

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2015-128

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 June 18, 2015, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 27, 2016, 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] who received a General discharge "under honorable conditions" for misconduct¹ on June 12, 2012, following an Administrative Separation Board (ASB), asked the Board to correct his record to show that he was retired, instead of discharged, and to upgrade the character of his separation from General to Honorable.

The applicant alleged that the Coast Guard should have retired him because at the time of his separation he had performed 20 years of military service with no violation of the Uniform Code of Military Justice (UCMJ), court-martial conviction, or even counseling about poor performance. He alleged that he "met all requirements to retire."

The applicant alleged, regarding his civilian felony convictions, that he was "duped and set up by family criminal act." He stated that the contractor who turned the criminals into the FBI wrote a statement on his behalf, but the ASB did not see it. He alleged that he was used by this family of criminals and charged and convicted in Federal court with making a false statement

¹ The record indicates that the applicant pled guilty to one charge of making a false official statement pursuant to a plea agreement and was convicted in a Federal district court along with a Coast Guard lieutenant, her husband, and her cousin, who each pled guilty to charges involving a scheme to defraud the Coast Guard on cutter maintenance contracts.

because he could not afford a good lawyer and had to accept a public defender. He stated that even the judge questioned the Coast Guard's refusal to retire him since he had a spotless record.

The applicant also alleged that he was not properly represented by counsel during the ASB. He alleged that the lieutenant commander (LCDR) who represented him contacted him for five minutes just two days before the ASB convened and for fifteen minutes the day before the ASB convened. The applicant alleged that the LCDR arrived at the ASB with his file not in order, "was still trying to put my case together," and did not present all of the evidence to the ASB.

In support of his allegations, the applicant submitted documents from his military record, which are included in the summary below, and a letter from a private attorney to the applicant's military attorney, dated February 29, 2012. The letter forwards copies of several statements taken by the private attorney's investigator. The private attorney noted that one was from the person who first reported the crime and another was from a welder hired to work on Coast Guard cutters and that neither claimed that the applicant knew that the object of the conspiracy was Coast Guard cutter maintenance. The private attorney also noted that three other codefendants had not implicated the applicant in the conspiracy in their statements, which were taken before they pled guilty, and that the applicant's first attorney reported that the applicant first learned the object of the conspiracy when interviewed by federal agents. The private attorney stated that he "believe[s] [the applicant] was 'duped' into acting on the pretext that [a codefendant] was assisting him on recruitment training, knowing that [the applicant] was soon to be separating from the Coast Guard."

The applicant also submitted just one of the witness statements forwarded by the private attorney, in which the person who first reported the crime discussed her knowledge of the applicant's involvement. This person, Ms. T, stated that she is a contractor and that LT X sometimes awarded her Coast Guard contract work. LT X gave her the name of a welder, Mr. E, who worked for a company called Strategy One and could do the welding work. At one point, LT X told her that she owed a vendor some money for another job and that she wanted to put more money on an invoice so she could pay the other vendor for the previous job. Ms. T reported this request to the Coast Guard. On another occasion, LT X picked up from Ms. T's house a cashier's check made payable to an electrical company. Ms. T stated that she knew the applicant but never had any monetary dealings with him regarding Coast Guard maintenance contracts, and she did not know that the applicant also worked for Strategy One or that the applicant knew LT X, her husband, or her cousin. Ms. T stated, "I do not believe that [the applicant] knew that the work performed was Coast Guard Cutter maintenance work."

SUMMARY OF THE RECORD

The applicant served in the U.S. Army from March 24, 1992, to July 23, 1999. On August 27, 1999, he enlisted in the Coast Guard as an [REDACTED] E-5 based on his prior service. The applicant received good performance evaluations and advanced to [REDACTED] E-6 in 2007.

On August 18, 2011, at age 45, the applicant was indicted along with LT X and LT X's husband and cousin for their suspected involvement in defrauding the government of funds allo-

cated for cutter maintenance through an illegal kickback scheme in 2009, when the applicant was serving as a Coast Guard recruiter. Specifically, the applicant was indicted on charges of conspiracy to defraud the United States, embezzlement of public money, wire fraud, and money laundering in violation of 18 U.S.C. §§ 371, 641, 1343, and 1956, respectively.

