DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-131

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FINAL DECISION

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 Chair docketed the application on May 4, 2007, upon receipt of the applicant's completed application and military records and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated January 24, 2008, 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) to an honorable discharge. The applicant enlisted in the Coast Guard on November 10, 1950, and was discharged from the Service on June 6, 1952.

The applicant stated that after completing boot camp, he was sent to Yerba Buena Island, CA, where he experienced a great deal of prejudice. He stated that he was assigned to cleaning toilets and latrines on a buoy tender, a job he hated, while others were being promoted. The applicant also stated that he suffered from severe seasickness.

The applicant stated that he subsequently went to fireman school, after which he was assigned to a forty foot patrol boat. He stated that someone told him that he was going to be assigned to a large cutter that deployed overseas. He stated that he could not handle the thought of being seasick every day, so he went AWOL (absence without leave (also referred to as unauthorized absence)). He stated that he had two periods of AWOL that terminated with turning himself in to authorities each time.

The applicant was convicted and sentenced for each period of authorized absence at separate courts-martial. For the second AWOL, he was sentenced at special court-martial to six

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[1] The applicant filed his application under as assumed name and did not explain why he does not use the name in his official military record. He did however provide the Board with his service number.

months confinement and a BCD. He argued that the BCD was a harsh punishment for what he did and it has prevented him from getting government jobs and from receiving other benefits. He stated that his then-misconduct was mitigated by the fact that he suffered from dyslexia, hearing loss, illnesses, immaturity, and prejudice and ignorance.

The applicant stated that he discovered the alleged error in 1998, and that his failure to file a timely application should be excused because he is currently retired and in need of his benefits. In addition, he stated that he has been a good citizen since his discharge.

SUMMARY OF THE RECORD AND SUBMISSIONS

The applicant enlisted in the Coast Guard on November 10, 1950. The record indicates that the applicant completed recruit training on February 20, 1951.

The applicant began a period of unauthorized absence on August 8, 1951 and surrendered himself to military authorities on September 10, 1951.

On October 15, 1951, at the request of the Coast Guard, the applicant underwent a psychiatric examination to determine whether he was mentally competent to stand trial by special court-martial. The applicant indicated during his psychiatric interview that he had gone to bed on August 8, 1951 and awakened five days later unkempt in Los Angeles with a complete loss of memory. The psychiatric report notes that the applicant remained on unauthorized absence for another 25 days, at which point, he turned himself in to base authorities. The applicant also reported that he suffered from headaches one or two times per week. The psychiatric report continued:

> [The applicant] remains extremely resentful of his superiors and taking orders, feels he has a bad name on the base and they tend to make it more difficult for him than it needs to be. While it is not possible to state unequivocally that the [applicant] did not undergo amnesia as stated, in terms of lack of corroborative evidence of a psychoneurotic nature, lack of anxiety about the episode, his general air of indifference and hostility, etc. it is felt that the period of amnesia as stated is only a very remote possibility. I am still of the opinion that the headaches, though now reported [to be] much less frequent than previously are related to his hostility and may possibly have been [an] over react[ion] in terms of his implied wish to be out of the service. I feel he is competent to stand trial by Coast Guard court-martial.

On November 29, 1951, the applicant was convicted at special court-martial for unauthorized absence from August 8, 1951 to September 10, 1951. He was sentenced to forfeit $50 per month for three months. The Convening Authority, persuaded by the applicant's claim that he suffered a five day period of amnesia, reduced the forfeiture to $48 per month for three months and approved only so much of the finding of guilty for unauthorized absence from August 13, 1951, to September 10, 1951.

The applicant underwent a second period of unauthorized absence. On May 5, 1952, he was convicted by a special court-martial in accordance with his pleas of unauthorized absence from December 3, 1951, to February 6, 1952.[2] He was sentenced to a bad conduct discharge (BCD) and confinement at hard labor for three months.

On April 14, 1952, the applicant signed a statement waiving his right to request restoration to duty and requested execution of the BCD. His signature indicated that he understood that the discharge would not be under honorable conditions; that he could forfeit all rights as a veteran; that he could not reenlist without special permission; that the discharge would not be automatically reviewed or changed; and that he could expect to encounter substantial prejudice in civilian life. In his waiver statement, he said, "I can't adjust myself to military service. I want out because of that and will do anything to get out." The applicant's signature was witness by a Marine Corps officer.

