DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-097

FINAL DECISION

This is a proceeding under the provisions of section 1552 of Title 10 and section 425 of Title 14 of the United States Code. It was docketed on June 16, 2003, upon the Board's receipt of the applicant's complete application for the correction of his military record.

This final decision, dated April 29, 2004, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked that his military record be corrected as follows:

To remove all records of any nature, which in any manner pertain to [his] being accused of, and convicted of any offense of which he was acquitted by the trial court, or which was set aside by the Coast Guard Court of Criminal Appeals.

To reflect that [he] remained on continuous active duty from the date of his initial enlistment in the Coast Guard (26 January 1981) until the date of his discharge on 31 October 2001.

To reflect that [he] was retired from the Coast Guard on 31 October 2001 and to award [him] back retirement pay retroactive to 31 October 2001.

To correct the Certificate of Release or Discharge from Active Duty to properly reflect the dates of service, and to reflect separation authority of [Personnel Manual], Article 12.B.2.f.(1)(a)(2) [expiration of enlistment], re-

entry code of RE1 and narrative reason for separation of Retirement from the Coast Guard.

For other relief . . . as may be deemed appropriate under the circumstances.

BACKGROUND

The applicant enlisted in the Coast Guard on January 26, 1981. He was promoted regularly and eventually reached pay grade E-6 (petty officer first class).

In a May 1997 General Court-Martial, the applicant was convicted of attempted forcible sodomy, maltreatment by sexual harassment, indecent assault, and solicitation to commit sodomy as an indecent act. The applicant's sentence included confinement for 45 days, reduction in rank to pay grade E-3, and a discharge from the Coast Guard with a bad conduct discharge (BCD). The charges grew out of a single incident and involved a petty officer third class (E-4), a rank two pay grades below that of the applicant.

On July 3, 1997, the applicant completed his 45 days of confinement and was placed on appellate leave. [1]

On June 29, 2001, the United States Coast Guard Court of Criminal Appeals, (CGCCA) disapproved all the guilty findings except the lesser included offense of attempt to commit consensual sodomy, on the ground that evidence offered in support of the other offenses did not persuade the Court beyond a reasonable doubt that the applicant was guilty of the offenses. The court reassessed the sentence and approved the 45 days of confinement and reduction to pay grade E-5. The BCD was set aside. See United States v. Matthews, CGCMG 0128 (2001). The incident for which the applicant was court-martialed occurred in June 1996. The CGCCA's evaluation of the evidence provides background:

> In June 1996, [the applicant] and DC3 A [alleged victim] were sent on temporary duty to another state for several days in order to perform maintenance work on a Coast Guard ship located there. During this temporary duty they stayed in a local motel. After completing their work one afternoon, [the applicant] asked DC3 A if she would like a ride to the local beach. They drove to the beach in the government truck they were

[1] Appellate leave is the "member's leave of absence (excess absence) from the Coast Guard without pay and allowances, unless he or she has accrued earned leave, while legal review of the court-martial occurs." See Article 7.A.21.e. of the Personnel Manual.

using for transportation. Once at the beach they went their separate ways until it was time to depart. Before returning to their motel, they had a meal together in a local beach bar. They each had several beers with their food, and DC3 A made two telephone calls including a call to her fiancé with whom she argued.

What happened upon their return to the motel is in dispute. However, CGCCA found no dispute with respect to the following facts:

> (1) DC3 A went to the [applicant's] room voluntarily on her own initiative; (2) Appellant at some point exposed his penis to DC3 A; (3) DC3 A did not leave or attempt to leave when Appellant exposed himself to her; (4) there were some verbal and physical overtures for DC3 A to engage in oral sexual contact with [the applicant]; (5) no oral sexual contact occurred. It is clear that by his undisputed actions with a subordinate in his chain of command, [the applicant] violated the general regulation against fraternization. However, [the applicant] was not charged with violating this regulation. It is also clear that [the applicant] attempted to have DC3 A engage in oral sex with him, notwithstanding Appellate Defense Counsel's argument to the contrary.
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> Key facts that are in dispute include whether: (1) [the applicant] lowered his shorts and exposed his penis without encouragement, or DC3 A invited this conduct by asking to see his penis after she had displayed the tattoo on her pubic mound [to the applicant]; (2) [the applicant] tried to force DC3 A to engage in oral sex . . . or they engaged in mutual foreplay that was never consummated; (3) DC3 A's wrists were pinned by [the applicant's] knees and he attempted to force his penis into her mouth as she lay on the bed, or [the applicant] simply lay on top of her as they "bumped and grinded" while still wearing their clothes; (4) DC3 A caused [the applicant] to stop by forcefully biting him on his shoulder, or DC3 A laughed and gave him a kiss after [the applicant] stopped with the observation that "this isn't going to happen."

