

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-107

XXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Andrews, J.

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on May 17, 2005, upon the Board's receipt of the completed application and military records.

This final decision, dated March 8, 2006, is signed by the three duly appointed members who were designated to serve as the Board in this case.

REQUEST FOR CORRECTION

The applicant is a deceased veteran of World War II who received a bad conduct discharge (BCD) on January 9, 1946, pursuant to the sentence of a general court-martial. The application was submitted by the applicant's daughter, who submitted a copy of her father's death certificate to prove her standing in accordance with 33 C.F.R. § 52.21(b). She stated that she did not learn the character of his discharge until after he died on December 31, 1993. She stated that her father received several awards while in the service and that she believes that the character of his discharge was unjust. She stated that when she was a child, her family visited Washington, D.C., several times and that her mother recently informed her that the visits were pursuant to her father's unsuccessful attempts to have his discharge upgraded.¹

SUMMARY OF THE RECORD

¹ The applicant may have applied to the Discharge Review Board. A review of the BCMR's historical files did not reveal any prior applications by the applicant to this Board.

On July 30, 1943, eighteen days shy of his 18th birthday, the applicant enlisted in the Coast Guard Reserve for three years. He had completed only one year of high school. On August 15, 1944, while the nation was still at war in Europe and the Pacific, the applicant missed the sailing of his ship, the *USS Lansing*. A seaman first class, he had been on leave prior to the sailing and failed to return when his leave ended. The *USS Lansing* was a destroyer escort employed in protecting convoys across the Atlantic Ocean to North Africa.

The applicant was reported as a deserter, but on September 13, 1944, he surrendered himself in New York after having been "absent over leave" (AOL) for 29 days. On September 16, 1944, at a report mast, the applicant's commanding officer determined that his offenses should be tried at a General Court-Martial (GCM). On September 30, 1944, the applicant was transferred to the disciplinary barracks on Hart's Island, in Long Island Sound near the Bronx.

At trial on October 6, 1944, the applicant pled guilty to one specification of being absent over leave for 29 days. The fact that he also missed ship's movement is noted after the charge parenthetically. At trial, the applicant stated that while he was on leave, his brother had injured a leg in a car accident and that his own testimony was necessary to get a settlement for his brother. He was found guilty and sentenced to reduction in rate to seaman apprentice and confinement for nine months to be followed by separation with a BCD. None of the members of the court recommended clemency.

On October 13, 1944, the Convening Authority approved the proceedings but mitigated the sentence so that the BCD would be remitted "on the condition that during confinement and for a period of six (6) months thereafter [the applicant] conducts himself in such manner as, in the opinion of his commanding officer, warrants his retention in the service, otherwise he shall be discharged from the service by his commanding officer in accordance with the terms of his sentence at the expiration of the period of his confinement, or at any subsequent time during the period of probation." He recommended that the applicant continue to be confined at Hart's Island. Also on October 13, 1944, the disciplinary barracks noted that the applicant was expected to be "confined for 4 mos.," in apparent anticipation of further mitigation of the sentence.

On November 9, 1944, the applicant was taken to mast for attempting to escape from the disciplinary barracks on Harts Island. The commanding officer sentenced him to "lose three (3) mos. good time."

On November 10, 1944, the Assistant Commandant of the Coast Guard forwarded the applicant's case to the Navy² for review with a recommendation that "if [the

² During World War II, the Coast Guard functioned under the auspices of the Navy, pursuant to 14 U.S.C. §§ 1, 3, until December 31, 1945. On January 1, 1946, the Coast Guard reverted to the Department of the Treasury and operated under its own rules. Executive Order No. 9666, December 28, 1945.

applicant's] conduct so warrants at the end of the first four (4) months of confinement, he be restored to duty with the unexecuted portion of the Sentence conditionally remitted subject to the satisfactory completion of six (6) months' probationary period."

On November 15, 1944, the applicant was transferred to disciplinary barracks at Camp Peary, Virginia, "for further confinement." He remained confined there until July 12, 1945.

On November 29, 1944, the Secretary of the Navy mitigated the sentence in accordance with the recommendation of the Assistant Commandant.