On November 4, 2011, the applicant submitted a request to retire on May 1, 2012 [REDACTED]

[REDACTED] On December 5, 2011, pursuant to a plea agreement, the applicant [REDACTED] guilty in federal district court to making a false official statement to [REDACTED] a criminal in [REDACTED] and an Assistant U.S. Attorney in violation of [REDACTED] 01. Specifically, he pled guilty to count #16 of the indictment [REDACTED] which states that he lied to the investigators by denying that he knew LT [REDACTED] [REDACTED] claiming that he met her in October 2008, even [REDACTED] he had named her as a long-time [REDACTED] who knew him between 2001 and 2007 on the questionnaire he completed for his security clearance. The court accepted the applicant's guilty plea and the government withdrew and agreed not to prosecute the applicant for several other offenses.

[REDACTED] On December 6, 2011, the applicant's commanding officer (CO) notified him in a memorandum that he was initiating the applicant's discharge for misconduct—

[REDACTED] Due to evidence that you have committed a serious offense, to wit: conspiring with one active duty officer and two civilians to defraud the Coast Guard of appropriated funds, and then making [REDACTED] statements regarding your role in that conspiracy to investigators. According to [REDACTED] federal jury indictment dated August 2011, as well as the Coast Guard Investigative Service's report of investigation into the alleged conspiracy, you assisted your accomplices by laundering in excess of \$80,000 of funds received as kickbacks from fraudulent contracts for cutter maintenance in 2009. The indictment and report also allege that during a May 2011 interview with the Assistant United States Attorney and Special Agents from the Coast Guard Investigative Service [CGIS] and Department of Homeland Security's Office of the Inspector General, you knowingly misrepresented the nature of your relationship with your active duty co-conspirator. ... The least favorable characterization of service [REDACTED] may be approved is other than [REDACTED] the decision to provide you with an honorable or general discharge rests solely with the Coast Guard's separation authority.

The CO further advised the applicant that he had a right to counsel, to object to the proposed discharge, to submit a statement, and to appear before an ASB represented by a military lawyer. The applicant acknowledged the CO's notification on December 7, 2011, and requested counsel.

[REDACTED] On December 16, 2011, the applicant's CO directed that an ASB be convened to consider whether the applicant should be recommended for separation or retained on active duty. Also on that date, the applicant acknowledged having consulted an attorney, waived his right to submit a written statement, and requested an ASB.

On January 3, 2012, the LCDR was appointed as counsel for the applicant. On January 10, 2012, the designated president of the ASB sent a memorandum to the applicant and his counsel regarding the purpose and procedures of the ASB and the applicant's rights. The memorandum states that the ASB would convene on January 26, 2012. The ASB Recorder provided the applicant's counsel with copies of the evidence he would introduce, including statements submitted by the applicant, LT X, her husband, and her cousin pursuant to their plea bargains; the

applicant's military records; the CGIS report; a summary of the transactions related to the kickback scheme; and news reports of the scheme.

The evidence from the CGIS investigation submitted to the ASB includes flow charts of the transactions showing how the Coast Guard's payments for cutter maintenance contracts were divided. For example, in May 2009, one payment of \$38,755 from the U.S. Treasury to [REDACTED] was split with \$9,627.50 going by wire transfer to the applicant, \$9,627.50 to a [REDACTED] company owned by LT X and her husband, and \$9,000 to a [REDACTED]. In June 2009, a payment of \$86,466.60 from the U.S. Treasury to [REDACTED] was split with \$20,000 going to the applicant, \$22,950.00 to the [REDACTED] owned by LT X and her husband, and \$16,000 to the same [REDACTED]. In the latter transaction, the applicant received all the money from [REDACTED]. [REDACTED] deposited \$22,950.00 in the account of the [REDACTED]. [REDACTED] got a cashier's check to pay the [REDACTED] \$16,000, and deposited \$20,000 in three of his own bank accounts. Pursuant to another kickback in August 2009, the applicant received \$9,908.00 of a \$74,448.00 Treasury check. An email from one of the investigators states that the applicant received about \$97,000 from [REDACTED] but paid some of this to others and kept \$51,162 [REDACTED] for himself.

On January 26, 2012, the ASB convened, and the applicant was represented by the LCDR. A [REDACTED] testified that he and two others investigated a kickback scheme involving the applicant from April to November 2009. The applicant's home address was the address of the company involved in the kickback scheme and he kept a lot of the money himself. [REDACTED] not informed his chain of command about his outside employment. The [REDACTED] that when the applicant pled guilty to making a false official statement, he also admitted to having embezzled money.