On May 21, 1952, after consulting with a legal assistance officer, the applicant waived his right to petition the United States Court of Military Appeals for review of his special-court-martial conviction.

On June 3, 1952, the Coast Guard Clemency Board concurred with the applicant's request for discharge. On June 4, 1952, the Commandant recommended that the applicant be discharged. Subsequently, the Secretary of the Treasury approved the applicant's discharge.

On June 6, 1952, according to the DD form 214, the applicant was discharged with an "other than honorable" character of service.

VIEWS OF THE COAST GUARD

On October 5, 2007, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief to the applicant.

The JAG argued that the applicant has failed to show by a preponderance of the evidence why it is in the interest of justice to excuse his fifty-five year delay in filing an application with the Board within three years of his discharge from the Coast Guard. The JAG stated that the nature and character of the applicant's discharge was known to him at the time of his discharge. The JAG further argued that the applicant admitted that he was aware of the alleged error in 1998 but still did not file his application until nine years later. He further argued that based upon a cursory review of the merits it is not likely that the applicant will prevail on his claim. See *Allen v. Card*, 799 F. Supp. 158, 166 (D.D.C. 1992) (In determining whether it is in the interest of justice to waive the statute of limitations, the Board should "consider the reason for the delay and the plaintiff's potential for success on the merits, based on a cursory review.") In this regard, the JAG argued that a review of the record reveals that the applicant was properly separated from the Coast Guard.

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[2] Although the applicant stated that he surrendered himself from this period of unauthorized absence, the military record shows that he was apprehended by Coast Guard authorities at Oakland, CA.

The JAG stated that the applicant has failed to present sufficient evidence to support his claim that the Coast Guard committed an error by discharging him with a BCD awarded to him by a special court-martial sentence for a 66 day unauthorized absence. Therefore, the JAG asserted that the Board should dismiss this case with prejudice.

Alternatively, the JAG argued that the Board should deny the applicant's claim on the doctrine of laches. Under 10 U.S.C. § 1552, the Secretary is not compelled to correct a record, but may exercise considerable discretion in determining whether such a correction is "necessary" to make the applicant whole. The JAG stated that in the instant case, the applicant's delay in bringing his claim is both unreasonable and unexcused and therefore may be denied due to laches. See *Cornetta v. United States*, 851 F.2d 1372, 1377-38 (1988). The JAG further stated:

> Underlying the laches bar is the fundamental principal that equity aids the vigilant; the doctrine prohibits applicants from delaying their BCMR applications absent circumstances excusing the delay, while the evidence regarding their contentions becomes lost, stale, or inaccessible, or while the costs of investigating or correcting the matter accumulate. In the present case, the Coast Guard's ability to contact key witnesses has been severely hampered by the mere fact that they no longer serve in the Coast Guard or are deceased. Therefore, considering the substantial delay between the error and date of application in this case and the applicant has the burden of proof, the Board should dismiss [the applicant's] claim with prejudice.

The JAG stated that if the Board excuses the applicant's untimely filing of his application, the Board should still deny relief. In this regard, the JAG stated that absent strong evidence to the contrary, it is presumed that Coast Guard officials carried out their duties lawfully, correctly, and in good faith. *Arens v. United States*, 969 F. 2d 1034, 1037 (D.C. Cir. 1990). According to the JAG, the applicant offers no evidence that the Coast Guard committed any error or injustice in the court-martial proceedings or in the discharge. The JAG noted that the applicant's statement referenced his unpleasant duties but the nature of the applicant's assigned duties were commensurate with his pay grade and there is nothing in the record to support the applicant's claim that he was improperly treated. Further, the record shows that the applicant was properly discharged from the Coast Guard after his conviction at court-martial and other incidents that resulted in disciplinary action.

The JAG also stated that the Board should not upgrade the applicant's discharge based solely on his post-service conduct. The JAG noted that the applicant has failed to substantiate any error or injustice and argued that the Board should not interpret the applicant's request as a matter of clemency because he has provided no compelling circumstances that would require a clemency review. The JAG 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.

