

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-060

FINAL DECISION

Ulmer, Chair:

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on April 7, 2003, upon receipt of the applicant's completed application and military records.

This final decision, dated December 18, 2003, 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 the Board to remove a summary court-martial (SCM) conviction from her military record. "Specifically, I request that the punishment be removed . . . and I receive back pay from 2 March xxxx."

APPLICANT'S ALLEGATIONS

The applicant stated that she was appealing the SCM because of an error prejudicial to her substantial rights and because the sentence was inappropriate. She stated that on March 2, 2000, a SCM¹ found her guilty of disorderly conduct, a violation

¹ Rule 1301 of the MCM states that the function of the SCM is to promptly adjudicate minor offenses under a simple procedure. It is composed on one commissioned officer on active duty and the accused is not entitled to counsel. The maximum punishment that may be imposed by a SCM is confinement for not more than one month, confinement without hard labor for not more than 45 days, and restriction to specified limits for not more than 2 months, and forfeiture of not more than 2/3 pay for 1 month.

of Article 134 of the Uniform Code of Military Justice (UCMJ). She was convicted of being disorderly "for knocking and shaking [an SK3's] door and for hitting his car with my hand and a broom handle" on 19 September 199x. She was sentenced to be reduced one rank to pay grade E-4.

The applicant further alleged that the SCM found her guilty of an inappropriate relationship with an SK3. She stated that a relationship between an E-5 and an E-4 "is hardly a reason for [her] to receive continuous and harsh punishment while the other petty officer [an E-4] was not even counseled."

The applicant stated that the punishment was harsh, unusual, and disproportionate to the offense for the following reasons:

Prior to the Courts-Martial I was banned from the office and sent to work in an office space alone and with no contact with other member of the command;

I received numerous Administrative Remarks² (page 7 entries) placed in my service record prior to the Courts-Martial, therefore, prior to any adjudication of guilt . . .

I did not receive an award that was given to every other member in my office (military and civilian) even though I was present and working in that very office during the entire period of the award;

I was not recommended for reenlistment by my Commanding Officer [CO] . . . and had to face a reenlistment board and plead for my livelihood;

My Enlisted performance evaluation dated 31 October 199x was significantly lowered prior to the Courts-Martial or any adjudication of guilt;

I was not recommended for advancement; and

I was removed from my workstation instead of a junior petty officer.

Subsection 2 states that "In the case of enlisted members above the fourth pay grade, summary courts-martial may not adjudge confinement, hard labor without confinement, or reduction except to the next pay grade."

² An administrative remarks page (known as a page 7) is a document used to record miscellaneous entries of a positive, adverse, or counseling nature.

The applicant stated that the reduction in rank was humiliating, particularly in light of the fact that she had between 16 and 17 years of service. She stated that the reduction in rate has cost her approximately \$462 per month and an additional \$500 per month after her advancement to E-6. She commented that as a result of the reduction in rank, she had to re-qualify and re-compete for advancement to E-5.

The applicant stated that she has learned her lesson. She asserted that in the 34 months since the incident she has dedicated herself to the mission of the Coast Guard and has served with honor and integrity. She further stated that she fought hard for the opportunity to reenlist because it was always her intention to serve in the Coast Guard for 20 years.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on June 17, 198x and has served continually on active duty since that time. The applicant's military record contains the following pertinent entries.

On August 18, 199x, a page 7 was placed in the applicant's record informing her that the eligibility period for a good conduct award had been terminated due to an unsatisfactory conduct mark on her performance evaluation for the period ending August 18, 199x.

On September 20, 199x, the applicant's CO informed her on a page 7 that he had received information indicating that the applicant had violated the UCMJ. The applicant was ordered to avoid all contact with a co-worker until an investigation and administrative action had been finalized.

On November 4, 199x, a page 7 was entered in the applicant's record documenting an unsatisfactory mark in conduct due to a civil arrest and her alleged harassment of a civilian family on September 19, 199x.

On November 4, 199x, another page 7 was entered into the applicant's record advising her that she was not recommended for advancement on the performance evaluation ending October 31, 199x. The page 7 stated that the applicant had shown poor judgment in dealing with others and had failed to conform to civilian and military rules, regulations and standards.

On November 4, 199x, a third page was entered in the applicant's record documenting the 2 that she received in the Human Relations category of her performance evaluation for the period ending October 21, 199x. The CO pointed to the counseling the applicant received on August 26, 199x concerning her actions in the work place toward the victim of her disorderly conduct. He also stated that later that

day, the applicant was counseled again about a confrontation with this individual. Last, the CO mentioned that a police report was filed against the applicant for harassing a civilian family and for criminal trespassing, resulting in her arrest.

