. The ASB found that the applicant "provided several inconsistent answers" to the board members' questions, could not explain or support his allegation that he had an adversarial relationship with one of the three witnesses against him; and that the applicant should not be trusted to continue as an FS in the Coast Guard. The ASB recommended that the applicant receive an honorable discharge for commission of a serious offense.

On September 16, 2010, the CO of the cutter concurred with the findings and recommendation of the ASB and forwarded the proceedings for further review.

On October 29, 2010, the Area Commander recommended discharging the applicant after reviewing the proceedings. On November 2, 2010, a JAG officer reviewed the proceedings and found that they had been conducted in compliance with the ASB Manual and the Personnel Manual and that the recommendation was supported by sufficient evidence. On January 21,

2011, the final reviewing authority for the ASB concurred with the ASB's report and recommendations.

On January 26, 2011, the applicant amended his EEO complaint to include his pending separation; his command's delay of his discharge proceedings after he decided to dispute his discharge; a superior's alleged response of "Let him do whatever. We don't care.," after being advised that the applicant had filed an informal discrimination complaint; the command's failure to process his request to be "ADD assigned," rather than temporarily assigned, to his current unit; and the command's failure to process his request for restoration of rank.

On January 27, 2011, Commander, PSC issued orders for the applicant to be honorably discharged due to a "pattern of misconduct" in accordance with Article 12.B.18. of the Personnel Manual. The applicant was honorably discharged on February 24, 2011, with a GKA separation code denoting a "pattern of misconduct" and an RE-4 reentry code (not eligible to reenlist).

The EEO investigation was completed on May 9, 2011. The Report of Investigation (ROI) shows that the applicant made essentially the same complaints that are in his BCMR application. The investigator had interviewed the applicant's chain of command and two other crewmembers named by the applicant, both of whom stated that they believed that the applicant had been punished disproportionately severely because he is Latino and that they had seen white crewmembers receive what they considered to be less and insufficient punishment for worse offenses. The investigator had also reviewed statistical information about the demographics and punishments of members awarded NJP aboard the cutter.

### **VIEWS OF THE COAST GUARD**

On August 17, 2015, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board grant partial relief. In so doing, he adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

PSC noted that the applicant was not timely filed and so argued that the Board should conduct only a cursory review. Regarding the merits of the case, PSC stated that the applicant's claims have been thoroughly investigated and "all reports unanimously concluded that the applicant was properly discharged. These reviews also concluded that the punishment awarded at mast was neither unjust nor disproportionate or due to the applicant nationality. PSC stated that the applicant's chain of command acted in accordance with policy and that the applicant has not proven that his NJP and discharge were erroneous or unjust. PSC recommended that the applicant's request for reinstatement be denied.

Regarding the narrative reason and separation code on the applicant's DD 214, PSC noted that the final reviewing authority had authorized a discharge for commission of a serious offense, which corresponds to separation code GKQ and "Misconduct" as the narrative reason for separation. Therefore, the applicant may have received GKA and "Pattern of Misconduct" as a result of administrative error. PSC recommended that the Board grant partial relief by

correcting the applicant's separation code to GKQ and his narrative reason for separation from "Pattern of Misconduct" to "Misconduct."

### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On August 27, 2015, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond in writing within thirty days. No response was received.

### **APPLICABLE LAW**

Under Article 12.B.18. of the Personnel Manual in effect in 2011 (COMDTINST M1000.6A), the Commandant may discharge members for misconduct, a pattern of misconduct, or commission of a serious offense. Article 12.B.18.d. states that any member with eight or more years of total active and inactive military service is entitled to an ASB if the CO is processing the member for discharge due to misconduct.

Article 12.B.32.b. provides that a member with more than eight years of service who is being administratively discharged for misconduct has the right to consult counsel, to be notified of the basis for the proposed discharge, to be informed of the potential prejudice and deprivation of veterans' benefits, to submit statements, and to be represented by counsel before an ASB.

