DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-021

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FINAL DECISION ON RECONSIDERATION

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 October 26, 2007,[1] 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 June 12, 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, a former seaman who was discharged on October 8, 1951, asked the Board to upgrade the character of his discharge from General to Honorable. The applicant originally received a Bad Conduct Discharge (BCD) under other than honorable conditions. He applied to this Board for an upgraded discharge in 1953, and his request was denied. However, in 1957, the Board reconsidered his case in BCMR Docket No. 432 and upgraded his discharge from BCD to General.

The applicant alleged that it is in the interest of justice for the Board to upgrade his discharge because he believes "the incident leading to [his] discharge did not warrant such a severe discharge." He stated that he is an upstanding citizen who has led an honorable life raising his family. He retired from a railroad company after 38 years of service.

The applicant alleged that the incident for which he was separated "did not warrant such a severe discharge status." He alleged that in the spring of 1951, he was in a bar when two Navy patrolmen entered and told him "to square [his] hat or remove it," so he did. Then they accused him of wearing "tailored made blues," which were not allowed, and one of the patrolmen left, saying he was going to call for transport to take the applicant to the brig. While he was gone, the

[1] The application was inadvertently docketed as a new case because the applicant's prior applications to the BCMR were not discovered until several months after the case was docketed. Therefore, although the application did not meet the requirements for reconsideration under 33 C.F.R. § 52.67, the Board will reconsider the case.

other patrolman told him to “get out of here” because his partner was overreacting. But the applicant did not leave and, when the other patrolman returned, “got into a verbal and physical altercation with him” because the applicant had been drinking alcohol. Therefore, the applicant was taken to the brig for one night and then returned to his ship. The applicant argued that he deserved only a warning but instead was discharged because of this incident. He explained that he was first taken to mast, and when he pled not guilty, the commanding officer “said he would give [the applicant] a chance to prove it and gave [him] a general court martial.” The officer assigned to represent the applicant urged him to plead guilty, but the applicant refused. Upon the advice of a Marine officer, the applicant hired a civilian attorney to represent him but was convicted and sentenced to serve nine months at a retraining base since the judge said he “was suitable material for rehabilitation.” However, a reviewing authority at Coast Guard Headquarters reduced his sentence to two months and so the applicant was quickly discharged with a BCD just a month shy of the end of his enlistment.

Although the Board has since upgraded his BCD to a General discharge, the applicant argued that an Honorable discharge would be “more appropriate considering [his] entire length of service to the Coast Guard, [his] otherwise satisfactory record, [his] voluntary reenlistment to support the Korean War effort, the initial determination of the court and the seemingly excessive punishment as related to the incident.”

SUMMARY OF THE RECORD

On November 24, 1948, the applicant—then 17 years old—enlisted in the Coast Guard for three years. (He had previously enlisted in the Navy at age 16, but was discharged after 2 months upon the discovery of his age.) On February 10, 1949, he advanced from seaman recruit to seaman apprentice. Various mast and court reports in the applicant’s record document his offenses and punishment as follows:

- On May 31, 1949, the applicant was taken to captain’s mast for being out of uniform, shirking duty, and showing disrespect to a petty officer. He was awarded 25 hours of extra duty and 5 days’ restriction.

- On June 30, 1949, the applicant was taken to mast for being absent over leave (AOL) for 2 hours. He was awarded 8 hours of extra duty.

- On August 24, 1949, the applicant was taken to mast for being AOL for 11 hours. He was awarded 20 hours of extra duty.

- On September 28, 1949, the applicant was taken to mast for failing to make reveille. He was awarded 6 hours of extra duty.

- On October 20, 1949, the applicant was tried by deck court for being out of uniform and having no identification card while on shore on October 12, 1949. He was awarded a fine of $10.00.

- On October 25, 1949, the applicant was taken to mast for returning from liberty out of uniform and impersonating a petty officer. He was awarded 20 hours of extra duty and 5 days' restriction.

- On November 27, 1949, the applicant was taken to mast for returning from liberty out of uniform and failing to return a proper salute upon his return. He was awarded 20 hours of extra duty and 5 days' restriction.

- On January 18, 1950, the applicant was taken to mast for failing to make reveille and was awarded 6 hours of extra duty.

- On February 9, 1950, the applicant was taken to mast for having an unmade bunk at inspection. He was awarded loss of one liberty period.

- On February 13, 1950, the applicant was taken to mast for failure to make reveille and was awarded 3 days' restriction. The report notes that the applicant had been placed on report several times for not making reveille.

- On April 12, 1950, the applicant was tried by deck court for failing to obey an order by refusing to stand watch when ordered to do so. A petty officer noted that when told that he would be placed on report if he did not stand watch, the applicant told the petty officer to go ahead and place him on report. The investigating officer noted it was the eleventh time that the applicant had been punished for offenses and that the applicant "is as close to being a hopeless case as we have on this ship. He has absolutely no conception of discipline." The applicant was awarded a $20 fine and extra duty for one month.

- On May 17, 1950, the applicant was tried by summary court-martial for using liquor aboard ship and creating a disturbance. He pled guilty and was sentenced to 3 months of extra duty and loss of $25 of pay per month for 6 months.