Attached to the advisory opinion as Enclosure (1) were comments from commander, Coast Guard Personnel Command (CGPC), who stated that under the current Manual for Courts-Martial (2005 ed.), the maximum punishment for an unauthorized absence totaling more than 30

days is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year. For an absence of more than 30 days terminated by apprehension, the punishment is the same except the maximum period of confinement is 18 months.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 6, 2007, the BCMR received the applicant's reply to the views of the Coast Guard. He stated that he was remorseful for what happened but he argued that the BCD was inequitable. He stated that the country was overtly racist in the 1950s and he was treated differently because of his surname. He also asked the Board to consider the fact that he suffered from severe seasickness and suggested that based on that he could obtain a medical discharge.

The applicant also stated that if he had had some legal representation and counseling that explained the ramifications of his decision not to challenge his discharge and the effect the discharge would have on his life, he never would have signed it.

The applicant stated that after leaving the military, he had difficulty finding jobs due to the BCD, but eventually became a carpenter and obtained a building contractor's license. He stated that he married and raised five children in a good Christian environment and sent all five to college.

The applicant stated that he was not aware that there was a limit on trying to reverse his discharge. He stated that he was 76 years old and would like to rectify this terrible mistake before passing on. Also, correcting it would help with his medical problems.

The applicant submitted a statement from his wife. She stated that the applicant is being judged too harshly for what he did. She further stated that the applicant was young and naïve and did not have any one to advise him of the consequences of his actions. She also indicated that the applicant has worked hard, supported his family, and educated his children. She stated that the applicant is a good man who made a mistake.

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. To be timely, an application for correction must be filed within three years of the date the alleged error or injustice was, or should have been, discovered. *See* 10 U.S.C. § 1552; 33 CFR § 52.22. This application was submitted to the Board over fifty years after the applicant's discharge. Although the applicant stated that he did not discover the alleged error until 1998, he did not deny that he was aware that his court-martial sentence in 1952 included a BCD. He was aware of the negative affect of the BCD because he wrote that he had problems

obtaining a job because of it. Therefore, he should have discovered the alleged error within three years of his discharge from the Coast Guard.

Even if the Board accepts the applicant's statement that he did not discover the alleged error until 1998, he still waited more than approximately nine years before bringing the matter before the Board. The applicant has not presented any evidence that he sought any help or assistance in upgrading his BCD prior to filing his application with the Board in 2007. The applicant's reason for not filing his application within three years of his discharge or within three years of the alleged discovery of the error in 1998 is not persuasive to the Board. The application is untimely.

3. Although the application is untimely, pursuant to 10 U.S.C. § 1552 the Board may waive the three-year statute of limitations if it is in the interest of justice to do so. To determine whether it is in the interest of justice to waive the statute of limitations, the Board should consider the reason for the applicant's delay and conduct a cursory review of the merits of the case. *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

4. In similar cases where applicants were discharged with BCD's in the 1940s, the Board waived the statute of limitations in part because it determined that the BCMR did not exist at the time of discharge for certain applicants and they might not have known about the Board, although at the time of filing their applications the BCMRs had existed for many years. See BCMR Nos. 132-96, 34-93, 348-89, 152-81, and 24-81. Also, the Board waived the statute of limitations because it determined that during the 1940s and 1950s applicants were discharged with BCDs for absence offenses and/or other minor infractions that under today's standards would most probably lead to a general discharge. A cursory examination of the merits in this case indicates that the facts are sufficiently similar to other cases in which the Board waived the statute of limitations in the interest of justice and upgraded BCDs that were imposed by courts-martial for absence offenses, some of which occurred during World War II.

5. With respect to the merits in the instance case, the Board looks to the then-Deputy General Counsel's decision in BCMR No. 322-91 for guidance. In that case, the then-Deputy General Counsel upgraded that applicant's BCD to a general discharge even though he had committed two periods of unauthorized absence (23 days and 41 days of unauthorized absence and the theft of a mate's uniform, all occurring during wartime). In granting relief,[3] the Deputy General Counsel did not find that the Coast Guard committed any error in issuing that applicant a BCD, but stated:

> I noted that repeated absenteeism (AWOl and AOL) of the types involved here are, under contemporary Coast Guard standards, grounds for a general discharge under honorable conditions for the convenience of the government, rather than a [BCD]. See BCMR 89-78; also CG Personnel Manual Article 12-B-2 and 12-B-12 . . .