* * *

> Ultimately, this case boils down to a swearing contest between the two involved parties. Consequently, the resolution of the disputed fact inevitably requires an assessment of these witnesses' credibility. As already noted, the character witnesses for [the applicant] established his reputation for outstanding performance and dependability. Their assessment of his veracity stood in sharp contrast to the testimony concerning DC3 A's character. Her co-workers, even a friend and former

> roommate, all expressed serious reservations about her truthfulness. We find the stark contrast between the assessments of those who knew them to be especially significant. While we will never know with certainty what actually happened in [the applicant's] motel room, we have concluded there is ample reason to doubt DC3 A's version of those events. We are constrained to disapprove any charged violation for which we are persuaded there is reasonable doubt. Having considered the record in this case and the evidence that supports the trial court's findings, it is clear that, based on his own testimony, Appellant demonstrated remarkably poor judgment, violated the service regulation governing interpersonal relationships, and attempted to engage in oral sodomy with DC3 A. However, we do not find the most serious charges in this case proven beyond a reasonable doubt.

On August 15, 2001, the applicant submitted a request for reinstatement in the Coast Guard at pay grade E-6. The request was denied without explanation on August 29, 2001.

On September 17, 2001, the applicant's appellate defense counsel submitted a Request for Redress on behalf of the applicant requesting back pay, reenlistment or, in the alternative, voluntary retirement.

On September 28, 2001, the Commandant notified the applicant that he was eligible to join the Thrift Savings Plan.

On October 17, 2001, Commander, Coast Guard Personnel Command (CGPC) replied to the applicant's September 17, 2001 Request for Redress. CGPC told the applicant that he would be paid back pay and allowances as a DC2 subject to statutory setoffs. With respect to retirement, CGPC stated "We have found no statutory basis to consider . . . extensive periods of appellate leave as "creditable service" toward a twenty-year retirement."[2] CGPC further advised the applicant that his last day of active service occurred on July 3, 1997, when the applicant commenced appellate leave, at which point he had sixteen years, three months, and five days of active service.

On October 31, 2001, the applicant was issued an Honorable Discharge Certificate, which said, "Certificate is awarded as a testimonial of Honest and Faithful Service." The applicant was also given a DD Form 214 showing his separation date as

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[2] The Coast Guard sought an advisory opinion from the Department of Defense, Office of Hearings and Appeals (DOHA), to confirm the fairness and reasonableness of its decision not to reinstate, reenlist, or retire the applicant. DOHA determined that DOHA lacked authority to reinstate or reenlist the applicant. On the issue of retirement, DOHA stated that "we do not see how the claimant's period of appellate leave, particularly the excess leave portion, qualifies as active service for the purposes of 14 U.S.C. 355 for the simple reason that the claimant did not perform any service for the Coast Guard during that period."

October 31, 2001, his net service for the recent enlistment as six years, four months, and 11 months, his separation code as JND (separation for general/miscellaneous reasons), and his reenlistment code as RE-4 (not eligible for reenlistment). The DD Form 214 noted that the applicant had incurred lost time from June 6, 1997 to October 31, 2001.

On February 7, 2002, the applicant's civilian attorney requested the applicant's reinstatement to active duty as an E-5 rather than an E-6. On August 5, 2002, CGPC responded to this request stating, "The decision to discharge [the applicant] was administrative and based on the provisions of Article 7.A.21.h(3) of the Coast Guard Personnel Manual." Also, CGPC corrected the DD Form 214 by issuing a DD Form 215 showing date as July 2, 1997, the date the applicant was placed on appellate leave, as the date of discharge.

APPLICANT'S ALLEGATIONS

The applicant argued that he has been wrongfully denied his entitlement to retirement from the Coast Guard, as well as assorted other benefits. In this regard, the applicant stated that the Coast Guard summarily discharged him on October 31, 2001, in violation of 12.B.5.c. of the Personnel Manual, which provides that a member of the Coast Guard with more than eight years of service cannot be separated from the Coast Guard unless he is afforded the right to appear before a reenlistment board. The applicant did not have a reenlistment board. He argued there is nothing to support any contention that his command would have processed him for administrative separation based solely upon a conviction for attempted consensual sodomy.