On June 2, 1945, the applicant began a "retraining camp" at Camp Peary. On July 12, 1945, he was released upon completion of nine months of confinement and returned to duty on six months' probation "subject to the execution of a BCD." The applicant's Certificate of Retraining notes that he had received an average grade of 3.5 during his retraining and had been "a good worker. He got along well with his mates." The Certificate of Retraining bears a scale of "Conduct During Confinement" with the choices Fair, Satisfactory, Good, Very Good, Excellent, and Outstanding. The applicant's conduct was rated as Satisfactory.

On December 17, 1945, the applicant was absent without leave (AWOL) from his unit, the *USCGC Nourmahal*. His commanding officer noted in the applicant's record that he was on probation and subject to the execution of the BCD pursuant to the sentence of the GCM.

On December 20, 1945, the applicant surrendered himself. His commanding officer confined him to the brig and requested authority from the Commandant "to execute the unexecuted portion" of the applicant's sentence because he had gone AWOL during his probationary period. The Commandant approved the request on January 4, 1946.

On January 9, 1946, the applicant was released from the brig and separated with a BCD pursuant to the sentence of the GCM because he had not met the terms of his probation. Upon his discharge, the applicant's final average marks were 2.65 for proficiency in rating and 3.41 for conduct. He had completed 1 year, 6 months, and 9 days of creditable service, including approximately 1 year and 2 months of sea service on five different ships. He was entitled to wear the American Area Ribbon, the European-African-Middle Eastern Area Ribbon, and the World War II Victory Ribbon.

VIEWS OF THE COAST GUARD

On October 5, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended granting relief. He based this

recommendation on a memorandum on the case from the Commander of the Coast Guard Personnel Command (CGPC), which the JAG adopted.

CGPC stated that the Board should waive the statute of limitations because, CGPC alleged, there is a basis for relief in the record. CGPC noted that the sentence received by the applicant is in accordance with the policies and procedures at the time, which "do not differ in material respects from policies and procedures currently applicable. ... A person currently tried at General Court-Martial may be separated with a Bad Conduct discharge for a similar charge of Missing Movement." CGPC also stated the following:

On November 29, 1944, the Secretary of the Navy concurred with the recommendation of the Commandant and mitigated the Applicant's sentence to four (4) months of confinement, provided the Applicant conducted himself in a manner satisfactory to his commanding officer at which time the Applicant would be released on probation for a period of six (6) months. The Applicant's record shows that the Applicant was not released after four (4) months of confinement. The Applicant was released after completing nine (9) months in confinement. *There is no record justifying the Applicant's extended confinement.* The Applicant's Certificate of Retraining, which documents his performance during confinement, reflects that the Applicant was, at minimum, a satisfactory performer. In addition to having good to excellent marks, it is noted that "this man was a good worker. He got along well with his mates." [Emphasis added.]

Had the Applicant's sentence been properly carried out, the Applicant would not have been on probation at the time of the second incident and may not have been separated with a Bad Conduct Discharge. It is also plausible that the incident could have been completely avoided had the sentence been properly executed. In light of this error, I find that it would be unjust to presume that the Applicant's separation was just and within Coast Guard regulations at the time of his separation.

RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 4, 2005, the applicant's daughter responded to the advisory opinion by stating that she agreed with them.

In response to further inquiry by the BCMR staff about the basis for her belief that the BCD was unjust, which was not explained in the application, the applicant's daughter stated that his commanding officer had promised him that "if he maintained good behavior, he would receive an honorable discharge. The date led up to approximately 4 days prior to his discharge." She stated that her mother told her that her father had been "pushed out of the military due to the fact that WWII was over and they were getting rid of men any way they could." She further stated that as a former member of the Coast Guard herself, she wants "to be able to go to my father's grave and put a flag upon it with pride to know that I was able to overturn this for him."

APPLICABLE LAW

Article 459 of the Personnel Instructions in effect in 1946 provided that “[u]pon separation from the Coast guard for any reason other than death, an enlisted man shall be entitled to receive a discharge, the character of which shall be determined by the reason for discharge and/or the character of service rendered during his period of enlistment.”

