DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-144

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FINAL DECISION

This is a proceeding 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 June 20, 2007, upon receipt of the applicant's completed application, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 30, 2008, is approved and 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 1975 discharge under other than honorable conditions to an honorable discharge. He stated that his discharge should be upgraded because his "time in the Coast Guard was served and I had completed whatever discipline associated with any previous reprimand." The applicant argued that the Board should find that it is in the interest of justice to waive the three-year statute of limitations for his application because in 1975 he "was young and did not think the status could prevent me [from having] a good life. I did not, however, realize the long-term implications, such as ineligibility for VA medical services."

SUMMARY OF THE RECORD

On April 10, 1970, at the age of 18, the applicant enlisted in the Coast Guard for four years, through April 9, 1974. He is African-American. Upon completing boot camp on June 12, 1970, he was advanced to fireman apprentice (E-2) and assigned to a cutter based in Honolulu, Hawaii. On October 16, 1970, the applicant was awarded non-judicial punishment (NJP) for an unauthorized absence of less than one day. He was awarded fourteen days' restriction and extra duty and reduction to pay grade (E-1), but the reduction in pay grade was suspended and then remitted. On November 1, 1971, the applicant advanced to fireman (E-3).

On April 12, 1972, the applicant was transferred to a cutter based in Morgan City, Louisiana, his home state. On July 24, 1972, the applicant was absent without leave (AWOL), and he remained so for twenty-four days until August 17, 1972. On September 25, 1972, he was tried by summary court-martial for his unauthorized absence of twenty-four days. He was sentenced to reduction to E-2; forfeiture of $200.00 for one month; and restriction to the cutter at hard labor for thirty days. The sentence was approved by the convening authority on October 21, 1972.

On April 10, 1973, the applicant re-advanced to fireman (E-3). On May 2, 1973, he was awarded NJP of seven days' extra duty for insubordinate conduct occurring on April 30, 1973. On June 2, 1973, the applicant was transferred to the Port Safety Station in Houston, Texas.

On January 1, 1974, the applicant, who was 22 years old, was on duty making security rounds at the station when he got into an argument with his roommate SN R.[1] The duty master-at-arms (MAA), a first class petty officer, found the applicant brandishing a knife at SN R and threatening to "cut" him. The MAA ordered the applicant to put away the knife several times, but he refused to do so. The MAA then sought assistance from the Office of the Day (OOD), an ensign. While the MAA was explaining the situation to the OOD, the applicant interrupted them. When the MAA "made some comment that was offensive," the applicant brandished his knife and stepped toward the MAA. The OOD tried to stop the applicant by grabbing his arm but realized he could not overpower him and so released his arm. The applicant then brandished his knife at the OOD and "made an obscene comment challenging [them] to take the knife away from him." When another first class petty officer (PO1) arrived, the applicant walked toward him brandishing the knife. The PO1 pulled a pistol and invited the applicant to "come on." The applicant then tossed his knife away, and it was confiscated by the OOD. The OOD took the applicant to his quarters, where the applicant told him that the incident started because he was trying to keep his friend, SN R, from going AWOL and that by intervening and ordering the applicant to put his knife away, the MAA "had been intruding on a private matter" between friends. Ten minutes later, the OOD thought that the applicant had calmed down, returned his knife to him, and told him to continue his security rounds. However, fifteen minutes later, the OOD found the applicant in possession of a handgun. The applicant told the OOD that he had gotten the gun for his own protection. The OOD took the gun and told the applicant to continue his rounds without causing more trouble.

On February 10, 1974, the applicant went AWOL. He was declared a deserter on March 11, 1974. On May 22, 1974, he was apprehended at his mother's home in Kenner, Louisiana, by Coast Guard agents, taken back to Houston, and placed in pre-trial confinement.