On May 3, 1951, the Officer in Charge of the cutter reported to the District Commander that the applicant had been returned to the cutter under guard by the Navy patrol on April 30, 1951, under charges of wearing a non-regulation uniform, using obscene language, assault, and resisting arrest. The Officer in Charge reported that, when asked why he had behaved as charged by the Navy patrolmen, the applicant admitted to the offenses but also said he could not remember what had happened the night before and must have been "too drunk to know any better." The Officer in Charge stated that he had transferred the applicant off the cutter for disciplinary action because of his history of similar offenses.

On May 23, 1951, the applicant was tried at general court-martial for (1) using obscene, abusive, and threatening language by telling a Navy patrolman on April 30, 1951, "'You're a little shit, a mother fucker, and a no-good regulation son-of-a-bitch, and I'm going to stamp your ass,' or words to that effect"; (2) forcibly resisting arrest by the Navy patrolman; and (3) committing conduct to the prejudice of good order and discipline by assaulting the Navy patrolman. The applicant pled not guilty but was found guilty on all charges. His sentence was to be imprisoned for nine months and then discharged with a BCD. The convening authority approved

the guilty findings on charges (1) and (3) but disapproved the guilty finding on charge (2). In addition, the convening authority approved a sentence "for a bad conduct discharge and confinement for a period of two months" and forwarded the case for appellate review.

On October 1, 1951, the District Commander affirmed the sentence of two months' confinement to be followed by the BCD and ordered that the sentence be executed. On October 8, 1951, the applicant was discharged with the BCD. His final average marks (on a 4.0 scale) were 2.9 for proficiency in rating and 3.5 for conduct.

SUMMARY OF APPLICANT'S PRIOR BCMR CASES

In BCMR Docket No. 270, the applicant asked the Board to upgrade his BCD to an Honorable discharge. The Board noted that the BCD was a permissible sentence for the offenses tried at the general court-martial because of the applicant's prior convictions. The Board denied relief, concluding that the BCD was neither erroneous nor unjust.

In July 1954, the Board denied the applicant's request for reconsideration of his case. However, in 1957, the Board docketed a subsequent request for reconsideration submitted through the applicant's congressman as BCMR Docket No. 432. Upon reconsideration, the Board noted that, after enlisting, the applicant "had a good record for about six months" but was then "involved in a series of minor offenses" that culminated in his conviction by general court-martial and sentence including the BCD. The Board cited Law Bulletin No. 230 for the principle that a member awarded a short sentence and a BCD should not be in a worse position than a member awarded a longer sentence and a BCD who, because of the longer sentence, is sent to a retraining camp where one can earn the remission of a BCD. (Members who successfully completed retraining camp could get their BCDs remitted if they served satisfactorily during a subsequent six-month probationary period.) The Board took into account the court's clemency recommendation, the youth of the applicant, and the nature of his offenses and upgraded his BCD to a General discharge. As a result of the Board's order, on June 10, 1957, the Coast Guard issued the applicant a General discharge certificate and a DD 215 to correct his DD 214 and paid him back pay of $178.20 "due under P.L. 220."

VIEWS OF THE COAST GUARD

On March 12, 2008, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny the applicant's request. The JAG adopted the findings and analysis provided in a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC). CGPC noted that the application is untimely and that the applicant's claim and position "in the current application is patently the same as that presented in Docket No. 432 … . The applicant should be denied due to untimeliness and lack of merit."

CGPC further noted that the applicant's record "reveals a pattern of misconduct" and that the BCD was upheld upon review. … A complete review of the applicant's record given his significant breaches of conduct supports the award of a general discharge. … Applying today's standards, it is unlikely the applicant would be awarded a discharge with a character of service any higher than his current General discharge." CGPC stated that the applicant's repeated mis-

conduct contradicts his claim to having an "otherwise satisfactory record" and that his General discharge is not "unjust or disproportionate for his offenses and service."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 16, 2008, the applicant responded, stating that he agreed with the Coast Guard's recommendation. He alleged that he did not ask the Board to reconsider his case earlier because he was not aware that he could ask for reconsideration.

The applicant argued that had he been granted clemency, he could have been rehabilitated. He believes he was "hastily stripped of my opportunities to serve my country." He alleged that he has served as a "father of four children, a mentor, and a career supervisor of many productive employees." He further argued that he was a young man and should have been allowed to learn from his mistakes and retained on active duty instead of being discharged.

On April 7, 2008, the Board received a letter from the applicant's congressman in support of his request for an Honorable discharge.

APPLICABLE REGULATIONS

Under Chapter 12-B-4 of the Coast Guard Personnel Manual in effect in 1951, members could receive an Honorable discharge if (a) they were never convicted by a general court-martial and were convicted not more than once by a special court-martial and (b) their final average marks were at least 2.75 for proficiency in rating and 3.25 for conduct. Members could receive a General discharge if they had been convicted only once by a general court-martial or more than once by a special court-martial or if their marks did not meet the requirements for an honorable discharge. Members could receive an Undesirable discharge for repeated petty offenses not warranting trial by court-martial, habitual shirking, alcoholism, drug addiction, pathological lying, or sexual perversion. BCDs and Dishonorable discharges could only be awarded by courts-martial.

