

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-105

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX SA (former)

FINAL DECISION

Author: Ulmer, D.

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 May 9, 2005, upon receipt of the applicant's completed application and military records.

This final decision, dated February 28, 2006, 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 military record by upgrading his bad conduct discharge (BCD). The applicant was discharged from the Coast Guard in 1949. He stated that he was never given an opportunity to explain the absence without leave offenses that led to his General Courts-martial (GCM) and subsequent BCD. In a letter attached to his application, he provided the following explanation:

My actions that led up to my discharge are my first born child in June 1949 was born at Newport Naval Hospital . . . She was born with a combination "hare lip" and "cleft palate." No one wanted to help her until she was 7 years old. So being young and stupid, I started going AWOL to get someone mad at me, well it went to extremes. I ended up with a BCD. We moved . . . My daughter got all her operations and treatment and today is a wonderful lady with two daughters of her own. I just thought,

I'm 79 years old it would be a shame to eventually die and have this on my record. As I said it was a stupid mistake and all I can say is I'm sorry.

SUMMARY OF THE RECORD AND SUBMISSIONS

The applicant enlisted in the Coast Guard on February 2, 1949.

On August 10, 1949, the applicant was convicted at summary court-martial for absence over leave from May 22, 1949 to June 11, 1949. He was sentenced to deprivation of liberty for two months and to perform 100 hours of extra duties. The deprivation of liberty was mitigated to 30 days by the convening authority.

The applicant was absent without authority from August 12, 1949 until August 15, 1949, having failed to returned from special liberty granted by the commanding officer. The applicant's enlistment was extended for three days to cover time lost.

On December 23, 1949, the applicant was convicted at a GCM in accordance with his pleas of two specifications of absence over leave from October 7, 1949 to October 18, 1949 and from November 2, 1949 to November 16, 1949. He was sentenced to a dishonorable discharge, which was mitigated to a BCD by the convening authority.

The applicant was discharged with a BCD on January 3, 1950. Upon discharge, his average performance marks were 1.25 in "performance in rate" and 2.16 in "conduct" measured on a scale of 1 to 4, with 4 being the highest mark.

VIEWS OF THE COAST GUARD

On October 5, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant partial relief to the applicant by upgrading the BCD to a general discharge under honorable conditions.

The JAG stated that although the application was submitted well beyond the time limit, the circumstances appear to be a rare case where the BCD, while legal and authorized at the time adjudged, may be considered an injustice. He noted that 10 USC 1552(f) prohibits the BCMRs from removing convictions from military records, but recognized that it may act under its clemency powers to change a sentence. He argued that the Board's clemency power should be reserved for those unusual cases where unanticipated circumstances cause the lawful sentence of a court-martial to have an effect that shocks the conscience or conflicts with notions of fundamental fairness. He asserted that the Board should not consider clemency unless there are compelling reasons for doing so. In this regard, the JAG stated that the Attorney General suggests that a Board must consider whether it can more fairly determine the equities in a case

than the court martial that originally imposed the sentence. See e.g. 40 Op. Atty. Gen 504 (February 24, 1947).

The JAG stated that this application is one of those extraordinary cases where there are compelling reasons to consider clemency. He offered the following reasons for granting clemency:

(1) Applicant was tried under the disciplinary laws of the Coast Guard and the punishment awarded at the court-martial in issue - a dishonorable discharge that was later reduced to a bad conduct discharge - was lawful . . .

(2) Shortly after applicant's court-martial Congress passed the UCMJ. On February 8, 1951, the President published the Manual for Courts-Martial, which became effective with respect to all courts-martial on and after May 31, 1951. A punitive discharge would not have been an authorized punishment for applicant's offenses under the Manual for Courts-Martial 1951. Therefore, the extraordinary use of the Board's authority to provide clemency is appropriate.

Attached to the advisory opinion as Enclosure (1) were comments from CGPC, who offered the following:

Under current Coast Guard separation policies, it is highly unlikely that two similar events, absent other patterns of misconduct, would lead to a member's separation with a [BCD]. In considering the applicant's petition under 33 CFR Chapter 1 § 51.7 [the Discharge Review Board regulation], equity standard of review . . . I find that the policies and procedures under which the applicant was discharged may differ in material respects from policies and procedures currently applicable on a service-wide basis to discharges of that type. A person currently tried at General Court-Martial cannot be punished with a [DD] or [BCD] for the same charge.

* * *

Under 33 CFR Chapter 1 § 51.7, Equity Standard of review, I believe it would be fair and equitable to upgrade the Applicant's discharge. I find that the applicant's discharge from the Service with a [BCD] for fifty-five years is adequate punishment for his offense.

However, the records indicate that the applicant does not meet the minimum characteristic average required to receive an honorable discharge. A General Discharge-Under Honorable Conditions would

more accurately reflect the Applicant's record in that the Applicant performed honorably in some aspects of his service, but also reflects that he engaged in serious misconduct, which brought discredit to him and the Service.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 14, 2005, the BCMR received the applicant's reply to the views of the Coast Guard. He stated that he had no objection to the Coast Guard's recommendation.

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.

2. The application was not timely. To be timely, an application for correction of a military record must be submitted within three years after the applicant discovered or should have discovered the alleged error or injustice. See 33 CFR 52.22. This application was submitted approximately 53 years beyond the statute of limitations.

3. However, the Board may still consider the application on the merits, if it finds it is in the interest of justice to do so. In Allen v. Card, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that in assessing whether the interest of justice supports a waiver of the statute of limitations, the Board "should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review." The court further stated that "the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review." Id. at 164, 165. See also Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir. 1995).

3. Although this application was submitted to the Board well after the expiration of the three-year statute of limitations, the Board finds that it is in the interest of justice to waive the statute of limitations in this case. The Board is persuaded in this finding by the recommendation for relief by the JAG, who noted that under today's standards two relatively minor unauthorized absences, like the applicant's, would not cause a member to receive a BCD. Therefore, as a matter of equity, the JAG recommended that the applicant be granted relief.

4. With respect to the merits of his claim, the Board having reviewed the applicant's military record is satisfied that his misconduct while in the Coast Guard was

limited to short periods of unauthorized absences. Therefore, the Board finds that based on the JAG's conclusion, as verified by the table of punishments in the Manual for Courts Martial (2002), such short unauthorized absences would not result in a less than honorable discharge under today's standards. Therefore, it is in the interest of justice to correct the applicant's record to show that he was discharged from the Coast Guard with a general discharge under honorable conditions in 1950. Moreover, there is no evidence in the record that the applicant has engaged in misconduct since his discharge from the Coast Guard.

5. The applicant is not eligible for an honorable discharge, however, because his average performance marks (1.25 in "performance in rate" and 2.16 in "conduct") over the period of his enlistment do not meet the minimum required average marks that would entitle him to an honorable discharge. Under Article 12.B.2.f. of the Personnel Manual in effect at that time of the applicant's discharge, an average mark of 2.5 in each performance factor was required for an honorable discharge. In addition, the applicant indicated that he had no objection to the Coast Guard's recommendation in his case that he receive a general discharge under honorable conditions.

6. Accordingly, the Board finds that the applicant is entitled to partial relief.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of former SA xxxxxxxxxxxxxxxxxxxxxxxx USCG, for correction of his military record is granted. The applicant's record, including his DD Form 214, shall be corrected to show that he was discharged from the Coast Guard with a general discharge under honorable conditions.

Julia Andrews

Dorothy J. Ulmer

*

*Pursuant to 33 C.F.R. § 52.11(b), two designated members constitute a quorum of the Board.