DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-144

Xxxxxxxxxxxxxxxxxxxxx
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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. The BCMR docketed the case on September 29, 2003, upon receipt of the applicant's completed application and military records.

This final decision, dated May 20, 2004, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, who was discharged from the Coast Guard on July 19, 1968, under other than honorable conditions (OTH) after having been tried and convicted for possession of marijuana in a civilian state court, asked the Board to correct his record by upgrading his discharge to honorable. The applicant alleged that he would have made a career in the Coast Guard if he "hadn't been set up in the bust that caused my wrongful conviction."

The applicant also asked that he be awarded a Gold or Silver Lifesaving Medal for an incident that occurred while he was stationed on the Coast Guard cutter *Xxxx*.

APPLICANT'S ALLEGATIONS

The applicant alleged that two years after his conviction and discharge, he was proved innocent and exonerated on appeal and "all charges were dismissed." He

alleged that the court issued an "Order Dismissing Accusation Against Probationer" that vacated his conviction.

The applicant stated that when he previously tried to get his discharge upgraded, he could not find a copy of the court's order because he was unfamiliar with the microfiche system and there was no one to help him. However, when he recently returned to the courthouse, a clerk helped him find all of the records of his case, including the order that dismissed the charges. He alleged that he discovered the errors in his record on May 22, 2003.

The applicant alleged that since his discharge, he has been an advocate against drug abuse for seventeen years by circulating a poster to educate children about the perils of social drug use. In addition, he stated that twice each year, he visits a veterans' hospital to cheer up patients with presents.

In support of his allegations, the applicant submitted a microfiche copy of an "Order Dismissing Accusation Against Probationer" dated June 18, 1970. The order indicates that on February 23, 1968, a state court placed the applicant on probation for three years after he was convicted of possessing marijuana. The order states that because the applicant had fulfilled the conditions of his probation, the conviction was "vacated and a plea of not guilty entered." The order further states that the "Accusation filed [in the case is] dismissed" and that the applicant should be "released from all penalties and disabilities resulting from the offense."

The applicant also submitted a letter from an attorney, who stated that he has known the applicant for twenty years and that the applicant "is loyal, selfless, and generous to a fault"; copies of posters in English and Spanish that bear the applicant's name and show "crystal meth" as a rat trap catching a person; several letters from various government offices acknowledging a letter from the applicant about his efforts to inform children about the dangers of substance abuse; a copy of a flier about a "Ride Against Terrorism to Salute America's Veterans" that also bears the applicant's name as a contact person; a newspaper clipping stating that the applicant had led efforts to recruit the local fishing industry to provide fish to feed the homeless; a letter stating that the applicant had done community service for the xxxxxx County Interfaith Council for several years; and two letters to the applicant from relief agencies, thanking him for many donations of tons of fresh fish to feed the hungry and homeless.

Regarding his request for a Gold or Silver Lifesaving Medal, the applicant stated that during a search and rescue off the coast of New Jersey, he and a crewmate were ordered into a small boat to help search for bodies. His crewmate was unskilled and "maneuvered the boat too close to shore, athwart the ground swells, and we broached to." The applicant stated that, though weighed down by foul weather gear, he made it to shore, but his crewmate did not. The applicant alleged that he spotted his crewmate

in the water, shed his gear and boots, and dove back into the heavy surf to rescue his crewmate. When he reached his crewmate, he discovered that the propeller had cut his crewmate's arm. The applicant stated that after "what seemed like an eternity," he managed to get his crewmate ashore. The applicant alleged that he then removed his crewmate's "upper clothing" and squeezed his arm to stop the bleeding. They were picked up "after a time" by a jeep from a nearby aid station.

SUMMARY OF THE RECORD

On October 15, 1965, the applicant enlisted in the Coast Guard for four years. Upon completing boot camp on December 17, 1965, he was advanced from seaman recruit (SR) to seaman apprentice (SA). On January 2, 1966, he reported aboard the *Xxxx*. An entry in the applicant's record shows that the entire crew of his cutter was commended for their performance of search and rescue activities during a storm on January 23 and 24, 1966. The applicant's record contains no confirmation of the alleged incident in which he saved a crewmate's life.