The applicant argued that time on appellate leave is creditable service for retirement. In this regard he stated that Article 12.C.2 of the Personnel Manual provides that for enlisted members, active service in the Coast Guard is creditable toward retirement. He further stated the following: "10 U.S.C. § 101 (d)(3) defines 'active service' as being synonymous with 'active duty.'" He stated that at the time of his court-martial, he had honorably served on active duty for a period of 16 years, five months, and 27 days. At that time, he was also serving on a six-year enlistment, which was scheduled to terminate on January 25, 2001.

The applicant argued that the fact that certain actions by the Coast Guard after his BCD had been set aside support his contention that he is entitled to reinstatement and/or retirement. Such actions consisted of issuing him a discharge certificate with an October 31, 2001 separation date, paying him for the period he was on appellate leave, and advising him that he was eligible for the Thrift Savings Plan on September 28, 2001.

The applicant contended that it is evident upon close scrutiny of the facts that but for his wrongful conviction of numerous offenses he would not have been placed on an appellate leave status on July 3, 2001. He pointed out that it took four years for the

appellate courts to review his case and during which time he was on appellate leave and subject to the control of and recall by the Coast Guard. The applicant further argued that the Coast Guard has imposed upon him the most serious consequences a member of the military can face - loss of retirement income and benefits for life--without due process.

In support of his application, the applicant noted his favorable service record. During his military career, he had been assigned to nine different commands and attended 26 different schools or training courses. He had also received the following awards and decorations:

> Good Conduct Medal x 5; Coast Guard Meritorious Team Commendation x 2; Coast Guard Achievement Medal x 2; Letter of Commendation x 3; Expert 45 Cal Pistol Medal; Expert M-16 Rifle Medal; Sea Service w/ 1 Bronze Star; Coast Guard Meritorious Unit Commendation; Coast Guard Bicentennial Unit Commendation; Joint Meritorious Unit Award; September 1993 Coast Guardsman of the Quarter; Idea Express MLCA-331-93(M) Award; Idea Express MLCA-288-93(M) Award; Coast Guard Special Operations Service Ribbon; Armed Forces Expeditionary Service Medal; [and] National Defense Medal.

VIEWS OF THE COAST GUARD

On November 17, 2003, the Board received the advisory opinion from the Judge Advocate General (TJAG) of the Coast Guard, recommending that the Board deny relief. He argued that the applicant had failed to meet his burdens of production and persuasion.

TJAG stated that under Article 7.A.21.h. of the Personnel Manual, the Coast Guard was under no obligation to reinstate or reenlist the applicant. He noted that under this provision, the applicant was granted the right to request reinstatement if his BCD were set aside, but it was up to the designated Coast Guard officer to either grant or deny that request. TJAG stated that no one has a right to remain in the Armed Force unless a specific statute or regulation grants that right. Dodson v. United States Government, 988 F.2d 1199, 1203, 1204 (Fed Cir. 1993). According to TJAG, the military officer's decision to deny the applicant's request for reenlistment is entitled to the presumption that he carried out his duties correctly, lawfully, and in good faith. Arens v. United States, 969 F.2d 1034, 1037 (D.C. Cir. 1992). TJAG argued that the nature and circumstances of the applicant's conduct that resulted in his court-martial and his remaining conviction provided more than ample information for Commander (CGPC-emp) to conclude that his reenlistment was not in the best interest of the Coast Guard.

TJAG maintained that the applicant was not entitled to an Administrative Discharge Board (ADB) or a Reenlistment Board (REB). He noted that Article 7.A.21.h of the Personnel Manual specifically provided that the applicant's presence was not required to effect his discharge, unless the Coast Guard was contemplating an Other than Honorable Discharge. According to TJAG, this provision stated that a "service record review -- without the member's presence -- is sufficient to determine the nature of a discharge based on expiration of enlistment." TJAG cited Keef v. United States, 185 Ct. Cl. 723-4 (1968), for the proposition that "an honorable discharge for the convenience of the government, without more, is within legally proper bounds when effected without a hearing," and that an "individual's release - based on unique and unusual circumstances not covered elsewhere in regulations was not stigmatizing and thus did not require a hearing." TJAG argued that Article 7.A.21.h., being a specific provision on the subject of appellate leave takes precedence over Article 12.B.5.c., which is a general discharge provision granting reenlistment boards to members with over eight years of service and who are not recommended for reenlistment.