On June 7, 1974, the applicant was tried by special court-martial for numerous offenses against the Uniform Code of Military Justice (UCMJ). He was represented by a military attorney throughout the proceedings. The charges included violations of Article 90, by lifting a knife against an ensign who was then in execution of his office; Article 91, by assaulting a first class petty officer by approaching him with a knife and slashing it at him and by assaulting another first class petty officer by approaching him with a knife and "offering to do grievous bodily harm to him"; and Article 92, by possessing a handgun at his station without authorization. In addi-

[1] This account of the events of January 1, 1974, is taken from the August 28, 1975, summary of the testimony at trial prepared by the Chief of the Office of Personnel for the Commandant's clemency review.

tion, the applicant was charged with violating Article 85 by being AWOL with intent to desert from February 10, 1974, to May 22, 1974; and Article 128, by striking a fellow confinee with a metal pipe on June 11, 1974, and "inflict[ing] grievous bodily harm upon him, to wit: severe bruises to his arm and body" so that he required treatment in a hospital emergency room.

At trial, the applicant pled not guilty. Following the testimony of twelve witnesses, however, he was found guilty on June 28, 1974, of all but two of the charges, and for those two he was found guilty of the lesser included offenses of simple assault and assault consummated by battery. His sentence was

- to be discharged from the Coast Guard with a bad conduct discharge (BCD);
- to be confined at hard labor for four months;
- to forfeit $210.00 per month for four months; and
- to be reduced to seaman recruit, pay grade E-1.

On October 4, 1974, the Convening Authority, who was the Commanding Officer (CO) of the Port Safety Station, approved the sentence awarded by the special court-martial but suspended the execution of the BCD "for the period of confinement and six months thereafter, at which time, unless the suspension is sooner vacated, the bad conduct discharge shall be remitted without further action."

On October 10, 1974, the applicant completed his period of confinement and was returned to the Port Safety Station in Houston for duty. However, he went AWOL from October 20 to 23, 1974, and failed to report for duty on time on October 24, 1974. On November 18, 1974 the applicant went AWOL again and did not return to the station until December 5, 1974.

On December 16, 1974, an investigating officer reported to the CO about events that had occurred on December 9 and 10, 1974. The report indicates that on December 9, 1974, the executive officer (XO) ordered the applicant and his friend, SN R, to move to separate rooms by the end of the day because their room was in "severe disarray," they had repeatedly failed to meet barracks cleanliness standards, and there were unauthorized alcoholic beverages in their room. Although SN R eventually complied and moved his things to another room on December 10, 1974, the applicant repeatedly refused to move his things, threatened petty officers with a bamboo pole, and fought with petty officers who were sent to move his things for him. The applicant also took something from his locker, hid it in his jacket, and told the petty officers that if they touched his things he would get a gun and someone would get hurt. When the XO ordered that the applicant be confined to his room until the CO returned that afternoon, the applicant struck the chief petty officer assigned to enforce the order and left the room. The applicant was then left alone until the CO arrived in the afternoon. The CO heard the applicant's complaint about having to change rooms and ordered him to obey the order to change rooms.

On December 17, 1974, the CO convened a hearing to determine whether he should vacate the suspension of the BCD based on the applicant's violation of the terms of his probation by his two unauthorized absences from October 20 to 23, 1974, and November 18 to December 5, 1974; and by his willful disobedience of a lawful order on December 10, 1974. After the

hearing, the CO recommended that the suspension be vacated and that the applicant be sent home to await the completion of the court-martial proceedings.

On January 16, 1975, the applicant was sent home in a leave without pay status. On January 27, 1975, the Officer Exercising General Court-Martial Jurisdiction (OEGCMJ), who was the Eighth District Commander, approved the sentence along with the suspension of the BCD. On March 27, 1975, the OECGMJ approved the vacation of the suspension of the BCD, as well as the execution of the BCD once the appellate review was complete.

On May 5, 1975, the Court of Military Review affirmed the findings of guilty, with one exception concerning a lesser included offense, and found the sentence appropriate. On July 21, 1975, the OEGCMJ served notice on the applicant of the decision of the Court of Military Review and of his right to petition the U.S. Court of Military Appeals for review within thirty days. The applicant did not submit an appeal.

On August 28, 1975, the Chief of the Office of Personnel wrote a memorandum to the Commandant pursuant to his clemency review. He stated that according to the applicant's testimony at trial, the applicant had "encountered racial discrimination both on and off the ship" when he was assigned to the cutter in Morgan City, Louisiana, from April 1972 to June 1973. The applicant testified that he went AWOL from the cutter for twenty-four days in 1972 because he was afraid of racist crewmates and could not get transferred. He further testified that his actions on January 1, 1974, resulted from a build-up of stress and "overpowering rage" due to racial discrimination. The Chief of the Office of Personnel concluded that the applicant's testimony of racism and tension was credible but that his offenses on January 1, 1974, were very serious and not justified. He noted that the CO had given the applicant a chance to redeem himself by suspending the BCD, but that the applicant violated the terms of his probation soon after being released from confinement. He stated that "there are no grounds to justify a grant of clemency in this case" and recommended the execution of the BCD.