Under Article 4952(1) and (2), members could receive an honorable discharge if

- (a) they had a final average proficiency in rating mark of “not less than 2.75” and a final average conduct mark of at least 3.0;
- (b) they were “[n]ever convicted by general Coast Guard court or more than once by a summary Coast Guard court, or more than twice by a Coast Guard deck court”; and
- (c) they were being discharged for one of the following reasons: expiration of enlistment, convenience of the government, minority, hardship, or physical or mental disability not the result of own misconduct.

Members being discharged for the reasons listed in paragraph (c) above could receive a general discharge under honorable conditions if their marks did not meet the minimums required for an honorable discharge or if they had been convicted once by a General Court Martial, twice or more by a Summary Court-Martial, or at least three times by a deck court.

Under Article 4952(6), a member could receive a BCD if he was “[d]ischarged in accordance with the approved sentence of a general or summary Coast Guard court, as mitigated.”

Article 12.B.2.f.1.c. of the current Personnel Manual states that, to receive an honorable discharge prior to 1983, a “member must have made a minimum final average of 2.7 in proficiency and 3.0 in conduct.”

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 discovers the alleged error in his record. 10 U.S.C. § 1552(b). The applicant

received his BCD on January 9, 1946. Thus, the application was untimely by more than 50 years.

3. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if 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 to determine 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 instructed 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.”³ A cursory review of the merits of this case indicates a reasonable possibility that the claim has substantive merit, and there is some excuse for delay given the applicant’s youth and lack of education at the time of his BCD. Furthermore, the JAG and CGPC have not asked the Board to deny the claim on the basis of the statute of limitations; rather, they have recommended that the Board grant the requested relief. Therefore, although the application is more than 50 years late, the Board finds that it is in the interest of justice to excuse its untimeliness and consider it on its merits.

4. On October 6, 1944, the applicant was convicted by a GCM of being absent over leave for 29 days, during which he missed his ship’s movement. He was sentenced to reduction in rate to seaman apprentice and confinement for nine months to be followed by a BCD. This Board does not have the authority to overturn a conviction by court-martial but it may grant clemency on the sentence of a court-martial. 10 U.S.C. § 1552(f)(2).

5. On October 13, 1944, the Convening Authority approved the proceedings but mitigated the sentence so that, if the applicant’s behavior was satisfactory during his first six months of confinement, he would be released at the end of six months and returned to duty on a further six months of probation. In addition, if his behavior was satisfactory, he could be retained on active duty, but if not, “he shall be discharged from the service by his commanding officer in accordance with the terms of his sentence at the expiration of the period of his confinement, or at any subsequent time during the period of probation.” The Convening Authority designated Hart’s Island as the place of confinement. The command at Hart’s Island noted on October 13, 1944, that the applicant was to be confined for four months in apparent anticipation of further mitigation of the sentence. As the Coast Guard was then under the aegis of the Navy, on November 10, 1944, the Assistant Commandant forwarded the case to the Secretary of the Navy with a recommendation that, if the applicant’s behavior was satisfactory during the first four months of his confinement, he be released at the end of four months and returned to duty on six months of probation, subject to execution of the BCD. On November 29,

³ *Allen v. Card*, 799 F. Supp. 158, 164-65 (D.D.C. 1992); see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

1944, the Secretary of the Navy mitigated the applicant's sentence in accordance with that recommendation.

6. The record shows that the applicant's behavior during his first four months was not satisfactory. On November 9, 1944, he was found guilty at mast for attempting to escape from the disciplinary barracks on Hart's Island. Therefore, on November 15, 1944, he was transferred to Camp Peary in Virginia "for further confinement." If the applicant had not attempted to escape, he would have been kept at Hart's Island and eligible for release from confinement on February 12, 1945, at the end of four months, and his probationary period would have ended on August 12, 1945.

7. In reviewing the record, CGPC did not mention the applicant's attempted escape during his first four months of confinement, and alleged that "[t]here is no record justifying the Applicant's extended confinement." However, the applicant's transfer to Camp Peary "for further confinement" on November 15, 1944, just six days after his conviction at mast for attempted escape, indicates that his commanding officer determined that the applicant had not met the satisfactory behavior requirement for release at the end of four months. Therefore, the applicant was confined for the entire nine months of his original sentence. Because of the applicant's conviction at mast for attempted escape during his first four months of confinement, the Board disagrees with the Coast Guard's finding that the applicant's confinement for nine months was not justified by any record of misbehavior. The applicant attempted to escape during the first four months of confinement and so did not meet the condition for early release under his mitigated sentence.

