

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-008

XXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

ANDREWS, Deputy 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. On October 27, 2003, the BCMR docketed the applicant's request for correction.

This final decision, dated June 30, 2004, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his record to show that, upon his discharge from the Coast Guard on May 6, 2003, he had 61.5 days of accrued annual leave instead of just 13 days. The applicant alleged that at the time of his discharge he was authorized to sell back 62 days of leave. However, two months after his discharge, the Coast Guard adjusted his leave total to 13 days. The applicant alleged that he never used that much leave.

In support of his allegations, the applicant submitted a Statement of Intent dated April 30, 2003. It shows that he intended to sell 62 days of leave upon his discharge. It also contains the following information: "Number of days [of] leave taken and the dates of the leave, not posted in recents: None."

The applicant also submitted copies of his Leave and Earnings Statements (LESes) for the months of February, March, and April 2003. The February LES shows that he accrued 2.5 days of annual leave during the month, used 1 day, and had 56.5 days of accrued leave at the end of that month. His March LES shows that he accrued

another 2.5 days of annual leave during March, used none, and had 59 days of accrued leave at the end of the month. His April LES shows that he accrued another 2.5 days of annual leave during April, used none, and had 61.5 days of leave at the end of the month. A copy of his LES for May 2003, which was submitted by the Coast Guard, shows that he began the pay period with 61.5 days of accrued leave, earned 0.5 days of annual leave prior to his discharge on May 6, 2003, and was charged for 49 days of annual leave, which left a balance of 13 days of annual leave.

SUMMARY OF THE RECORD

On August 3, 1999, at the age of 22 years, the applicant enlisted in the Coast Guard. On November 23, 2000, after completing "A" School, he became a xxxxxxxxxx. On May 31, 2001, the applicant was placed on performance probation. On August 31, 2001, his commanding officer (CO) made an entry in his record indicating that the applicant was not recommended for advancement because his work "constantly need[ed] monitoring" and he did not show a "good understanding of routine concepts, numbers and codes." The applicant received low marks for "Setting an Example" because of his poor attitude and disparaging remarks about the Coast Guard, and for "Integrity" because he had told colleagues that he had sold a tool that had been issued to him and suggested that they do so as well and because he had "made false statements about [his] whereabouts" on two occasions.

On March 31, 2002, the applicant was again not recommended for advancement. Moreover, because of his performance problems and verbal outbursts, the applicant was sent for psychiatric evaluation and anger management training. On November 21, 2002, while arguing with a Master Chief Petty Officer, the applicant stated that he was homosexual and wanted to leave the Coast Guard. An investigation ensued, during which the applicant alternately admitted and denied being homosexual to various members.

On February 7, 2003, the applicant submitted a letter to his CO stating that he was not homosexual and that his admissions were false. On April 6, 2003, he signed another letter stating that "I, [name] am indeed gay" and that his prior letter was false.

On April 9, 2003, the applicant's CO notified him that he was initiating procedures to discharge him because of his admissions. The applicant was informed of his right to consult counsel, to appear at a hearing, and to submit a statement in his own behalf. On April 10, 2003, after consulting with counsel, he waived his right to a hearing and to submit a statement in his own behalf

On April 10, 2003, the CO recommended to the Coast Guard Personnel Command (CGPC) that the applicant receive a general discharge for homosexual conduct because of (a) his admissions, (b) his past poor performance, and (c) his "fail[ure] to

uphold the basic core values of loyalty and integrity.” On April 28, 2003, CGPC ordered the CO to discharge the applicant as recommended no later than May 23, 2003.

On May 6, 2003, the applicant was involuntarily discharged from the Coast Guard. His DD 214 indicates that he was paid for 13 days of annual leave.

VIEWS OF THE COAST GUARD

On March 9, 2004, the Judge Advocate General (TJAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial relief by compensating the applicant for an additional 20 days of leave. He attached to his opinion a memorandum on the case prepared by CGPC.