On November 9, 199x, the applicant was counseled on a page 7 regarding the provisions of Article 8.H. of the Coast Guard Personnel Manual. She was further counseled that any inappropriate behavior on her part against another member, whether actual or perceived, that threatened the good order and discipline of the unit, could result in further administrative or disciplinary action.

Summary Court-Martial (SCM)

On March 2, xxxx, a SCM convicted the applicant of "disorderly conduct for repeatedly knocking and shaking [an SK3's] apartment door and repeatedly striking [the SK3's] automobile with her hands and a broom handle," a violation of Article 134 of the Uniform Code of Military Justice (UCMJ). The SCM heard testimony from the applicant and from the victim (the E-4). According to the testimony, this incident occurred off base at or around 0145 on September 19, 199x. The SCM also considered the applicant's military record, including her performance marks, 3 Coast Guard Unit Commendations, 4 good conduct awards, 2 special operation service awards, a Bicentennial Unit Commendation, a National Defense Service Medal, a Humanitarian Service Medal, and a Secretary's Outstanding Unit Award.

On March 9, xxxx, the applicant submitted an appeal of her SCM to the convening authority (CA), in which she requested that the charge and specification of which she was convicted be set aside. She also requested that her sentence of reduction to the next inferior pay grade be remitted. She stated that she "was engaged in a personal relationship with an individual plagued with months of dishonesty and anger" and that she "realize[d] [she] put [her]self in a bad situation by going over to the [victim's apartment]." In mitigation, she pointed out that she had sixteen years of service, was the mother of two minor children who depended on her for their support, and was providing housing for a foreign exchange student. She told the CA that she was receiving anger management therapy and that she was sorry for her actions.

On March 10, xxxx, the applicant's military lawyer challenged the SCM's finding that the applicant had been guilty of disorderly conduct. The lawyer argued that the conduct that formed the basis for the applicant's conviction did not meet the definition of disorderly conduct. She argued that the Manual for Courts-Martial defined disorderly conduct as that "of such a nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment thereby."

On March 15, xxxx, the CA approved the finding of guilty and sentence and ordered it executed. On March 23, xxxx, a law specialist reviewed the SCM, including

the applicant's appeal and her lawyer's allegation of error. The law specialist determined that based on Unites States v. Rogers, 50 M.J. 805 (1999), the evidence presented was legally sufficient to sustain the finding that the applicant was guilty of disorderly conduct. He also stated that her conduct "disturbed [the E-4's] peace and quiet enough to cause him to call the police."

On July 24, xxxx, a lawyer in the office of the Chief Counsel reviewed the SCM record of trial under Article 69 of the UCMJ.³ He found no basis for modification of the findings or sentence.

Reenlistment Board Proceedings

On May 2, xxxx, the applicant was advised by the CO that she was not recommended for reenlistment because of two separate disciplinary actions during the current enlistment. She was informed that she had the right to present her case and appear before a reenlistment board, the right to be represented by counsel, and the right to waive the reenlistment board, in writing, with the advice of counsel. The applicant acknowledged this advice with her signature.

On June 13, xxxx, a reenlistment board convened to consider whether to recommend to the Commandant that the applicant be allowed to reenlist. The reenlistment board found that the applicant had been punished at non-judicial punishment (NJP) on August 18, 1997 for failure to obey a lawful order as a result of her relationship with a chief petty officer; that she was removed from recruiting duty as a result of her relationship with the chief petty officer and the NJP; and that she was convicted at a SCM for disorderly conduct involving an incident with a co-worker, an SK3.

The reenlistment board offered the following pertinent opinions: 1. That the relationship between the applicant and the SK3 while not prohibited by the Coast Guard, was nonetheless inappropriate due to the close working relationship between the two and the size of the office in which they worked. 2. That a pattern of inappropriate behavior had not been established on the part of the applicant. 3. That the applicant's performance has been average or above average during her Coast Guard career.

On the issue of whether the applicant should be allowed to reenlist, the reenlistment board made the following recommendations to the Commandant:

³ Rule 1201(b)(3)(A) of the Manual for Courts-Martial states that the Judge Advocate General may, sua sponte or at the request of the accused, review a final conviction by court-martial for several reasons, including sentence appropriateness or for an error prejudicial to the substantial right of the accused. Subsection (C) requires that such request be made within two years of the convening authority's action approving the SCM findings and sentence.

1. That [the applicant] be granted a probationary extension of reenlistment for a period not to exceed 12 months.
2. That [the applicant] be transferred to a billet within the Storekeeper rating at a Coast Guard unit outside [of the] area.
3. That during the probationary period [the applicant] shall not have any UCMJ violations or equivalent civilian convictions. . . .
4. That during the probationary period [the applicant] shall complete all requirements for advancement to SK2. Failure to meet this requirement shall be grounds for immediate discharge from the Coast Guard.
5. That the applicant be evaluated by a qualified health care professional for her recurring anger management and relationship problems. If this evaluation recommends continued counseling . . . it is strongly recommended by the board that this counseling be pursued.