The applicant's attorney presented many witnesses testifying to the ASB about the applicant's good character and dedication to the Coast Guard. The applicant himself provided only unsworn testimony, so he was not subject to cross-examination. The applicant stated that he was at a gas station when he first saw that there was a lot of money in his bank account. He first called LT X's cousin and the LT X, who told him to "disperse it into different accounts." He alleged that he thought the money was "his percentage for recruiting certain workers." He received a 1099 for the money and at tax time, an accountant told him that he owned the company. He knew this was wrong, so he called LT X "and then everyone started distancing themselves from me." The applicant alleged that he had no idea that he was dealing with Coast Guard contracts. When asked what he thought he was doing, the applicant said, "Based on me, based on what I've read on head hunting, I thought I was just trying to find people that were looking for jobs. I read about how you can make a lot of money recruiting people, such as \$10,000 a person. That is just my opinion."

On January 31, 2012, the ASB forwarded its report to the Convening Authority. The ASB concluded that the applicant did "plead guilty to lying to federal officials and more likely than not was involved in a conspiracy (with others) to steal money from the government." The ASB found that the preponderance of the evidence showed that the applicant had been involved in a scheme to defraud the Coast Guard of cutter maintenance funds. The ASB stated that LT X, who oversaw maintenance projects on 270-foot cutters, had steered maintenance contracts to the business of her cousin. The ASB stated that "[t]hrough a business partnership established with

[the cousin], the [applicant] received large portions of funds from these contracts, where [he] either kept the money, or transferred the money back to [LT X] as illegal gratuities, or ‘kickbacks.’” The ASB stated that the applicant “was personally and illegally enriched by approximately \$51,000 in cutter maintenance funds unlawfully obtained from the Coast Guard.” The ASB stated that telephone records showed that the applicant had used his government cell phone to speak to the cousin, whom he met through LT X.

The ASB noted that the applicant claimed that he did not know the funds were embezzled; that he thought he was receiving a “head-hunted” for [redacted] and that the funds were transferred to account [redacted] of LT X that he had no knowledge of. The ASB found, however, that there was no evidence that the applicant had ever “head-hunted” [redacted] that he kept the money for himself. The ASB [redacted] applicant would have 20 years of a [redacted] duty toward retirement as of April 27, 2012; that he had a good record with no other misconduct or performance deficiencies; and that his supervisors and colleagues had praised his strong work ethic and devotion to duty.

The ASB stated that the applicant had knowingly and willingly accepted funds that were not designated for him and that “the sheer dollar volume of the transaction amounts should have triggered [his] further question the validity of the process and the large dollar figures flowing through his bank accounts.” The ASB concluded that the applicant “was not the ringleader of the scheme, but a pawn that got wrapped into a situation that spun out of control,” but not [redacted] his claim [redacted] naivety and request for leniency “only goes so far.” The ASB [redacted] the applicant “was a conduit in the scheme to defraud the government. His assertion of ignorance to what was going on around him was a clear sign he knew exactly what he was doing—it didn’t make sense otherwise.”

The ASB stated that before participating in this scheme, the applicant’s record “reflects that he served his country diligently and at times above and beyond the call of duty for seventeen (17) years.” The ASB stated that the [redacted] assignments, money transfers, lies and deceit occurred in year seventeen (17)” of his service, although by the time of the ASB he had accumulated 19 years and 9 months of “time served.” The ASB concluded that the applicant had not earned a pension and noted that a “pension is a privilege and not a right; one must serve honorably for 20 years in order to have the privilege of receiving a government pension.” Therefore, the ASB recommended that the applicant be discharged for misconduct, instead of retired. The ASB also recommended that he be discharged “under honorable conditions” because he had served his country honorably for seventeen years.

On February 8, 2012, the LCDR submitted to the CO the applicant’s response to the ASB. The LCDR asked the CO to recommend retirement for the applicant and forwarded two press releases, which had been submitted to the ASB, regarding officers who had been allowed to retire following convictions. The first involved a Coast Guard captain who was allowed to retire after being convicted of wrongful use of cocaine in 2009. The second involved a Coast Guard captain who was allowed to retire as a lieutenant in 2010 pursuant to a pretrial agreement after he was charged with having inappropriate sexual relationships with subordinates over a 13-year period, making a false official statement, misusing government equipment, and soliciting an enlisted member to destroy evidence. The LCDR argued that refusing to retire the applicant

when he became eligible on April 27, 2012, would “condone a double standard between the disposition of officer and enlisted personnel decisions. Such decisions promote the appearance that officers are held to a different standard than our enlisted men and women.” He noted that he had addressed the significance of these cases during his closing arguments before the ASB.