8. The Convening Authority held that the applicant could be retained to complete his enlistment if he "conducts himself in such manner as, in the opinion of his commanding officer, warrants his retention in the service, otherwise he shall be discharged from the service by his commanding officer in accordance with the terms of his sentence *at the expiration of the period of his confinement, or at any subsequent time during the period of probation.*" [Emphasis added.] Because the applicant did not meet the condition for early release under his mitigated sentence, the Coast Guard could have discharged him with a BCD on July 12, 1945. Instead, the Coast Guard returned the applicant to active duty on six months' probation "subject to execution of a BCD." Therefore, if the applicant's behavior had been satisfactory to his commanding officer through February 12, 1946, he would no longer have been subject to the BCD. However, the applicant went AWOL for four days, from December 17 through 20, 1945.

9. Because the applicant went AWOL in December 1945, he did not meet the terms of his probation and was subject to the BCD in accordance with his sentence as mitigated. After he surrendered on December 20, 1945, his commanding officer confined him to a brig and requested and received authority to execute the BCD. On January 9, 1946, the applicant received a BCD in accordance with his GCM sentence as miti-

gated and Article 4952(6) of the Personnel Instruction then in effect. Given the facts of this case, the Board finds that the Coast Guard committed no error in executing the BCD.

10. Under 10 U.S.C. § 1552(a), the Board may “remove an injustice” from a veteran’s record, as well as correct an error in the record. The Board has authority to determine whether an injustice has been committed on a case by case basis.⁴ Therefore, although the Coast Guard committed no error in separating the applicant with a BCD, the Board must consider whether the applicant’s BCD constitutes an injustice. With respect to upgrading discharges, the General Counsel of the Department of Transportation informed the BCMR on July 7, 1976, that it “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.” The Board does not, however, construe this standard as prohibiting it from exercising clemency in court-martial cases under 10 U.S.C. § 1552(a) and (f), even if the discharge was neither disproportionately severe compared to the misconduct, nor clearly inconsistent with today’s Coast Guard standards. Such a construction would be inconsistent with the very nature of “clemency,” which means “kindness, mercy, leniency.”⁵ Clemency does not necessarily require that a sentence have been unjust or wrong; on the contrary, it can be (and often is) forgiveness of punishment that is otherwise appropriate. In particular, the line of cases cited in footnote 13, *infra*, is based more on the exercise of the Board’s clemency authority, which is part of its general authority to correct injustice in military records, than on the strict application of the 1976 guidance, although the decisions do not typically discuss this distinction. An analysis under the 1976 guidance primarily considers whether the past discharge was unjust at the time or would be unjust if applied to a similarly situated servicemember today; a clemency analysis considers, rather, whether it is appropriate today to forgive the past offense that led to the punishment and to mitigate the punishment accordingly.

11. In the Coast Guard’s advisory opinion, CGPC stated that a member tried for missing ship’s movement today could receive the same or a worse sentence under the Uniform Code of Military Justice and that “the policies and procedures under which the applicant was discharged do not differ in material respects from policies and procedures currently applicable on a service-wide basis.” During World War II, the Articles of War were in effect, as the UCMJ had not been enacted. Under the Articles of War, the offense of missing movement “required a positive intent to avoid particular ship-board service. ... Where the specific intent to avoid scheduled movement was not present, the fact of missing ship was alleged as a matter in aggravation to a charge of

⁴ Decision of the Deputy General Counsel, BCMR Docket No. 2001-043. According to *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev’d on other grounds*, 930 F.2d 1577, and *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976), purposes of the BCMRs under 10 U.S.C. § 1552, “injustice” is “treatment by military authorities that shocks the sense of justice.”