On September 5, 1975, the Commandant denied clemency and approved the execution of the applicant's BCD. On September 12, 1975, the BCD was executed. The applicant's DD 214 states that he was discharged "under other than honorable conditions."

VIEWS OF THE COAST GUARD

On November 6, 2007, the Judge Advocate General (JAG) submitted an advisory opinion in which he adopted the findings and analysis provided in a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC). CGPC recommended that the Board deny the requested relief because of the application's untimeliness and lack of merit.

CGPC stated that even if the Board waives the statute of limitations, relief should be denied because a "complete review of the applicant's record does not reveal an error or injustice with regards to his processing for separation." CGPC stated that the applicant's bad conduct discharge was part of his sentence upon conviction of several serious offenses and that the Commandant denied clemency upon review and ordered that the BCD be executed. CGPC stated that the BCD was "just and commensurate … with the nature of the applicant's offenses.

… There is no justification for upgrading his character of service." CGPC submitted copies of several documents from the applicant's military record, including the August 28, 1975, clemency memorandum recounting the applicant's offenses and testimony about racial tension.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 13, 2007, the Chair sent the applicant a copy of the advisory opinion and invited him to respond within thirty days. After being granted an extension, the applicant submitted his response on January 29, 2008.

The applicant apologized for his actions and asked for the Board's "compassion to overturn the conditions of my discharge and restore my honor. … I simply lacked the understanding of the impact my actions would have on my entire life." He pointed that that he "had a near perfect service career," except for what happened at the end, and stated that his discharge has caused him great hardship both economically and psychologically. The applicant stated that at the time of his offenses, he

> was very young. I voluntarily enlisted and … was not able to handle the constant racial adversity. With one altercation, others became involved that were not part of the original incident, [and] then I was returned to the same unit, with the same continuing issues. Even though I was given the opportunity to "straighten up" my act, I could not perform in that environment. The previous handling of my case, in my mind, was a "no-win" situation and all that was on my mind was "getting out." … I am truly sorry for the pain and anguish that my behavior caused and am very grateful that no one was injured badly due to my actions. I have suffered terribly over the years because of the status of my discharge and ask humbly for the reconsideration of the Board. Please restore my honor.

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(a) and (f)(2), which authorize the Board to take "action on the sentence of a court-martial for purposes of clemency."

2. Under 10 U.S.C. § 1552(b), an application to the Board must be filed within three years after the applicant discovers the alleged error in his record. The applicant received his BCD on September 12, 1975. Thus, the application was untimely.

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."[2]

4. The applicant's explanation for his long delay in applying for relief is not compelling. Although he attributes the delay to his youth, he was twenty-four years old on the date of his discharge and is now more than fifty-five years old. Likewise, his ineligibility for medical benefits from the Department of Veterans' Affairs (DVA) is not a compelling reason to excuse his long delay.

5. The applicant argued that his discharge should be upgraded (a) because he was young at the time, (b) because the BCD makes him ineligible for DVA medical benefits, and (c) because his "time in the Coast Guard was served and I had completed whatever discipline associated with any previous reprimand." The Board will address these arguments in order:

(a) The applicant was 22 years old on January 1, 1974, when he committed the offenses for which he was tried and sentenced, and 23 years old in late 1974, when he violated his probation and thus had the suspension of the BCD vacated. The Board finds that his age at the time of the offenses is not an excuse or a reason to upgrade his discharge since a 22- or 23-year-old man should take responsibility for his own conduct.

(b) The applicant's ineligibility for DVA medical benefits results from the character of his discharge. Under 38 C.F.R. § 3.12(d), the DVA normally denies benefits to those discharged under other than honorable conditions. The Board finds that the applicant's ineligibility for benefits from the DVA is not grounds for upgrading his BCD.