On September 28, xxxx, the Commander, Coast Guard Personnel Command (CGPC) approved the findings of fact, opinions, and recommendations of the reenlistment board. CGPC stated that the applicant would be eligible to reenlist at the end of the 12-month probationary period if she met all of the requirements of her probations.

On October 18, xxxx, a page 7 was placed in the record, wherein the applicant acknowledged the terms of her probation.

VIEWS OF THE COAST GUARD

On August 20, xxxx, the Chief Counsel of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. He argued that the application should be denied because the applicant did not exhaust the administrative remedies that were available to her under the Manual for Courts-Martial (MCM) because she did not seek review of the SCM from the Judge Advocate General of the Coast Guard. See Rule 1201 of the MCM. He asserted that "because of the appeal procedures established by statute and regulation within the military system, the Board should deem any issue not raised through this process to be waived, absent proof of compelling circumstances that prevented the applicant from raising such issues within the military justice system."

The Chief Counsel stated that under 10 U.S.C. § 801, a SCM is defined as a congressionally established, quasi-judicial means for military commanders to deal with

relatively minor violations, as an essential part of their responsibility to preserve discipline and maintain an effective armed force. He further stated that it is an interim step between the less formal non-judicial punishment and the more formal special or general court-martial, where a finding of guilty could result in a federal conviction.

The Chief Counsel stated that the BCMR may review a SCM only with respect to granting clemency on the sentence. See, 10 U.S.C. § 1552(f). However, when doing so it should recognize that the officer appointed to serve as the SCM is responsible for determining the appropriate punishment after weighing the evidence including the demeanor of the witnesses. He further stated that the applicant's commanding officer (CO), as convening authority, is charged with oversight of the entire process and has the ability to grant clemency or to set aside the decision of the SCM. He argued that absent evidence that the CO's determinations were clearly erroneous or that there was a violation of one of the applicant's substantial rights, the CO's decision should be upheld. The Chief Counsel argued that the applicant has failed to prove any factual or legal error with respect to the SCM.

The Chief Counsel argued that the applicant has presented no substantial reason that the Board should grant clemency in her case. He stated that the power of clemency like the power of pardon is intended to address extraordinary circumstances that normal legislative and judicial processes cannot effectively address. See 59 AM JUR 2d 10-11. He stated that the punishment the applicant received was far less than the maximum she could have received. In addition, he argued that the applicant's conduct toward a junior service member was more than enough evidence for the SCM to conclude that reduction in rank was an appropriate punishment. He stated that the punishment was fair, fitting, appropriate and anything but unjust.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 25, xxxx, the BCMR sent the applicant a copy of the views of the Coast Guard and invited her to respond. No response was received.

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 section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant requested an oral hearing before the Board. The Chairman, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The Board is not persuaded by the Chief Counsel's argument that the BCMR is barred from reviewing this application because the applicant failed to exhaust her administrative remedies by failing to seek a review of her SCM from the Judge Advocate General (TJAG), as permitted under Rule 1201.(b)(3) of the Manual for Courts-Martial. The time for a TJAG review has expired. Review under this rule must be requested within two years of the date on which the CA takes action approving the sentence. The CA's action in this case occurred on March 15, xxxx. Therefore, this remedy was no longer available to the applicant at the time she filed her application with the Board on March 24, 2003. The Board deems that in situations where a remedy is no longer available, exhaustion of administrative remedies has occurred.⁴

4. Moreover, the SCM record of trial shows that, through her own statement and that of her lawyer, the applicant appealed the SCM to the CA. The record of trial further shows that a review under Rule 1201.(b)(3), which allows the TJAG to complete such a review sua sponte or upon application of the accused, was completed on July 24, 2000. Since the SCM was thoroughly reviewed by the CA, a law specialist, and TJAG, the Board finds that the applicant exhausted her administrative remedies.

5. The applicant has not shown that she was denied any of her rights. She was advised of all of her rights with respect to the SCM and was represented by counsel during the entire process.

6. With respect to the applicant's request to set aside the conviction, the Board does not have the authority to remove the SCM conviction from her record. Section 1552(a) of title 10 of the United States Code authorizes the Board to correct any military record to remove an error or an injustice. However, the Board's authority with respect to courts-martial convictions is limited by section 1552(f)(2) of title 10 of the United States Code, which states the Board may only act to grant clemency with respect to a court-martial sentence. Clemency is defined as "bestowing mercy -- treating an accused with less rigor than he deserves." See, United States v. Healy, 26 M.J. 394 (CMA 1988).