On February 21, 2012, the CO forwarded the report of the ASB to the Personnel [REDACTED] (PSC) and recommended approval. He stated that the ASB had recommended an [REDACTED] [REDACTED] charge. The CO noted that the applicant had submitted a request [REDACTED] voluntary retirement on November 4, 2011, which he had deferred acting [REDACTED] the ou [REDACTED] criminal case and ASB. The CO stated that he [REDACTED] ASB that the applicant should not be permitted a retirement [REDACTED] his transgressions occurred when he had just seventeen years of [REDACTED] [REDACTED] years before he would be retirement eligible. [REDACTED]

On February 29, 2012, the applicant’s civilian attorney for the criminal proceedings sent the LCDR the statements his investigator had collected, as noted on page 2, above. The packaged [REDACTED] investigator’s notes of his interview with the [REDACTED] and Ms. T, the person who reported the scheme:

- The [REDACTED] who had previously been a member of the Coast Guard but was medically separated due to a back condition, stated that LT X had asked him if he wanted to do some welding for the Coast Guard and had put him in touch with her cousin at [REDACTED] [REDACTED] who hired him. He performed the welding and was paid by [REDACTED]. His only contact with the applicant was that LT X told him to contact the applicant if he could not reach her to work out any work-coordination problem if another contractor’s work interfered with his. He claimed that he had had very little contact with the applicant and never had any dealings with him involving money.
- Ms. T stated that she was awarded jobs from LT X, who gave her the welder’s phone number to do the work. The [REDACTED] had been working for [REDACTED] and Ms. T hired him to do some work in Boston. Ms. T stated that she had had ten “dealings” with LT X that were “a little off” and it was “building up.” Then LT X told her she owed someone for a completed job and wanted Ms. T to put more money on her invoice so LT X could pay this other person. Ms. T reported it and got a cashier’s check made payable to an electrical company. LT X picked up this check from Ms. T’s house. Regarding the applicant, Ms. T stated that she had met him at LT X’s house two years earlier but she did not know he was working for [REDACTED] and did not have any “money dealings” with him.

On March 5, 2012, a JAG officer advised PSC that the ASB proceedings were legally sufficient, supported by sufficient evidence, and had been conducted in accordance with Coast Guard policy. The JAG noted three short delays in the proceedings: First, the ASB had originally been scheduled for January 4, 2012, but was postponed to January 26, 2012, because the applicant was not assigned an attorney until January 2, 2012. The date January 26, 2012, had been offered by the applicant’s attorney. Second, the JAG noted that the applicant’s command took more than 30 days to forward the record to PSC and attributed the delay to the fact that there were more than 600 pages for the ASB, the applicant’s counsel, and the CO to review in

writing their reports. Third, the JAG also noted that the junior member of the ASB did not sign the ASB report until February 26, 2012.

On May 9, 2012, the Final Reviewing Authority (FRA) for the applicant's ASB approved the findings and recommendations of the ASB except with regard to the characterization of his discharge as honorable. The FRA noted that the applicant had accumulated enough service and that the ASB had recommended that he be administratively discharged in [REDACTED]. The FRA stated that he agreed that the applicant should not be awarded a retirement given the severity of his offense. The FRA disagreed with the ASB's recommendation regarding their recommendation that the applicant receive an honorable discharge, however. The FRA wrote that "an Honorable Discharge is not justified in light of the severity of the crimes [the applicant] committed."

On May 17, 2012, PSC issued orders for the applicant to receive a General discharge for misconduct due to his commission of a serious offense no later than June 14, 2012. In accordance with these orders, the applicant received a General discharge with an RE-4 reentry code, which makes him ineligible to reenlist.

VIEWS OF THE COAST GUARD

On November 23, 2015, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny relief.

The JAG recapped the facts of this case and noted that under Article 1.B.17. of the Military Separations Manual, the Coast Guard may discharge a member for misconduct due to the commission of a serious offense when the member has committed a civilian offense for which the maximum penalty for a similar offense under the Uniform Code of Military Justice (UCMJ) includes a punitive discharge and when the circumstances warrant separation. In this case, the JAG argued, the circumstances warranted discharge, and the applicant pled guilty to a charge—making a false official statement—for which the maximum penalty under the UCMJ includes a punitive discharge. Therefore, the JAG argued, he was properly separated for misconduct.