CGPC stated that under Article 7.A.20.a. of the Personnel Manual, members being discharged may sell leave and that members may sell a maximum of 60 days of unused annual leave during their careers. CGPC alleged that the applicant actually used 49 days of leave during his last three months on active duty even though it was not reflected in his February, March, and April LESes. CGPC alleged that it is not necessary for members to complete leave authorization request forms in order to take leave and that leave may be authorized upon a verbal request due to circumstances. CGPC stated that the applicant was granted leave prior to his discharge to allow him to look for a job in his home state.

CGPC stated that although the applicant actually took the 49 days of annual leave, under Article 7.A.10.b.11. of the Personnel Manual, he was authorized to take “up to 20 days of administrative absence (absence not chargeable as leave) to conduct a pre-separation job search and house hunting/relocation activities prior to the effective date of separation.” CGPC stated that this “benefit is granted at the discretion of the command” and that there is no evidence in the record that the applicant was told about or offered this benefit. CGPC stated that there is “no compelling reason why the Applicant’s command would deny the Applicant this benefit, while at the same time approving his absence for a purpose for which the benefit was specifically authorized.” CGPC stated that the command’s failure to grant the applicant the 20 days of administrative absence “was the result of administrative oversight” and that the applicant should therefore be granted an additional 20 days of leave.

In support of these allegations, CGPC submitted a copy of an electronic record — a leave authorization dated May 6, 2003—showing that the applicant took leave from February 15 through April 4, 2003. CGPC also submitted copies of emails from the applicant’s command. In one, dated April 3, 2003, a commander stated to a lieutenant commander that another officer had called him “over the weekend (I believe 23 March) to request a leave extension for a couple of days for [the applicant]. The answer was yes with an emphatic, ‘You have to be back to meet your medical appointment,’” which

was scheduled for April 3, 2003. The email further indicates that the applicant had called his command on April 2, 2003, stating that he was in his home state, that his car had broken down, and that he could not return in time for his appointment.

Other emails submitted by CGPC indicate that after his discharge, on June 25 and 29, 2003, the applicant asked about the 49 days of leave and stated that he had been "robbed" of them. In one response dated July 1, 2003, a lieutenant commander stated that "[a]fter your February 11 mast,[¹] you requested to take leave for job hunting purposes in xxxxxxxx. You departed this unit 1600 hours, February 14 and returned to this unit 1500, Friday April 04. You were rightfully charge[d] 49 days of leave (14 days in February, 31 days in March, 4 days in April) you used to job hunt in [his home state]. Let me remind you of your Negative Page 7 for missing a medical appointment on Thursday, 03 April, 2003 at xxxxxxxxxxxx Naval Hospital at 0830.[²] You had transmission problems Wednesday, April 02 and finally returned to this unit at 1500 on Friday, April 04, 2003."

Adding to CGPC's arguments, TJAG stated that the applicant has failed to submit evidence to contradict his command's statement that he was verbally authorized to take leave and did in fact take it. TJAG stated that because the applicant took the leave to seek employment, "it seems appropriate, purely as a matter of equity and not of right, to credit Applicant with twenty additional days of leave at the time of his separation."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 11, 2004, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

APPLICABLE LAW

Under 37 U.S.C. 37(b), a member of the armed forces "who has accrued leave to his credit at the time of his discharge, is entitled to be paid in cash or by a check on the Treasurer of the United States for such leave on the basis of the basic pay to which he was entitled on the date of discharge. ... However, the number of days of leave for which payment is made may not exceed sixty, less the number of days for which payment was previously made under this section after February 9, 1976." This statute is reflected in Article 7.A.20.a. of the Personnel Manual, which authorizes upon discharge a lump sum payment of unused leave "to a maximum career total of 60 days."

¹ The records of and reason for this mast are not in the record before the Board.

² There is no copy of this page 7 in the record before the Board.