With respect to the applicant's request for retirement, TJAG stated that the applicant has not met the statutory requirements for retirement. He stated that section 355 of title 14 of the United States Code permits a member on full time active duty to voluntarily retire with the approval of the Commandant, if the member has completed 20 years of full time active service. He argued that the applicant was neither in a full time active duty status at the time of his application for retirement, nor had he completed 20 years of full time active service at the time he requested retirement. He stated that the term "active service" as used in the statute means "full time active duty in the Coast Guard." He stated that the Decision of the Comptroller General B-167647 of October 21, 1970 and sections 101 (d)(1) and 101 (d)(3) of title 10 of the United States Code support the definition that full time active service mean full time active duty. TJAG further stated that the Comptroller General stated in B-189768 of April 15, 1975 that "full duty is attained when a member . . . is assigned to perform useful and productive duties."

TJAG stated the purpose of placing a member on extended leave is to unfetter the member from military service. He further stated as follows:

> Appellate extended leave permits the member to enter the civilian community and to pursue civilian goals. The fact that a member on appellate extended leave could be recalled to full duty is a minute formal technicality originating in the legal need to retain military control over the member solely for the purpose of completing action on the court martial. An involuntary recall to full time duty of a member on appellate extended leave is never imminent but only the remotest possibility.

TJAG argued that the limited exception under 10 U.S.C. 707 to the no pay and allowance restriction in 37 U.S.C. 502(b) for periods while on excess leave does not make the time spent on appellate excess leave full time active duty. In this regard he stated the following:

> The limited pay entitlement under 10 U.S.C. 707 did not transform appellant's excess leave into constructive full time duty, and thereby render him eligible to apply for a voluntary retirement under 14 U.S.C. § 355 and be retired. As set forth by the Comptroller General in B-126240 of April 4, 1956, a member is only entitled to the pay and allowances, and other benefits, mentioned in the [pertinent statute] and not any benefit or payment other than those specifically named in the statute. The clearly expressed remuneration under 10 U.S.C. 707 for time spent on appellate extended leave specifically provides a limited entitlement to pay and allowances, subject to civilian earnings offset, and it does not provide any benefits beyond the specific language of the statute. No provision of 10 U.S.C. 707 makes the time spent on appellate extended leave a constructive full time active duty. Once again, applicant does not have 20 creditable full time active duty years to qualify for retirement under 14 U.S.C. 355.

Finally TJAG concluded that the Coast Guard acted properly in the applicant's case, and none of the applicant's records are in need of correction.

APPLICANT'S REPLY TO THE VIEWS OF THE COAST GUARD

On January 29, 2004, the Board received the applicant's response to the views of the Coast Guard. The applicant argued that subsequent to his affirmed conviction for the attempt to commit consensual sodomy, the Supreme Court, in Lawrence v. Texas, 123 S. Ct. 2472 (2003), ruled that a private sexual act between consenting adults is not a criminal offense. The applicant argued that under current rulings of both the CGCCA and the U.S. Supreme Court, the applicant's act of attempted consensual sodomy is not now considered to be a criminal offense, but his promising career has been wrongfully terminated along with his right to retirement benefits.

The applicant requested that as alternative relief, the Board grant him retirement under the Temporary Early Retirement Authority (TERA), of section Pub. L. No. 102-484 of 23 October 1992 (as amended by section 542d, Public Law 103-337 of 5 October 1994. Under this act, the Secretary of Transportation was authorized to reduce the 20-years creditable service requirement for retirement to 15 years during the period from 20 September 1994 through 30 September 2001. The applicant stated he had 15 years of active duty on January 26, 1996.

SUPPLEMENTAL VIEWS OF THE COAST GUARD

TJAG stated that the effect of the Supreme Court's ruling in Lawrence v. Texas remains to be seen. He stated that the Coast Guard's appellate courts have not yet addressed the issue, and no other service courts have found the statute unconstitutional. He stated that the constitutionality of Article 125 (sodomy) of the Uniform Code of Military Justice (UCMJ) was argued before the Court of Appeals for the Armed Forces in the case of United States v. Marcum, 59 M.J. 131 (2003), but no opinion has been issued.