On November 1, 1966, the applicant was advanced to seaman (SN). However, on December 19, 1966, the applicant was reduced back to SA and restricted to base for six days with extra duties as non-judicial punishment he received at a captain's mast for violating Article 92 the Uniform Code of Military Justice (UCMJ) by being derelict in his duties. He never regained his rank.

On August 7, 1967, the applicant began "A" School to become a dental technician. On October 18, 1967, the Group Commander informed the Commandant that the applicant had been arrested by civil authorities on October 14, 1967, for possession and furnishing of marijuana, and was released on bail on October 17, 1967. The Group Commander stated that the applicant had been disenrolled from "A" School but would remain in the custody of the training center pending the results of his trial.

On November 3, 1967, the applicant was taken to captain's mast after he was found to have asked another SA to take some narcotics pills from him and plant them in a third SA's car. The "sentence" awarded was trial by a special court-martial for violating Article 134 of the UCMJ. However, the command never held the special court-martial because of the civil proceedings against the applicant.

On November 7, 1967, the applicant received a psychiatric evaluation. According to the psychiatrist's report, he refused to discuss his legal problems but admitted that he was "hoping to be found temporarily insane" to escape conviction. The psychiatrist found the applicant to be intelligent, with no delusions or hallucinations, but noted that his personality was passive-aggressive and manipulative. The psychiatrist reported that the applicant was "so far free from mental defect, disease or derange-

ment" as to be able to distinguish right from wrong, adhere to the right, and understand the charges and proceedings.

On December 18, 1967, the applicant was arraigned. On December 19, 1968, his command was notified that on February 2, 1968, he would be tried in state court for (a) possession of marijuana and (b) possession of marijuana for sale.

On February 8, 1968, the applicant was taken to captain's mast for having been away without leave (AWOL) for two hours and ten minutes on January 29, 1968. He was awarded two days' restriction to base with extra duties.

On March 1, 1968, the applicant's CO notified the Commandant that on February 2, 1968, pursuant to a plea bargain, the charge of possession of marijuana for sale was dropped and the applicant pled guilty to possession of marijuana. The CO further stated that at a sentencing hearing on February 26, 1968, the applicant had been sentenced to 90 days' confinement and a suspended three-year sentence during which he would be on probation. The CO recommended that the applicant receive an undesirable discharge.

On May 23, 1968, the applicant was arrested on suspicion of burglary and possession of marijuana, but the state dropped all of the charges because the homeowner had called the applicant and asked him to enter her home to feed her dog while she was in jail and because he claimed he did not know a friend who went with him was carrying marijuana.

On June 3, 1968, the applicant was taken to mast for having slept through his duties as mess cook on May 28 and 30, 1968. He was awarded seven days' restriction to base and fourteen hours of extra duties.

On June 6, 1968, the applicant's CO informed the Commandant that the applicant had been released from jail on May 2, 1968, and that an Administrative Discharge Board (ADB) convened on May 8, 1968, had recommended that he receive an undesirable discharge.

On June 27, 1968, the applicant failed to rise at reveille or report to muster, was found in bed at 9:05 a.m., and thereafter attempted to find breakfast instead of reporting for duty. He was taken to mast and awarded two weeks' restriction to base with extra duties.

On July 15, 1968, the applicant was further reduced to SR at a captain's mast for failing to obey an order by not rising at reveille and participating in morning clean-up on July 7, 1968. His punishment also included restriction to base with extra duties.

On July 16, 1968, the findings and recommendation of the ADB were approved by the Acting Chief of the Office of Personnel. On July 18, 1968, the Commandant ordered that the applicant be discharged for misconduct due to his conviction by civil authorities.

On July 19, 1968, the applicant received an undesirable discharge under other than honorable conditions by reason of "misconduct due to trial and conviction by civil authority" under Article 12-B-13 of the Personnel Manual. His DD 214 indicates that he was entitled to wear only the National Defense Service Medal.

In 1977, the applicant applied to a Special Discharge Review Board for an upgrade to his discharge. On December 31, 1977, his request was denied.

VIEWS OF THE COAST GUARD

On February 25, 2004, the Judge Advocate General of the Coast Guard submitted an advisory opinion recommending that the Board waive the statute of limitations and grant partial relief in this case by upgrading the applicant's discharge to a general discharge. He based his recommendation on a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC).