Regarding the lack of retirement and General discharge, the JAG pointed out that the ASB had concluded that the applicant had served his country honorably only before his seventeenth year of military service, when the events leading to his guilty plea began. Moreover, the JAG stated, under Article 1.B.2.f.(2) of the Military Separations Manual, a member may receive a General discharge for misconduct "based on the individual's overall military record or the severity of the incidents which results in the discharge." The JAG argued that in this case, the FRA appropriately exercised his discretion in determining that the applicant's misconduct warranted a General discharge. The JAG further argued that the applicant's prior years of service do not negate the facts and circumstances of his guilty plea.

Regarding the applicant's ASB counsel, the JAG alleged that the applicant failed to substantiate his claim that he did not receive proper representation. The JAG noted that the record shows that the applicant's counsel submitted statements and evidence at the ASB, as well as a memorandum in response to the ASB's recommendation.

The JAG concluded that the applicant has failed to provide any evidence of an error or injustice with respect to his General discharge or representation by counsel.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 10, 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 1.B.17.b. of the Military Separations Manual, the Commandant may discharge members for a civilian or foreign conviction for any offense which could warrant a punitive discharge if prosecuted under the UCMJ; for a pattern of misconduct; or for commission of a serious offense, established by a preponderance of the evidence, whether or not adjudicated at mast or trial. Article 1.B.17.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 1.B.2f.(b) states that a member may receive a general discharge for misconduct “[w]hen based on the individual’s overall military record or the severity of the incident(s) which results in discharge, Commander (CG PSC-EPM-1) directs issuing a general discharge.”

Article 1.B.23. 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.

Article 1.C.10.a.(1) states that “[o]n application and at the Commandant’s discretion, any enlisted member who has completed 20 years of service may retire from active service (14 U.S.C. §355).”

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 over this matter pursuant to 10 U.S.C. § 1552. The application was timely filed within three years of the applicant’s discharge.²

2. The applicant alleged that his General discharge and lack of retirement are erroneous and unjust. 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

² 10 U.S.C. § 1552(b).

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

3. The applicant alleged but has not proven by a preponderance of the evidence that he received ineffective assistance of counsel during his ASB. The record shows that the LCDR was appointed his counsel approximately three weeks before the ASB convened on January 26, 2012. The ASB report shows that the LCDR submitted a large amount of evidence and presented many character witnesses to the ASB and strongly argued that the applicant should be retired. The fact that the LCDR received statements from the applicant’s civilian attorney a month after the ASB convened and forwarded those statements to the ASB Convening Authority for consideration does not persuade the Board that the LCDR did not provide the applicant with effective assistance of counsel before, during, and after the ASB hearing.

4. The applicant has not proven by a preponderance of the evidence that his discharge and lack of retirement are erroneous or unjust. By law, retirement is a privilege, not a right.⁵ The applicant alleged that he was naïve, that he was not the ringleader of the kickback scheme, and that he did not know that the money he was receiving came from Coast Guard cutter maintenance funds. The preponderance of the evidence shows, however, that he knowingly received more than \$50,000 for doing no apparent work; that LT X was a long-time friend of his, but he lied and pretended he hardly knew her; and that he accepted huge sums from [REDACTED] a Coast Guard contractor owned by LT X’s cousin, and paid part of the money to a [REDACTED] who worked on Coast Guard cutter equipment and part to a [REDACTED] owned by LT X and her husband. The Board finds that the applicant’s claim that he was naïve and did not realize that he was illegally taking Coast Guard cutter maintenance funds is not credible.

5. The record shows that the applicant’s involvement in the kickback scheme began no later than May 2009, when he had just completed 17 years of service, and he was indicted and convicted in 2011, when he had 19 years of service. Accordingly, while the applicant was on active duty for more than 20 years before his General discharge in June 2012, the Board finds that he performed at most 17 years of honorable service. The applicant has therefore not shown that the Coast Guard committed any error or injustice by refusing to award him a retirement. The fact that two Captains who committed different types of misconduct at different points in their careers were awarded retirements does not persuade the Board that the applicant earned a retirement with just 17 years of honorable service or that the Coast Guard’s refusal to award him one constitutes an error or injustice.

6. The record shows that the applicant received counsel and due process in the discharge proceedings and the ASB and was properly discharged for misconduct in accordance with Article 1.B.17. of the Military Separations Manual. The Board finds no evidence that the Final Reviewing Authority for the ASB abused his discretion under Articles 1.B.2., 1.B.17., and

³ 33 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).

⁵ COMDTINST M1000.4, Article 1.C.10.a.

ORDER

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

May 27, 2016