With respect to the applicant's request to be retired under TERA, TJAG stated that that authority has expired. He stated that Congress designed TERA as a tool to assist the military in meeting the downsizing requirements imposed by Congress. He further stated that TERA was never intended to be, nor was it used in the Coast Guard as an entitlement.

APPLICANT'S REPLY TO THE SUPPLEMENTAL VIEWS OF THE COAST GUARD

The applicant stated that while no Armed Forces Court has issued a decision on the criminality of sodomy, the Supreme Court has made it abundantly clear that private sexual conduct between consenting adults is not a criminal act. He also argued that while TERA was not an entitlement, "justice would permit the application of TERA retirement authority in the applicant's case, especially in light of Lawrence v. Texas."

APPLICABLE LAW AND REGULATIONS

United Stated Code

Congress implemented appellate leave at 10 U.S.C. § 876a., which states that under regulations prescribed by the Secretary concerned, an accused whose sentence includes an approved unsuspended BCD may be required to take leave until such time as appellate review and final action is taken on the case. Section 706(a) of title 10 of the United States Code orders such leave to be charged against accrued earned leave, and if there is none, such leave shall be charged as excess leave. Subsection (b)(2) of the provision states that a member may not accrue or receive pay or allowances during a period of leave required to be taken under § 876(a) of title 10. However section 707 of title 10 mandates that a member receive pay and allowances for the time spent on appellate leave if the punitive discharge is set aside and no rehearing is ordered.

Coast Guard Personnel Manual

Article 7.A.11.b. states that periods of excess leave or leave without pay are deducted from active service on a day-for-day basis.

Article 7.A.21.e states that all military members who receive a court-martial sentence, including a punitive discharge or dismissal from the Service approved by the convening authority, are placed in a required appellate leave status, with command approval. Also, it states that required appellate leave is the member's leave of absence (excess leave) from the Coast Guard without pay and allowances, unless he or she has accrued earned leave while legal review of the court-martial occurs. It further states as follows:

> Appellate leave begins the date after the convening authority approves the punitive discharge or dismissal portion of the sentence, if it does not include confinement. If the sentence includes confinement, required appellate leave begins the date released from confinement. If the convening authority or a higher authority approves, suspends, or sets aside the punitive discharge or dismissal by the date the required appellate leave is to begin, the member will not be placed in a required appellate leave status. If the Court of Military Review, Court of Military Appeals, or U. S. Supreme Court remits or sets aside the punitive discharge after the member begins appellate leave, he or she is entitled to all back pay and allowances accruing from the date he or she began appellate leave, less the period of accrued leave taken or for which paid and less deductions for earned civilian income received during leave. Civilian income includes wages, salaries, tips, other personal service income, unemployment compensation, and public assistance benefits from any Government agency.

Article 7.A.21.f. states that members who have accrued leave may elect either to be paid a lump sum for that leave or to use the accrued leave. When any accrued leave is exhausted, leave continues as leave without pay and allowances.

Article 7.A.21.h. sets forth the entitlements of members on appellate leave, as follows:

> The member and his or her dependents are entitled to Government transportation by the least costly means available from the permanent duty station to the home of record or place where he or she entered the Service.
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> If a rehearing is ordered, the member may be recalled from leave for further court-martial proceedings. Travel is at Government expense.
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> Shipment of household goods may be authorized. Once the appellate review process is completed, if it upholds, the member's punitive

> discharge or dismissal, Commander, (CGPC-epm) or (CGPC-opm) will effect the discharge. If the sentence is set aside and charges dismissed during the appellate process, dismissal or punitive discharge is remitted or set aside, or the Commandant grants clemency, the member has 15 days from the date he or she is notified (date of service) or the date of attempted service to petition Commander, (CGPC-epm) or (CGPC-opm) for restoration or reenlistment. If (CGPC-epm) or (CGPC-opm) denies the member's petition, discharge for the convenience of the Government or enlistment expiration with the type of discharge warranted by the member's service record will be directed. Unless discharge Under Other than Honorable Conditions is contemplated, the member's presence is not required to effect discharge. If the member is restored to duty or allowed to reenlist, he or she is entitled to travel at Government expense.

According to Article 7.A.21.i , before a member departs on appellate leave, the commanding officer must, among other things, ensure that the member has been given a medical examination, that a DD Form 214 has been prepared to the extent possible and the member has signed it, that the member's pay has been stopped, and the member has been administratively assigned to the Commanding Officer, Human Resources Service and Information Center.