CGPC stated that the "Order Dismissing Accusation Against Probationer" is not a legal action that negates the underlying facts of the case but a "routine legal process used in California to remove misdemeanor offenses from a person's criminal record." However, CGPC argued that since the applicant's discharge was based on his civil conviction, "the presumption that the Coast Guard's original basis to separate the member remains valid is questionable."

CGPC stated that the Coast Guard committed no errors in discharging the applicant under other than honorable conditions since his record documents "a chronic pattern of misconduct" and he was "afforded his due process rights." However, CGPC stated, given the expungement of his civil conviction and the evidence he has submitted indicating that he has become a good citizen and "overcome the behavioral traits that led to his separation, it would be in the interest of justice to upgrade his discharge to "General, Under Honorable Conditions." CGPC argued that because of the applicant's "consistent record of misconduct and his documented illegal involvement with illegal drugs on at least two occasions," he is not entitled to an honorable discharge.

Neither CGPC nor the Judge Advocate General addressed the applicant's request for a lifesaving medal.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 1, 2004, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. On March 31, the applicant responded. He stated that while he "was not a model Coastie," his problem with making reveille was caused primarily by "sleep apnea/deprivation."

The applicant stated that he cannot recall the incident in which he encouraged someone to plant pills on the "snitch," but if he did he "must have felt justified for [he] was betrayed by the very system [he] volunteered to serve." He alleged that the snitch had driven him against his will to the apartment of the "guilty 5 defendants" and banged on their door for 20 minutes to wake them up. The applicant alleged that he tried to dissuade the snitch and returned to the car to go to sleep, but the snitch refused to let him stay in the car. He alleged that when someone opened the door, the snitch entered the apartment, pulled out three or four hand-rolled cigarettes, and said, "It's party time. Let's get high!" He also alleged that he and the snitch did not actually smoke the marijuana but that he was arrested and charged along with the others so that he would not be able to go back to school, where fellow students would have asked him where the arrested students had gone. He alleged that he was arrested simply to save the Coast Guard from "more embarrassment."

APPLICABLE LAW

Under 10 U.S.C. § 1552(a), the BCMR "may correct any military record of the Secretary's department when the [Board acting on behalf of the] Secretary considers it necessary to correct an error or remove an injustice."

Under Article 12-B-13 of the Personnel Manual in effect in 1968, the Commandant could separate a member for misconduct with an undesirable discharge if the member had been convicted by a civil authority for an offense that, under the UCMJ, was punishable by confinement for more than one year. Under the UCMJ, the maximum punishment for possession or sale of marijuana in 1968 was five years' confinement at hard labor and a dishonorable discharge.

Under Article 20.C. of the current Personnel Manual, any member involved in a "drug incident" today may be administratively discharged with no greater than a general discharge under honorable conditions. Under Article 20.A.2.k., a "drug incident is defined as "[i]ntentional drug abuse, wrongful possession of, or trafficking in drugs. … A civil or military conviction for wrongful use, possession, etc., or controlled substances is prima facie evidence of a drug incident. The member need not be found guilty at court-martial, in a civilian court, or be awarded [non-judicial punishment at a captain's mast] for the behavior to be considered a drug incident." Article 12.B.18.b.4. provides that any enlisted member involved in a "drug incident" shall be separated with no higher than a general discharge. Article 12.B.2.c.(2) states that a "general discharge" is a separation "under honorable conditions."

Under Article 112a of the current UCMJ, possession of 30 grams or more of marijuana is punishable by a dishonorable discharge and five years' confinement. Possession of less than 30 grams is punishable by a dishonorable discharge and two years' confinement. Distribution of marijuana is punishable by a dishonorable discharge and fifteen years' confinement.

Under Article 12-B-14 of the Personnel Manual in effect in 1968, a member being discharged for misconduct had a right to be informed of the pending action and to submit a statement in his own behalf and he had a right to appear before an ADB represented by counsel. (However, under Article 12-B-13(c), the Commandant could waive the ADB when the evidence clearly established the conviction by civil authorities.) The ADB would recommend whether the member should be discharged and, if so, the character of discharge. The recommendation of the ADB was subject to approval by the Commandant.