Article 7.A.10.b. of the Personnel Manual states that “[r]etiring members and members separated involuntarily may be authorized up to 20 days (if separated IN-CONUS) ... of administrative absence to conduct pre-separation job search and house hunting/relocation activities prior to the effective date of separation. The administrative absence can be taken in consecutive days, including weekends and holidays; in increments ... ”

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 the provisions of 10 U.S.C. § 1552. The application was timely.

2. Absent evidence to the contrary, the Board presumes that Coast Guard records are correct and that Coast Guard officers have acted “lawfully, correctly, and in good faith.” *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979); 33 C.F.R. § 52.24(b). The record indicates that upon the applicant's discharge on May 6, 2003, his command deducted 49 days of annual leave from his accumulated total. The applicant alleged that he did not take the 49 days of leave and that his leave balance should have been 62 days instead of 13. In support of his allegations, he submitted LESes showing that no leave was charged to him in February, March, and April 2003 and that as of April 30, 2003, his leave balance was 61.5 days. In addition, the Coast Guard is apparently unable to produce any leave request for the 49 days signed by the applicant. Therefore, the Board finds that the applicant has submitted sufficient evidence to overcome the presumption of regularity.

3. Under the Board's rules at 33 C.F.R. § 52.24(b), the applicant “has the burden of proving the existence of an error or injustice by the preponderance of the evidence.” The Coast Guard alleged that the applicant took leave to look for a job in his home state for 49 days, from February 15 through April 4, 2003. In support of these allegations, the Coast Guard has submitted a leave authorization completed by his command on May 6, 2003, and emails from the applicant's command discussing his visit to his home state and his failure to return to his unit on time for an April 3, 2003, medical appointment because of an apparent problem with his car.

4. In weighing the evidence, the Board also notes that the applicant sometimes displayed a lack of integrity during his Coast Guard service. His record of dishonesty casts doubt upon the credibility of his allegations. Moreover, the applicant did not respond to the Coast Guard's advisory opinion, and he has not submitted any evidence—other than the LESes—that he actually worked at his unit during the 49 days in

question. If he had actually worked at his unit during this period, he could presumably have submitted numerous statements to this effect from his coworkers, but he has not.

5. The applicant has failed to prove by a preponderance of the evidence that he is entitled to have 49 days of annual leave restored in his record.

6. The Coast Guard noted that under Article 7.A.10.b. of the Personnel Manual, the applicant's command could have authorized him to take an administrative absence—in lieu of annual leave—for up to 20 days to go to his home state and look for a job. The record does not indicate whether the command failed to consider this provision or considered it and intentionally chose not to authorize him 20 days of administrative absence. In light of the applicant's record of misconduct and poor performance, it is certainly possible that his command intentionally withheld this discretionary benefit, especially since the applicant had accumulated sufficient annual leave to conduct his job search. However, after reviewing the record, CGPC concluded that there is "no compelling reason why the Applicant's command would deny the Applicant this benefit, while at the same time approving his absence for a purpose for which the benefit was specifically authorized." Likewise, TJAG concluded that "it seems appropriate, purely as a matter of equity and not of right, to credit Applicant with twenty additional days of leave at the time of his separation." In light of the views of the Coast Guard, the Board is persuaded that the applicant's record should be corrected to show that he was granted 20 days of administrative absence in lieu of 20 of his 49 days of annual leave.

7. Accordingly, the partial relief proposed by the Coast Guard should be granted.

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted in part as follows:

The Coast Guard shall correct his record to show that—instead of taking 49 days of annual leave from February 15 through April 4, 2003—he was first granted an administrative absence of 20 days in accordance with Article 7.A.10.b. of the Personnel Manual and then took 29 days of annual leave.

The Coast Guard shall correct his DD 214 accordingly and pay him any back pay and allowances he may be due as a result of this correction.

Philip B. Busch

Richard Walter

Suzanne L. Wilson