⁵ BLACK’S LAW DICTIONARY (5th ed.)

unauthorized absence.”⁶ The record indicates that the applicant pled guilty to and was convicted of a single specification of being AOL with missing ship’s movement as an aggravating factor, rather than to missing movement (as the JAG alleged). Examination of prior cases indicates that cases that involved a member’s missing movement with or without specific intent were consistently tried by court-martial and that the sentence the applicant received was similar to the sentences of other members who were absent over or without leave and missed their ship’s movement during World War II.⁷

12. Under Articles 86 and 87 of the UCMJ today, being absent without leave and missing ship’s movement by neglect (rather than by design, i.e., with specific intent) result in two separate charges unless the period of absence is just a day or two, in which case the unauthorized absence is considered a lesser included offense of missing movement.⁸ The maximum sentence for missing movement by neglect is a bad conduct discharge, forfeiture of all pay and allowances, and confinement for one year. The maximum sentence for being absent without leave for fewer than 30 days is confinement for six months and forfeiture of two-thirds pay per month for six months. Examination of recent court cases involving unauthorized absences and missing movements indicates that servicemembers convicted of these offenses at court-martial generally receive sentences of BCDs, which are sometimes suspended—like the applicant’s was—on condition of good behavior, as well as forfeitures of pay, reduction to E-1, and periods of confinement.⁹ As CGPC indicated, a member who is convicted of being

⁶ *United States v. Venerable*, 19 U.S.C.M.A. 174, 176 (C.M.A. 1970) (citing Naval Courts and Boards, 1937, section 98, Footnote 33).

⁷ See, e.g., BCMR Docket No. 9 (found guilty at GCM of being AOL for 6 days; released from confinement after 3 months; violated probation by being AWOL for 5 days; BCD executed); No. 15 (found guilty at GCM of being AOL for 3 days and missing ship’s movement; released from confinement after 3 months; violated probation by falling asleep while on duty; BCD executed); No. 52 (found guilty at GCM of being AOL for 19 days; released from confinement after 5 months; violated probation by being AWOL for 3 days; BCD executed); No. 68 (found guilty at GCM of being AOL for 7 days and missing ship’s movement; released after 5 months; chose BCD rather than probationary period); No. 107 (found guilty at GCM of being AOL for 42 days; released from confinement after 4 months; violated probation by being AWOL for 6 days; reconfined for 4 months; BCD executed); No. 116 (found guilty at GCM of being AWOL for 29 days; restored to duty on probation; violated probation by being AWOL for 11 days; BCD executed); No. 135 (found guilty at GCM of being AOL for 13 days and missing ship’s movement; released from confinement after 5 months; violated probation by disorderly conduct; BCD executed); No. 147 (found guilty at GCM of being AOL for 17 days and missing ship’s movement; released from confinement after 4 months; violated probation by “petty offenses”; BCD executed); No. 213 (found guilty at GCM of being AOL for 8 days and missing ship’s movement; released from confinement on probation; violated probation by being AOL for 4 days); No. 250 (found guilty at GCM of being AWOL for 11 days and missing ship’s movement; released from confinement after 3 months; violated probation by being AOL for 4 days); No. 283 (found guilty at GCM of being AOL for 15 days and missing ship’s movement; released after 5 months’ confinement; violated probation).

⁸ See *United States v. McGrew*, 53 M.J. 522, 526 (U.S.N.M.Ct.Crim.A. 2000); *United States v. Olinger*, 47 M.J. 545, 552 (U.S.N.M.Ct.Crim.A. 1997).

⁹ See, e.g., *United States v. Parker*, 60 M.J. 666 (U.S.N.M.Ct.Crim.A. 2004) (pled guilty to unauthorized absence and missing movement by neglect; sentenced to confinement for 30 days and an unsuspended

absent without or over leave and missing his ship's movement by neglect, as the applicant did, may under today's standards receive a sentence that includes a BCD even when the nation is not at war, as it was in 1944. However, the Board is also aware of more recent cases in which members who were absent over or without leave and missed ship's movement received much lesser punishments.¹⁰

13. In the aftermath of World War II, this Board denied most applicants' requests to upgrade BCDs absent evidence of procedural errors or psychiatric illness.¹¹ The applications for upgraded discharges listed in footnote 7, above, were all denied by the Board. However, the Board has sometimes upgraded BCDs to general discharges under honorable conditions when applicants were young, had committed only one major offense, had performed extensive sea duty during war, and/or had explanations for committing their offenses.¹² Moreover, the Board has sometimes upgraded BCDs to