(c) Prior to January 1, 1974, the applicant had been punished twice at mast and once by a summary court-martial following a 24-day unauthorized absence. The applicant's special court-martial sentence of June 28, 1974, consisted of four parts: (1) confinement at hard labor for four months; (2) forfeiture of $210.00 per month for four months; (3) reduction to pay grade E-1; and (4) the BCD. The record shows that the applicant completed the first three of these and that the Convening Authority tried to mitigate the sentence by suspending the fourth part—the execution of the BCD—for a six-month probationary period following his confinement. Therefore, if the applicant had served satisfactorily during the six months following his release from confinement on October 10, 1974, he would not have received the BCD. However, he went AWOL within days of his release from confinement, went AWOL again a month later, and on December 10, 1974, committed numerous additional offenses by refusing to obey orders and threatening and assaulting petty officers sent by the XO to enforce the orders. The Commandant later denied clemency based upon the gravity of the applicant's offenses although he took into account the applicant's testimony at trial about feeling overwhelming rage following a build-up of tension due to racism. Given that the BCD was part of the applicant's sentence and was only executed after he had violated his probation by committing numerous other offenses, the Board finds that the applicant's prior offenses and punishments and his completion of the first three parts of his special court-martial sentence are not grounds for upgrading his BCD.

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[2] *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).

6. The record shows that the applicant was represented by an attorney throughout the proceedings, that he received all due process, and that the Coast Guard committed no error in separating him with a BCD. However, 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 exists on a case by case basis.[3] Therefore, the Board's review should consider whether the applicant's BCD now 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 based on post-discharge conduct alone and "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 applicant has not proved either that his post-discharge conduct merits an upgrade or that his BCD was disproportionately severe in light of today's standards.[4] The Board does not, however, construe the 1976 guidance as prohibiting it from exercising clemency in court-martial cases under 10 U.S.C. § 1552(f),[5] even if the discharge was not disproportionately severe in light of today's standards. Such a construction would be inconsistent with the nature of "clemency," which means "kindness, mercy, leniency."[6] 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. 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, instead, whether it is appropriate today to forgive the past offense that led to the punishment and to mitigate the punishment accordingly.

7. In the aftermath of World War II, this Board denied most applicants' requests to upgrade BCDs absent evidence of procedural errors or psychiatric illness.[7] However, in more

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[3] 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."

[4] In fact, under the sentencing guidelines of the UCMJ, the applicant would likely receive a BCD if he were convicted of the same offenses today.

[5] Under 10 U.S.C. § 1552(f), the Board has authority to take "action on the sentence of a court-martial for purposes of clemency."

[6] BLACK'S LAW DICTIONARY (5th ed.)

[7] 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. For examples of BCDs not upgraded by the BCMR, see 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

recent years, the Board has granted clemency by upgrading BCDs to General discharges when applicants were teenagers at the time of their offenses; when their offenses under the UCMJ were essentially absence offenses, such as being AWOL or missing ship's movement, or they committed only one major offense; when they have borne the burden of their bad discharges for many years; and when their post-discharge conduct has been satisfactory.[8] Although the applicant in this case has borne the burden of his BCD for many years and although at trial he attributed his conduct on January 1, 1974—when the MAA tried to stop him from assaulting his friend, SN R, with a knife—to rage that built up inside him due to racism, the Board finds insufficient basis in the record for granting clemency given that he was not a teenager when he committed the offenses; he committed several major offenses including assaults with dangerous weapons and one battery inflicting grievous bodily harm; and he has submitted nothing to show that his conduct following his discharge from the Coast Guard has been satisfactory.

8. Accordingly, the Board finds that it is not in the interest of justice to waive the statute of limitations and that the applicant's request should be denied.

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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, e.g,* BCMR Docket No. 2005-107, in which the Board upgraded a BCD to a General discharge because the applicant was a teenager at the time of his offenses during World War II; because his offenses included only the 29-day unauthorized absence for which he was sentenced by a GCM, an attempted escape, and the 4-day unauthorized absence during his post-confinement probationary period that led to the execution of the BCD; because the applicant was not represented by counsel and received significantly less due process than defendants do today; and because the sentence was likely more severe than the punishment that might be meted out today for similar misconduct. For older 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 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).

ORDER

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

Bruce D. Burkley

Randall J. Kaplan

James E. McLeod