According to Article 7.A.21.j. the member is given a letter explaining his rights and obligations to the Coast Guard while in an appellate leave status.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The applicant requested an oral hearing. The Chair, under section 52.31 of title 33, Code of Federal Regulations, recommended disposition on the merits without a hearing. The Board concurred in that recommendation.

3. In May 1997, the applicant was convicted at a General Court-Martial of attempted forcible sodomy, maltreatment by sexual harassment, indecent assault, and solicitation to commit sodomy as an indecent act. He was sentenced to a BCD, confinement for 45 days, and reduction in rate to pay grade E-3. After serving his period of confinement, he was placed on appellate leave on July 3, 1997. Approximately four years later, on June 29, 2001, the CGCCA disapproved all findings

of guilty, except for a lesser-included offense of attempted consensual sodomy. The Court reassessed the applicant's sentence, setting aside the BCD and approving only the 45 days of confinement and reduction in rate to pay grade E-5. After receiving notice of the CGCCA's decision, the applicant requested to be paid pay and allowances for the period spent on appellate leave, to be either reinstated or reenlisted on active duty, or in the alternative to be retired from active duty, with 20 years of service or with a 15-year retirement under TERA. The Commandant granted the applicant's request for pay, but disapproved his request for reinstatement, reenlistment, or retirement. On October 31, 2001, the applicant was discharged from the Coast Guard, with approximately 17 years of creditable service.

4. The Board is not persuaded by the applicant's argument that he should be reinstated/reenlisted in or retired from the Coast Guard because he was convicted only of attempted consensual sodomy and that if he had not been wrongfully convicted of attempted forcible sodomy, maltreatment by sexual harassment, indecent assault, and solicitation to commit sodomy as an indecent act, he would not have been sentenced to the BCD that led to his placement on appellate leave.

5. In making this argument, the applicant glosses over the fact that his conviction for attempted consensual sodomy occurred against an E-4 subordinate in his chain of command. While the more serious guilty findings against the applicant were set aside, the applicant was not totally exonerated and stands convicted of attempted consensual sodomy, a violation of the UCMJ. The applicant, a senior enlisted person, used very poor judgment in allowing himself to become involved in this unfortunate situation. It was within the discretion of the applicant's commanding officer (CO) to determine how to dispose of the charges against the applicant. The CO did not commit an error or injustice by referring the applicant's case to court-martial.

6. In this regard, the Board notes that the applicant was tried under the laws, rules and regulations mandated for courts-martial. Appellate leave is a part of the post-trial process if a sentence includes a punitive discharge. Congress authorized this status at 10 U.S.C. § 876a., which states that under regulations prescribed by the Secretary concerned, an accused whose sentence includes an approved unsuspended BCD may be required to take leave until such time as appellate review and final action is taken on the case. Section 706(a) of title 10 of the United States Code directs such leave to be charged against accrued earned leave, and if there is none, such leave shall be charged as excess leave. Subsection (b)(2) states that a member may not accrue leave or receive pay or allowances during a period of appellate leave required to be taken under section 876(a) of title 10. However section 707 of title 10 mandates that a member receive pay and allowances for the time spent on appellate leave if the punitive discharge is set aside and no rehearing is ordered. Accordingly, the applicant was awarded pay and allowances subject to appropriate setoffs.

7. The applicant did not have the necessary 20 years of active service for retirement, as required by 14 U.S.C. 355 and 12.C.10 of the Personnel Manual. The time applicant spent on appellate leave is not time spent in active service and therefore is not creditable for retirement purposes. According to section 101 of title 10 of the United States Code, active service means service on active duty. This section defines active duty as full-time duty in the active military service of the United States and includes full-time training duty, annual training duty, and attendance at a service designated school. The applicant performed no training or military duties while on appellate leave. Article 7.A.11.b. of the Personnel Manual states that excess leave or leave without pay (as is appellate leave) are deductible from active service on a day for day basis.

8. The applicant's suggestion that his eventual receipt of pay and allowances for the time spent on appellate leave period means that time is creditable service for retirement purposes ignores the fact that section 101 of title 10 never mentions the receipt of pay in its definition of active service or active duty. As stated above, the statute defines full time active service/active duty that includes military training, schooling, or duties. Congress specifically mandated pay and allowances for members on appellate leave if their punitive discharge is set aside, as in the applicant's case; it did not mandate, however, that a member whose punitive discharge is set aside receive service credit for time spent on appellate leave. Nothing in the law or Coast Guard regulations requires that a member on appellate leave whose punitive discharge is set aside receive service credit for appellate leave. The applicant has failed to submit sufficient evidence showing that his four years of appellate leave, during which he performed no military duties, schooling, or training, should be creditable for retirement purposes.