BCD); *United States v. Juhnke*, 2003 CCA LEXIS 245 (U.S.N.M.Ct.Crim.A. 2003) (pled guilty to missing movement on a combat ship by neglect and two unauthorized absences; sentenced to confinement for 85 days and an unsuspended BCD); *United States v. Minyen*, 57 M.J. 804 (U.S.C.G.Ct.Crim.A. 2002) (pled guilty missing movement by neglect and two unauthorized absences; sentenced to confinement for 80 days and an unsuspended BCD); *United States v. Glover*, 57 M.J. 696 (U.S.N.M.Ct.Crim.A. 2002) (pled guilty to unauthorized absence of 24 days and missing movement; sentenced to confinement for 45 days; reduction to E-1; and an unsuspended BCD); *United States v. Nelson*, 2002 CCA LEXIS 91 (U.S.N.M.Ct.Crim.A. 2002) (pled guilty to unauthorized absence for 4 months and 11 days and to missing movement by neglect; sentenced to reduction to E-1, confinement for 100 days (suspended for 12 months except for 45 days), and a BCD that could be vacated if the member's conduct during the 12 months warranted it); *United States v. Dube*, 2001 CCA LEXIS 5 (U.S.N.M.Ct.Crim.A. 2001) (pled guilty to unauthorized absence of 39 days and missing movement by neglect; sentenced to forfeitures totaling \$1,250, confinement for 60 days (suspended for 12 months except for 45 days), and a BCD that could be vacated if the member's conduct during the 12 months warranted it).

¹⁰ See, e.g., BCMR Docket No. 48-80 (2-day period of AWOL and missing movement punished at mast with correctional custody for 15 days); 45-79 (SCM conviction of being AWOL for 41 days and missing movement, but honorably discharged due to a passive-aggressive personality disorder).

¹¹ For examples of BCDs upgraded to general discharges based on procedural errors or psychiatric illness, see BCMR Docket Nos. 11, 12, 13, 20, 41, 63, 71, 76, 109, 132, 143, 145, 157, and 212.

¹² For examples of BCDs upgraded to general discharges, see BCMR Docket No. 30 (3 deck courts for minor offenses; one GCM for being AWOL 44 days); No. 42 (1 mast for being AWOL 2 days; one GCM for being AWOL 28 days; upgraded on basis of youth (age at enlistment), one major offense, and 14 months of sea duty); No. 43 (1 mast for being AOL 2 days; 2 deck courts for being AOL 2 days and 6 days; one GCM for being AOL 10 days; violation of probation after 7 months of confinement by being AOL 11 days; upgraded on basis of extensive sea service "in Northern waters" and 7 months of confinement); No. 76 (2 masts for intoxication and for being AOL 4 hours; 1 GCM for being AWOL for 3 days and missing ship's movement; upgraded on basis of youth, possible battle fatigue, and extensive sea duty in the Pacific); No. 88 (1 GCM for being AWOL 80 days; violation of probation by being AOL 1 day; upgraded on basis of 6 months of confinement and one major offense following a year of sea duty); No. 93 (2 deck courts for being AOL 5 and 6 days; civil trial for petty larceny; 1 GCM for being AOL 15 days; upgraded on basis of 5 months of confinement and "us[ing] his AOL for a worthwhile purpose"); No. 100 (1 GCM for being AOL 42 days; upgraded on basis of 17 months of combat duty in Pacific, one major offense, and no probationary period); No. 127 (1 mast for being AOL 18.5 hours; 3 deck courts for disobedience; 1 GCM for disobedience and conduct to the prejudice of good order; upgraded on basis of youth, inexperience, and lack of probationary period); No. 128 (1 GCM for throwing a wad of paper at an officer and

general discharges under honorable conditions based on the fact that the veteran has suffered the burden of his BCD for many years and on the fact that the veteran was young when he committed the offense for which the BCD was awarded.¹³ The applicant in this case was 17 years old when he enlisted and 18 when he became AOL and missed his ship's movement. He suffered under the burden of his BCD until his death in 1993.