Under Article 12-B-2 of the Personnel Manual, the character of separation of a member who received an "undesirable discharge" was under "conditions other than honorable."

In *United States v. Bergeman*, 592 F.2d 533 (9th Cir. 1979), the defendant argued that a federal statute making it unlawful for someone to receive a firearm if he had been convicted of a crime punishable by imprisonment for more than one year did not apply to him because his prior conviction had been expunged by the state of Idaho. The U.S. Court of Appeals for the Ninth Circuit held that the state's action did not affect the defendant's convicted status for the purposes of the federal statute.[1]

In *Yacovone v. Bolger*, 645 F.2d 1028 (D.C. Cir. 1981), the defendant was fired by the U.S. Postal Service after being convicted for shoplifting. The Governor of Vermont granted the defendant a full pardon. The D.C. Circuit Court of Appeals upheld the defendant's dismissal, finding that the pardon did not erase the conviction for purposes of federal employment.[2]

On July 7, 1976, the delegate of the Secretary informed the BCMR of the following determination, which has never been countermanded:

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[1] *United States v. Bergeman*, 592 F.2d 533, 536-37 (9th Cir. 1979) (citing many similar decisions, including *United States v. Potts*, 528 F.2d 883 (9th Cir. 1974)). *See also Thrall v. Wolfe*, 503 F.2d 313 (7th Cir. 1974), in which the U.S. Court of Appeals for the Seventh Circuit held that a state pardon has no impact on a federal disability resulting from a state conviction.

[2] *Yacovone v. Bolger*, 645 F.2d 1028, 1034 (D.C. Cir. 1981).

> [T]he Board should not upgrade discharges solely on the basis of post-service conduct. The situation in which a man is granted a less than honorable discharge under circumstances all agree were just, and then goes on to become Albert Schweitzer, is one that—if it ever occurs—is properly handled by an exemplary rehabilitation certificate or a Presidential pardon.
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> This emphatically does not mean that the justness of a discharge must be judged by the criteria prevalent at the time it was rendered. The Board is entirely free to take into account changes in community mores, civilian as well as military, since the time of discharge was rendered, and upgrade a discharge if it is judged to be unduly severe in light of contemporary standards. …. [T]he Board should not upgrade [a] discharge unless it is convinced, after having considered all the evidence [in the record], that in light of today's standards the discharge was disproportionately severe vis-à-vis the conduct in response to which it was imposed.

FINDINGS AND CONCLUSIONS

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

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

2. An application to the Board must be filed within three years after the applicant discovered or reasonably should have discovered the alleged error in his record.[3] The record indicates that the applicant signed and received his discharge documents in 1968. Therefore, he knew or should have know of the character of his discharge and his lack of a lifesaving medal at that time. Although the applicant stated that he did not discover the documentation of the vacation of his criminal record until May 22, 2003, the Board believes that he knew or should have known of the court's action soon after June 18, 1970. At the time of his plea bargaining and sentencing, the court or his attorney presumably told the applicant that if he met the terms of his probation, the misdemeanor conviction would be vacated. Moreover, even if they failed to do so, the applicant's own failure to investigate and find the documentation for more than 30 years does not toll the Board's statute of limitations. Thus, his application was untimely.

3. The Board may waive the three-year statute of limitations if it is in the interest of justice to do so.[4] Factors for the Board to consider in determining whether it is in the interest of justice to waive the statute of limitations include any stated reasons for the delay and whether a cursory review of the record indicates that there is some

[3] 10 U.S.C. § 1552; 33 C.F.R. § 52.22.
[4] 10 U.S.C. § 1552(b).

merit in the case.[5] The applicant did not explain why he delayed seeking an upgrade of his reenlistment code and the lifesaving medal. However, the Board's review of the record indicates that the Judge Advocate General has recommended granting partial relief. Therefore, the Board will waive the statute of limitations and consider the application on the merits.

4. The record indicates that the applicant was properly discharged from the Coast Guard under other than honorable conditions after he was convicted by civil authorities of possession of marijuana in a plea bargain under which the charge of possession for sale was dropped and he was sentenced to 90 days' confinement and three years' probation. The record indicates that he was afforded all due process in accordance with Article 12-B-14 of the Personnel Manual in effect at the time. Although the applicant alleged that he was innocent of the charges, he submitted no evidence that supports this allegation.