Under Article 12.B.18. of the Personnel Manual in effect today, Commander, CGPC, may authorize an Honorable, General, or Other than Honorable (OTH) administrative discharge for a member due to misconduct. BCDs and Dishonorable discharges may only be awarded by court-martial.

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.[2] A request for reconsideration must be filed within two

[2] 10 U.S.C. § 1552(b).

years after the issuance of a decision by the Board.[3] The applicant was discharged in 1951, and the Board issued a decision upgrading his discharge from a BCD to a General discharge in 1957. Therefore, his request 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."[4]

4. The applicant argued that it is in the interest of justice for the Board to excuse his application's untimeliness because he was unaware that he could request reconsideration of the Board's decision. The applicant's claim is contradicted by the fact that after the Board denied relief in 1953, he requested reconsideration in both 1954 and 1957. Moreover, the applicant apparently accepted the Board's decision and failed to pursue further relief for 50 years. The applicant's argument regarding his 50-year delay is not compelling.

5. The Board's review of the record indicates that the applicant's request has no potential for success on the merits. Although he now argues that his discharge was too severe for his offenses, in 1951 the applicant claimed he had been too drunk to remember what he had done. Moreover, a member today may receive a BCD or even a Dishonorable discharge for assaulting a petty officer under Article 91 of the Uniform Code for Military Justice. In addition, in the Rules for Courts-Martial, Rule 1003(b)(8)(C) states that a BCD is "appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary." The applicant's record reveals a long list of minor and not-so-minor offenses. The applicant argued that he should have been granted clemency because of his youth, but the Board has already granted clemency by upgrading the applicant's BCD to a General discharge in BCMR Docket No. 432. The applicant did not meet the minimum requirements for an Honorable discharge under Chapter 12-B-4 of the Personnel Manual in effect in 1951, and the Board is not persuaded that his General discharge is too harsh given his numerous offenses.

6. The applicant further argued that an Honorable discharge is warranted because of his post-discharge efforts as an upstanding citizen, father, mentor, employee, and supervisor. The Board notes that the applicant submitted no evidence whatsoever to support his assertions of continuous good behavior. More significantly, however, in 1976 the delegate of the Secretary determined that the Board should not upgrade a discharge on the basis of 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."[5] As indicated in Finding 5, the Board is not convinced that the applicant's General discharge is disproportionately severe.

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[3] 33 C.F.R. § 52.67.

[4] *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).

[5] Memorandum from the General Counsel of the Department of Transportation to the BCMR (July 7, 1976).

7. The Board does not construe the standard provided in the 1976 memorandum 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 modern Coast Guard standards. Such a construction would be inconsistent with the very 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[7] 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.

8. The Board has sometimes upgraded BCDs to General discharges when applicants were young, had committed only one major offense or only absence offenses, had performed extensive sea duty during war, and/or had explanations for committing their offenses.[8] In addition, the Board has sometimes upgraded BCDs to General discharges based on the fact that the veteran received less due process than one would today and has suffered the burden of his BCD for many years.[9] However, the Board has already upgraded the applicant's BCD to a General

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

[7] According to *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976), for purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is "treatment by military authorities that shocks the sense of justice but is not technically illegal."

[8] For examples of BCDs upgraded to General discharges, see BCMR Docket No. 2005-105 (1 SCM for being AOL 3 weeks and 1 GCM for being AOL 25 days); Docket No. 30 (3 deck courts for minor offenses; 1 GCM for being AWOL 44 days); No. 42 (1 mast for being AWOL 2 days; 1 GCM for being AWOL 28 days; upgraded on basis of youth (age at enlistment), 1 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; 1 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).

[9] For examples of cases in which the Board upgraded BCDs to General discharges based primarily on the lack of due process in the past and/or the length of time the veteran had borne the burden of the BCD, see BCMR Docket No. 2005-107 (1 GCM for being AOL 29 days, 1 mast for attempted escape, and 1 mast for being AWOL 3 days); Docket No. 349-89 (World War II veteran with 2 masts for creating a disturbance and being AOL 2 days, 1 SCM for

discharge based on his youth and the nature of his offenses, and there is no basis for granting additional clemency. The long list of offenses committed by the applicant shows that for most of his enlistment he was a significant administrative and disciplinary burden to the Coast Guard rather than an asset.[10] In addition, the record indicates that he was represented by an attorney at trial, and his case underwent appellate review.

9. Accordingly, the Board should not waive the statute of limitations because the applicant cannot prevail upon the merits and additional clemency is not due in this case. His request for an Honorable discharge should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

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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).

[10] This case is similar to BCMR Docket No. 2006-072, in which the Board granted no clemency on a BCD because during that applicant's 5 years of active duty, he was taken to mast 10 times for a variety of petty offenses and was convicted of being AWOL 3 times by courts-martial.

ORDER

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

Evan R. Franke

Robert S. Johnson

Adrian Sevier