14. The record indicates that the applicant may have received significantly less due process than a member in similar circumstances would today. There is no evidence in the record that he was represented by an attorney or allowed to consult one, even though he had completed just one year of high school before enlisting. Moreover, a member in the applicant's circumstances today would be entitled to a vacation hearing before a BCD would be executed due to a four-day period of AWOL. Although it is possible that the applicant, if he committed the same offenses today, could receive a BCD, it is also unlikely that he would. Periods of AWOL and missing movement are commonly handled at mast, rather than court-martial, and the Personnel Manual provides numerous alternative methods for handling repeat offenders, such as general discharges for repeated absenteeism and misconduct under Article 12.B.18. Therefore, the Board finds that the applicant's BCD is probably more severe than the punishment he would receive today for similar offenses. The Board also believes that the passage of

threatening to kill 2 officers after one of them used a racial slur during a group lecture; upgraded because "clemency is justifiable"); No. 132 (1 GCM for being AOL 6 days and missing ship's movement; upgraded on basis of immaturity and only one offense); No. 165 (2 masts for being AOL 6 hours and 2 days; 1 deck court for being AOL 7 days; 1 GCM for being AOL 9 days and missing ship's movement; sentenced to reduction to SA, confinement for 3.5 years, and BCD; released after 4 months but violated probation by going AOL); No. 196 (1 SCM for being AOL 26 days; 1 GCM for being AOL 28 days; upgraded because absences were spent working on family farm after father was injured in car accident); No. 217 (1 GCM for being AOL and missing ship's movement; sentenced to 6 months at hard labor and BCD; released after 3 months but violated probation by being AOL); No. 264 (2 masts; 1 SCM; 1 GCM for being AOL 20 days and missing ship's movement; 2 masts while in confinement for yelling "racial discrimination"; no probationary period).

¹³ For examples of cases in which the Board upgraded BCDs to general discharges under honorable conditions based primarily on the length of time the veteran had borne the burden of the BCD and the veteran's youth at the time of the offense, see BCMR Docket No. 349-89 (World War II veteran with 2 masts for creating a disturbance and being AOL 2 days, 1 SCM for being AWOL 16 days, and another SCM for being AWOL 10 days and missing movement; upgrade based on length of time and youth; upgrade approved by delegate of the Secretary); No. 104-89 (1 SCM for 4 periods of AWOL totaling 71 days); No. 387-86 (1 SCM for being AOL 29 days and missing movement, and another SCM for being AOL 2.5 days, theft, and "scandalous [homosexual] conduct"; upgrade based on "length of time petitioner has suffered under the onus of his [BCD]"); No. 143-81 (1 SCM for petty theft of camera during boot camp; dishonorable discharge mitigated to BCD; upgrade based youth and length of time); No. 27-81 (1 SCM for 2 periods of AWOL for 9 days and 32 days; 1 GCM for being AWOL 27 days; upgrade based on youth and length of time); No. 159-79 (1 mast for neglect of duty; 1 SCM for being AWOL for 2 months; 1 GCM for being AOL 75 days; upgrade based on length of time and lack of mitigation of sentence); No. 149-79 (2 deck courts for being drunk and disorderly; 3 SCMs for being AWOL 59 hours, 20 days, and then 1 day; upgrade based on length of time).

time and the fact that the request is made by a deceased applicant's daughter who is herself a Coast Guard veteran support the exercise of additional clemency regarding the original sentence of the court martial that goes beyond the mitigation originally provided to the applicant in 1944. In light of the facts and precedents discussed above, the Board finds that it would be in the interest of justice to grant clemency on the sentence of the 1944 court-martial by modifying its sentence of a BCD to that of a general discharge under honorable conditions.

15. Although the applicant's daughter requested an honorable discharge, the applicant's GCM conviction and marks do not support an honorable discharge under either Article 4952(1) and (2) of the Personnel Instructions in effect in 1946 or Article 12.B.2.f.1.c. of the current Personnel Manual. Furthermore, the requested relief would exceed that previously granted by this Board in many similar cases.

16. Accordingly, partial relief should be granted by upgrading the applicant's discharge to general under honorable conditions.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application for correction of the military record of former SA xxxxxxxxxx, USCGR, is granted in part as follows:

The character of his discharge shall be upgraded to general "under honorable conditions."

Philip B. Busch

George J. Jordan

Adrian Sevier