5. The record further indicates that because the applicant met the terms of his probation, the state court issued an "Order Dismissing Accusation Against Probationer" on June 18, 1970, which vacated his conviction. The applicant alleged that the court's order proved him innocent and exonerated him. However, the court's order did not prove him innocent or exonerate him. The court's order on June 18, 1970, merely removed the conviction from his criminal record as a reward for the fact that he met the terms of his probation.

6. CGPC argued that the court's order of June 18, 1970, rendered the basis for the applicant's discharge "questionable." However, the law is clear that a state's decision to expunge or pardon a conviction has no impact on a federal disability—such as an undesirable discharge—arising from the state conviction.[6] Therefore, the "Order Dismissing Accusation Against Probationer" has no legal effect on the applicant's undesirable discharge.

7. The delegate of the Secretary permits the Board, in deciding whether to upgrade a discharge, to consider changing community mores. However, the Board is not persuaded that mores regarding military members' involvement with illegal drugs have changed significantly since 1968. Certainly the range of available disciplinary actions for involvement with illegal drugs under the Personnel Manual and the UCMJ has not significantly changed. Although some members of the Coast Guard who are involved in a "drug incident" today receive a general discharge under honorable conditions pursuant to Article 20.C. of the Personnel Manual, marijuana possession can also result in an OTH administrative discharge, such as the applicant received, or a dis-

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[5] *See Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405 (D.C. Cir. 1995); *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

[6] *Yacovone v. Bolger*, 645 F.2d 1028, 1034 (D.C. Cir. 1981); *United States v. Bergeman*, 592 F.2d 533 (9th Cir. 1979; *United States v. Potts*, 528 F.2d 883 (9th Cir. 1974)); *Thrall v. Wolfe*, 503 F.2d 313 (7th Cir. 1974).

honorable discharge and confinement in prison. Moreover, in addition to being convicted of possession of marijuana, the applicant was charged by the State with possession of marijuana for sale (but this charge was dropped in a plea bargain) and by the Coast Guard with conspiracy to plant narcotics on another member (but the court-martial was never held because of the civil charges against him). His military record also reveals several other incidents of misconduct. Given the applicant's overall record of misconduct and alleged misconduct, the Board is not persuaded that, if he had committed the same offenses in the Coast Guard today, he would have received anything better than an OTH discharge.

8. CGPC argued that the Board should upgrade the applicant's discharge to general, under honorable conditions, because the evidence of record indicates that he has become a good citizen. However, the delegate of the Secretary has held that the Board "should not upgrade discharges solely on the basis of post-service conduct." This does not mean, however, that the Board cannot consider post-service conduct as a factor in deciding whether it would be in the interest of justice to upgrade a discharge. The applicant has proved that after his discharge, he was for several years a driving force behind a program in which the local fishing industry provided tons of fresh fish to feed the hungry and homeless and that he himself provided tons of fresh fish for charity while working as a fisherman. He also apparently has volunteered on behalf of disabled veterans and distributed a poster warning people of the dangers of "crystal meth."

9. The delegate of the Secretary has held that "[t]he Board should not upgrade [a] discharge unless it is convinced, after having considered all the evidence … , that in light of today's standards the discharge was disproportionately severe vis-à-vis the conduct in response to which it was imposed." Despite the recommendation of the Judge Advocate General and the charitable acts of the applicant in the intervening years, the Board is unable to conclude that his discharge was disproportionately severe or that it is in the interest of justice to upgrade the applicant's discharge.

10. The applicant also asked to be awarded a Gold or Silver Lifesaving Medal. Although the record confirms that as a crewmember of the *Xxxx*, the applicant was involved in search and rescue missions, there is no evidence in the record to support his allegation of having saved the life of his crewmate. Absent evidence to the contrary, the Board is required to presume that the Coast Guard has acted correctly and in good faith.[7] Therefore, since the applicant has submitted no evidence to support his story of saving his crewmate's life during a search and rescue mission, the Board must presume that the applicant's record is correct as it is, without the lifesaving medal.

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[7] 33 C.F.R. § 52.24(b); *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

11. Accordingly, the applicant's requests should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former SR xxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

Bruce D. Burkley

Harold C. Davis, MD

John M. Dickinson