9. The applicant requested that he be allowed to retire under TERA, which authorized retirements with at least 15 years of service, if the Board does not grant a 20 - year retirement. He argued that retirement under TERA would be a fair and just outcome of his case. The Deputy General Counsel ruled in BCMR No. 2002-040 that the Coast Guard commits an injustice against a member when its actions shocks one's sense of justice. See Reale v. United States, 208 Ct. Cl. 1010 (1976). The Coast Guard's treatment of the applicant in this case does not shock the Board's sense of justice, such that we need to consider retroactively retiring the applicant under TERA. It was his poor judgment that caused this situation. Moreover, TERA was a tool to be used for downsizing personnel; it was not a tool to be used for retiring members who had engaged in misconduct.

10. The statute authorizing appellate leave is silent on the issue of reinstatement or reenlistment on active duty when a punitive discharge is set aside. However, the statute authorizes the Service Secretaries to prescribe regulations implementing appellate leave. The Commandant, acting under delegated authority, implemented the appellate leave regulation at Article 7.A.21.h. of the Personnel Manual. Under the

regulation, a member whose punitive discharge is set aside may request reinstatement or reenlistment, and if that request is denied, the member is to be discharged for the convenience of the government or for expiration of enlistment. The applicant received an honorable discharge for the convenience of the government (miscellaneous/general reasons). The Board can find no abuse of discretion in the Commandant's refusal to reinstate or reenlist the applicant. In this regard, the Board notes that the applicant was convicted of attempted consensual sodomy, in violation of Article 125 of the UCMJ. Such conviction was a sufficient basis for the Commandant to refuse the reinstatement/reenlistment of the applicant. It should also be noted that the applicant attempted to engage in this prohibited conduct with an E-4 subordinate in his chain of command.

11. The applicant's argument that he was entitled to a reenlistment board or an administrative separation board prior to his discharge because he had more than eight years of military service is without merit. The specific appellate leave regulations trump the general separation regulations. Article 7.A.21.h. of the Personnel Manual specifically states that if the request for reenlistment or reinstatement is denied, the member's presence is not required to effect discharge unless a discharge Under Other than Honorable Conditions is contemplated. The applicant received an honorable discharge for the convenience of the government and therefore his discharge was in accordance with the regulation. Article 12.B.5.c. (reenlistment boards) of the Personnel Manual grants reenlistment boards to members with eight years of service who are not recommended for reenlistment. However, Article 7.A.21. defines the rights of members on appellate leave, and it does not grant the right to enlistment or separation boards for such members, unless the Coast Guard is contemplating discharging them with an Other than Honorable Discharge, which is not the applicant's situation.

12. In his last submission to the Board, the applicant argued that retirement is fair and just in his case because under Lawrence v. Texas, 123 S. Ct. 2472 (2003), the offense of which he was convicted, attempted consensual sodomy, is not misconduct. In Lawrence, two adult men were convicted of engaging in consensual sodomy. The Supreme Court found that the "right to Liberty under the Due Process Clause gave them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." Id. The Court further found that the Texas law criminalizing sodomy between consenting adults of the same sex served no legitimate state interest.

13. The application of Lawrence v. Texas to the military is currently before the Court of Appeals for the Armed Forces (CAAF). There are at least five cases pending before the CAAF dealing with this issue. It would be premature and injudicious for the BCMR to determine that based on the Lawrence case, Article 125 of the Uniform Code of Military Justice (UCMJ), which prohibits sodomy in the military, consensual or

otherwise, is unconstitutional. In this regard, the Board notes that the military is a unique organization with unique needs and that no determination has been made as to whether Article 125 furthers those needs. Accordingly, the evidence is insufficient to establish that Lawrence v. Texas is applicable to the military. Even if Lawrence v. Texas is applicable to the military, the applicant has submitted no evidence to show that the Coast Guard would have reenlisted him.