[3] It should be noted that the Deputy General Counsel granted relief in BCMR No. 322-091 despite the fact that the Coast Guard rendered an advisory opinion recommending denial of relief because the applicant failed to comply with the statute of limitations and/or because the Discharge Review Board had already refused to upgrade that applicant's BCD.

> In a 1981 case, the Board upgraded a 1945 bad conduct discharge of an applicant after two unauthorized absences and a civil conviction for petty theft. In doing so, the Board considered the applicant's youth, his limited (tenth grade) education, the nature of his offenses (AWOL's) and the length of time that he had suffered under the onus of his [BCD], finding his punishment was too severe under contemporary standards. It also noted that the discharge was by reason of a summary court-martial. This case serves as a clear precedent for a grant of relief in the application here. I find that the upgrade should be granted in this case.
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> Moreover, upgrades from bad conduct discharges have been customarily granted by the Board where absences were involved. See BCMR 89-78, BCMR 154-85, BCMR 8-80; and BCMR 240-85.

The then-Deputy General Counsel's decision in BCMR No. 322-091 is instructive of the factors that the Board should consider in deciding whether to upgrade an applicant's BCD, especially for absences that occurred during World War II. Factors to be considered when determining whether to upgrade an applicant's BCD are the types of offenses committed, the length of time the applicant has suffered under the onus of his BCD, the applicant's age at enlistment, his level of education at the time, and whether members would receive a BCD for the absence offenses under contemporary standards.

6. Further guidance is provided in BCMR No. 89-78. The then-General Counsel in that case did not limit relief from a BCD to just those who committed absence offenses during World War II (1939 to 1945). The Board notes that in BCMR No. 89-78, the General Counsel approved upgrading an applicant's BCD that was issued as late as 1962. The Board's decision in that case, which was approved by the General Counsel, stated the following:

> [I]t should be noted that under contemporary standards of military justice petitioner could not be sentenced to a bad conduct discharge by a special court-martial unless he were provided with legal counsel and a judge presided over the proceedings (Article 19, Uniform Code of Military Justice; 10 U.S.C. § 819). The Board is of the opinion that the current procedures represent a substantial enhancement of the rights afforded a serviceman in such proceedings. Furthermore, in view of petitioner's entire record, this Board is of the opinion that had petitioner been provided with legal counsel to advise him and advocate his position, there is a reasonable doubt as to whether he would have received the same discharge.

7. Like the Deputy General Counsel in BCMR No. 322-091 and the General Counsel in BCMR No. 89-78, the Board finds that the Coast Guard did not commit an error by issuing a BCD to the applicant. In addition, the applicant provided no corroboration to support his claim that he suffered from seasickness, dyslexia, or ethnic prejudice while in the Coast Guard that would tend to be a basis for mitigation of the BCD. There is evidence that during one period of unauthorized absence the applicant stated that he suffered from a period of amnesia, but the psychiatrist found this to be unlikely and further found the applicant fit to stand trial.

8. Notwithstanding the above discussion, the Board will not direct an upgrade of the applicant's BCD at this time because he has failed to explain to the Board why he uses an alias rather than the name in his official military record or how he has been harmed by the BCD over the past 50 years. Moreover, he has not presented the Board with any evidence from any individuals other than his spouse that he has lived an exemplary life since his discharge. Therefore, if the applicant submits proof that he has no criminal record under his official or assumed names, an explanation and/or evidence of the suffering he has encountered as a result of the BCD, and character references that he has lived an exemplary life since his discharge to the Board within 180 days from the date of this decision, the Board will grant further consideration in this case.

9. As stated above the Board agrees with the Coast Guard that there was no error committed when the Coast Guard discharged the applicant with a BCD. However, the Board must also consider whether the applicant has suffered an injustice under the precedent discussed above.

10. Accordingly, the applicant's request is denied, except that the Board will grant further consideration if the applicant submits the documentary evidence identified in Finding 8. above within 180 days from the date of the issuance of this final decision.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of former xxxxxxxxxxxxxxx USCG, for correction of his military record is denied, except that the Board will grant further reconsideration if the applicant submits the documentary evidence identified in Finding 8. of the Findings and Conclusions.

Francis H. Esposito

Randall J. Kaplan

Darren S. Wall