### **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.
2. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice in his record. The applicant was discharged in 2011 and filed his application in January 2012, but then did not respond to the BCMR staff's inquiries until February 2015. According to the applicant, he never learned of any resolution of his EO complaint, and there is none in the record before the Board. Therefore, the Board finds that the application was timely filed although the applicant did not respond to the staff's communications until February 2015.
3. The applicant alleged that his NJP and discharge were the unjust result of discrimination by the command of his cutter. 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.<sup>2</sup> 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."<sup>3</sup>

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<sup>2</sup> 33 C.F.R. § 52.24(b).

<sup>3</sup> *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. The applicant has not proven by a preponderance of the evidence that his NJP was erroneous or unjust. While the record contains statements from two other members claiming that they believe his punishment was unjust and overly harsh because of his nationality, the preponderance of the evidence shows that the applicant had grossly abused his position of trust in the mess by contaminating the food served to the officers aboard the cutter. Three other crewmembers testified to several different instances of intentional contamination. There is no evidence that the command awarded less punishment to anyone else who had purposefully contaminated food. Given the nature of his offenses, the applicant could not expect to remain aboard the cutter as an FS with continuing access to the officers' food. Nor, given his apparent complete disregard for food safety rules, should he have expected to retain his rank as an FS1/E-6 or any FS billet. The Board finds that the Coast Guard had ample reason to discharge the applicant, and there are no grounds for reinstating him in the Service.

5. The applicant asked the Board to correct his separation code, GKA, and narrative reason for discharge, "Pattern of Misconduct." The record shows that the applicant received due process in his discharge proceedings. His CO recommended that he be discharged for commission of a serious offense (separation code GKQ) and notified him of that fact. The ASB recommended that he be discharged for commission of a serious offense, and the final reviewing authority approved his discharge for commission of a serious offense—not for a pattern of misconduct. Under the Separation Designator Code Handbook, members discharged for commission of a serious offense following an ASB are supposed to receive the GKQ separation code and "Misconduct" as their narrative reason for separation. Therefore, the Board agrees with the Coast Guard that the applicant's DD 214 should be corrected in this way.

6. The Board notes that the applicant made many allegations about racial tension and discrimination aboard the cutter, but he has not submitted substantial evidence showing that his NJP and discharge were a result of discrimination. Nor did he submit sufficient evidence to show that he was subject to a hostile work environment.<sup>4</sup> Even if he had, a hostile work environment would not justify contaminating others' food.

7. Accordingly, the applicant's request for reinstatement should be denied, but the Board will direct the Coast Guard to correct his separation code to GKQ and his narrative reason for separation to "Misconduct."

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<sup>4</sup> U.S. Coast Guard, COMDTINST M5350.4B, Equal Opportunity Manual, Chap. 3.A.3.a. (Nov. 1, 2005) ("Although the statutory prohibitions against discrimination in civilian employment do not apply to members of the uniformed services, it is the Coast Guard's policy to provide its military members equal opportunity during their military service and access to the rights, responsibilities, and privileges of such service, regardless of: Race; Color; Religion; Sex; National origin; or Participation in EO related activities."). Military officers are not protected from "hostile work environments" under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-16; *see Roper v. Dep't of the Army*, 832 F.2d 247, 248 (2nd Cir. 1987) (finding that "the Feres doctrine prevents members of the military from challenging military decisions through actions brought under Title VII"). However, "it is the Coast Guard's policy to apply the same protections [in Title VII] to the military workforce." EOM, Chap. 3.A.5.b. "To meet the definition of a hostile environment, the harassment must be so severe and pervasive that a reasonable person would view the environment as hostile, offensive, or abusive." *Id.* at Chap. 3.A.5.d.

**ORDER**

The application of former [REDACTED] USCG, for correction of his military record is granted in part. The Coast Guard shall correct his DD 214 to show a separation code of GKQ and "Misconduct" as the narrative reason for separation. No other relief is granted.

December 18, 2015

Date