14. Contrary to the applicant's request, the Board will not change the reason for his discharge from miscellaneous/general reasons to discharge by reason of expiration of enlistment. According to the Separation Program Designator (SPD) Handbook, a separation for miscellaneous/general reasons is applicable when a "Service component does not have a Service reporting requirement for specific reasons and desires to identify reasons collectively 'All other reasons' which qualify a member for separation." In contrast, the SPD Handbook states that a discharge by reason of completion of required active service means that a member is discharged upon completion of his required active service. As discussed above, the applicant did not complete his required active service because he spent more than half of his then six-year enlistment in an appellate leave status. During this period he was away from the Coast Guard and performed no military duties or training. To correct his DD Form 214 to say that he completed his required active service would not be an accurate description of the circumstances under which he was discharged. Therefore, the Board will not direct a change to the reason for the applicant's discharge.

15. Nor will the Board upgrade the applicant's RE-4 (not eligible for reenlistment) reenlistment code to an RE-1 (eligible for reenlistment) reenlistment code. The SPD Handbook authorizes either an RE-1 or RE-4 reenlistment code for a discharge for general/miscellaneous reasons. The Commandant determined that an RE-4 was appropriate in the applicant's case. The applicant's conviction for attempted consensual sodomy, with a subordinate E-4 in his chain of command, was a sufficient basis for assigning the RE-4 reenlistment code.

16. The applicant also challenged July 2, 1997 as the date of his discharge from active duty. Article 1.E. of COMDTINST M1900.4D (Certificate of Release or Discharge from Active Duty, DD Form 214) states that the effective date of release/discharge shall be entered in block 12.d of the DD Form 214. The date prior to the applicant's placement on appellate leave was the effective date of his release/discharge from active duty. Article 7.A.21.i.3 of the Personnel Manual required the applicant's commanding officer to complete a DD Form 214 to the extent possible prior to the applicant's departure on appellate leave, which was July 3, 1997. It also required that the applicant sign the DD Form 214. This action for all intents and purposes terminated the relationship between the applicant and the Coast Guard. To include the approximately four years that the applicant spent on appellate leave in block 12.d. of the DD Form 214 would have the appearance of crediting him with time on active duty that he did not

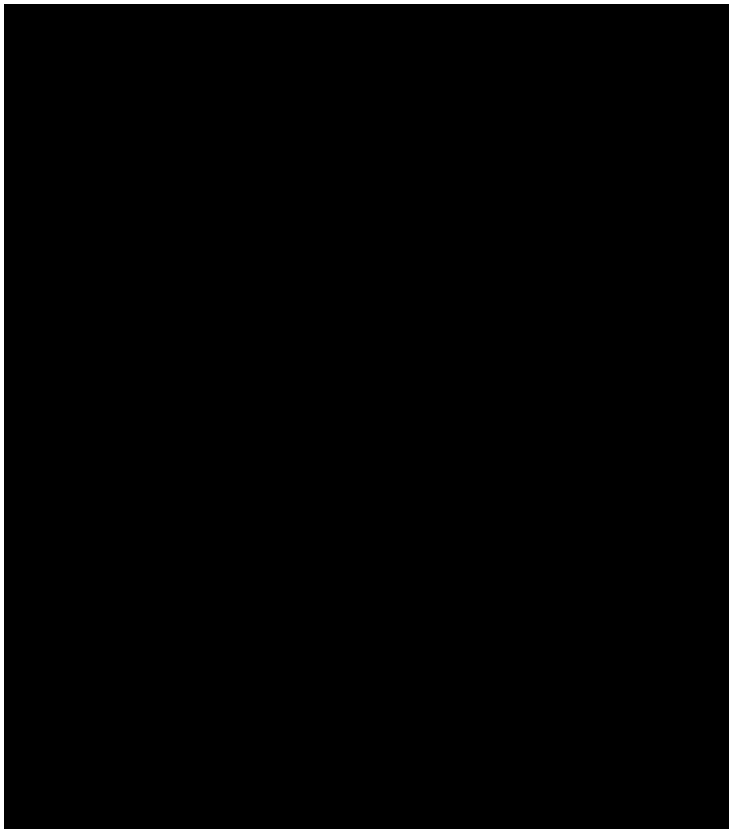
serve. The Board finds no error or injustice with the applicant's DD Form 214 showing his separation date from active duty as July 2, 1997.

17. The applicant asked that all records of any nature pertaining to charges for which he was acquitted be removed from his record. The Headquarters' record contains no evidence of the charges and specifications for which the applicant was acquitted.

18. Accordingly, the applicant has not established an error or injustice in this case and his request for relief should be denied.

ORDER

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



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