7. The applicant asked the Board to grant her clemency by setting aside the punishment she received for disorderly conduct. Although the applicant argued that her punishment was excessive, she received only a reduction to the next inferior pay

⁴ The Board does not agree with the Chief Counsel's position that the requirement to exhaust administrative remedies, as discussed in the Board's rules (33 CFR § 52.13), bars the Board from considering an application where a remedy was but is no longer available due to a statute of limitations. If no current remedy is available, the applicant is considered to have exhausted his or her administrative remedies.

grade, E-4, which was less than the maximum punishment that could have been imposed. The maximum allowable punishment the applicant could have received at the SCM was 60 days restriction, forfeiture of 2/3 of one month's pay, reduction to next inferior pay grade and a reprimand.

8. Despite the applicant's argument that the court-martial sentence is excessive in light of the number of page 7s that were placed in her record before and after her conviction, the CO acted properly in causing the page 7s to be placed in her record. The page 7s are administrative actions by the applicant's CO and they are independent of the court-martial charges, conviction, and punishment. In this regard several of them were prepared in support of low or adverse marks the applicant received on her performance evaluation for the period ending October 31, 199x. While the page 7s may appear excessive to the applicant in light of her other punishment, they were executed in accordance with the Personnel Manual, as discussed below.

9. Under Article 10.B. of the Personnel Manual, the rating chain must document any low performance marks (1 or 2 on a 7 point scale, with 7 being the highest) on a page 7. Therefore, the page 7 documenting the 2 she received in the Human Relations category for the evaluation period ending October 31, 199x was proper. It was appropriate for the rating chain in evaluating the applicant to consider the event of September 19, 199x, as it occurred during the reporting period.

10. In addition, the applicant was not recommended for advancement on the evaluation. Pursuant to 10.B.4.d.5.(4) of the Personnel Manual, this adverse mark required the CO to support it with a page 7, which he did on November 4, 199x. The page 7 advised the applicant that she was not recommended for advancement because of poor judgment in dealing with others and her failure to conform to civilian and military rules and standards. Under Article 10.B.7. of the Personnel Manual, a mark of not recommended is final and may not be appealed.

11. Article 10.B.4.d.5.(4) also required the CO to place a page 7 in the applicant's record to document the termination of her eligibility for good conduct due to the unsatisfactory conduct mark on the performance evaluation for the period ending October 31, 199x. Article 10.B.2. requires an unsatisfactory mark in conduct when in the judgment of the CO a service member does not comply "with civilian and military rules, regulations, and standards." It was the CO's judgment that the applicant failed to meet this standard because of her civil arrest and her harassment of a civilian family in September 199x. As a member with sixteen years of service, the applicant knew or should have known that her CO would not tolerate her actions.

12. The CO was required to document on a page 7 his decision not to recommend the applicant for reenlistment, which he did on May 2, xxxx. This recommendation against reenlistment represented the judgment of the CO after the

applicant's conviction at an SCM. However, because the applicant had eight years of service, she was entitled to a reenlistment board, which recommended her retention pending the successful completion of a probationary period.

13. The applicant's statement that she was convicted for having an inappropriate relationship with an E-4 is without merit. The SCM shows that she was convicted only of disorderly conduct that was prejudicial to good order and discipline. She also complained that the E-4 was not punished. However, maintaining good order and discipline within the command is within the purview of the CO and unless an abuse of that power is demonstrated the Board will not substitute its judgment for that of the CO. In the Board's experience, it is the senior person involved in a relationship with a junior who is usually held to a higher standard.

14. The Board is not persuaded that the applicant's good military service or her responsibility for the sole support of her minor children is a compelling reason to grant clemency, which would require the Board to set aside the only punishment she received. In light of the behavior for which the applicant was convicted, the punishment was not inappropriate. The applicant was outside the E-4's apartment at approximately 0200 knocking repeatedly on his door and repeatedly hitting his car with a broom handle. The act placed the applicant, the E-4 and the Coast Guard in a bad light. In addition, the applicant's family situation and good military service were considered by the SCM when it imposed sentencing on her. The CA also considered her circumstances during his post trial review. The applicant has not proved any error with respect to her SCM nor has she presented the Board with such exigent circumstances that a refusal to grant clemency on the sentence would be tantamount to an injustice.

15. There is insufficient evidence in the record establishing what award the applicant's unit received, if any, or whether the CO abused his discretion by not including the applicant as a recipient of that award.

16. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxx, USCG, for correction of her military record is hereby denied.

Julia Andrews

George J. Jordan

Kathryn Sinniger