

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-099

**XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX**

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 after receiving the applicant's completed application on January 26, 2010, 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 October 21, 2010, 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, who received a bad conduct discharge (BCD), on March 20, 1987, as the sentence of a general court-martial for wrongfully possessing about 30 pounds of marijuana and wrongfully distributing about 15 pounds of marijuana, asked the Board to upgrade his discharge to honorable so that he will eligible for veterans' benefits. He alleged that he has been a model citizen since his discharge. In support of his allegation, the applicant submitted five letters of reference:

- On October 24, 2009, the applicant's brother stated that the applicant is a model citizen and respectable person who holds a steady job and helps people in need.
- In an undated letter, a section leader at a carpet-dyeing factory stated that he has known the applicant some 20 years and that the applicant is of good character and respects other people. He stated that the applicant is a hard worker who would do whatever he could for a person in need.
- In a note dated November 2, 2009, a driving instructor who has known the applicant since 1983 stated that the applicant is respected by his peers in the community and that he is honored to call the applicant a friend.

- In an undated note, another friend stated that he has known the applicant for 10 years and that the applicant is a helpful and respectable young man.
- In an undated letter, someone who has known the applicant all his life stated that the applicant has worked for him and performed his work well. He also stated that the applicant is of good character and “has never been in any trouble prior to this to the best of my knowledge.”

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard at age 20 on October 26, 1981. On May 4, 1983, the applicant was convicted of his offenses at a general court-martial and was sentenced to a BCD and 14 months of confinement, which was approved by the convening authority and the District Commander. He was confined from May 4, 1983, to April 10, 1984, placed on appellate leave without pay, and ultimately discharged with the BCD on March 20, 1987, following appellate proceedings and a clemency review.

The chairman of the clemency board stated that the applicant’s offenses began when a crewmate boarded a boat that had been seized and stole about 30 pounds of marijuana. He hid it in the backseat of the applicant’s vehicle and showed the applicant the marijuana the next morning. The applicant then “became excited about the prospect of participating in this venture and offered to help hide and distribute the stash.” They drove the marijuana to the garage of a relative of the applicant in Fayetteville, North Carolina, and rebagged it in about 210 sandwich bags. They kept about 30 of these bags for their personal consumption and sold some of the rest.

The applicant pled not guilty to possessing and distributing the marijuana and denied having anything to do with his crewmate’s enterprise. Family members testified that he was never in Fayetteville on the weekend in question, but he was found guilty of both offenses. It was noted that he had been awarded non-judicial punishment (NJP) for possessing marijuana and had tested positive for marijuana use just one month prior to his court-martial. (Records of this NJP and drug test are in the applicant’s military record.)

The chairman of the clemency board stated that there were no extenuating circumstances that would warrant clemency. Although the crewmate had stolen the marijuana, the applicant willingly committed the offenses of which he was convicted. Moreover, he was found to have possessed and used marijuana again just one month before his trial. Therefore, clemency was not recommended. The Commandant’s Chief of Staff and the Vice Commandant concurred in this recommendation, and the Commandant denied clemency.

VIEWS OF THE COAST GUARD

On May 24, 2010, the Judge Advocate General of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum on the case prepared by the Coast Guard Personnel Service Center (PSC).

The PSC pointed out that the application is untimely since the applicant was discharged in 1987 and argued that his request should be denied for untimeliness. The PSC also stated that the applicant's discharge was properly carried out and that Coast Guard policy does not permit members involved with illegal drugs to receive an honorable discharge. The PSC stated that upgrading the applicant's BCD would be "unwarranted and unjustified."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 26, 2010, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

APPLICABLE LAW

Under Article 12-B-18.b.(4) of the Personnel Manual in effect in 1987, any member involved in a drug incident was to be "separated from the Coast Guard with no higher than a general discharge."

Under Article 20.C. of the current Personnel Manual, any member involved in any "drug incident" is subject to an administrative discharge with no greater than a General discharge "under honorable conditions."

Under the Uniform Code of Military Justice (UCMJ), the maximum punishment the applicant could have received was a dishonorable discharge, 20 years' confinement, and total forfeiture of pay and allowances. The same is true under the UCMJ today.

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. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice.

2. An application to the Board must be filed within three years after the applicant discovers, or reasonably should have discovered, the alleged error in his record. 10 U.S.C. § 1552; 33 C.F.R. § 52.22. The applicant was discharged in 1987. Therefore, his application is 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.” *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. The applicant did not explain his delay in seeking an upgrade of his discharge. However, his request is based on alleged long-term post-service good conduct, not on any alleged error or injustice committed during his years of service.

5. The applicant argued that his discharge should be upgraded in the interest of justice because he has been a model citizen since his discharge in 1987. However, the delegate of the Secretary informed the Board on July 7, 1976, by memorandum 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.”¹ Under today’s Uniform Code of Military Justice and the Manual for Courts-Martial, the maximum punishment allowed for a member who is convicted of possessing 30 pounds of marijuana and distributing marijuana is the same as in 1987: (a) Dishonorable discharge; (b) forfeiture of all pay and allowances; and (c) confinement for 20 years. Therefore, the Board is not persuaded that the applicant’s BCD and 14 months of confinement were disproportionately severe in comparison to a sentence a member would likely receive today for the same offenses.

6. The Board does not, however, construe the delegate’s guidance as prohibiting it from exercising clemency in court-martial cases under 10 U.S.C. § 1552(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 “mercy or leniency.”² Clemency does not require that a sentence have been unjust or overly harsh; on the contrary, it can be (and often is) forgiveness of punishment that was otherwise appropriate. An analysis under the 1976 guidance³ primarily considers whether the past discharge was unjust at the time or would be unjust if applied to a similarly situated member today; a clemency analysis considers whether it is appropriate today to forgive the past offense that led to the punishment and to mitigate the punishment accordingly.

7. This Board has sometimes granted clemency by upgrading BCDs to General discharges under honorable conditions based upon such factors as the applicants being teenagers at the time of their offenses or having limited education; having committed comparatively short absence offenses; having performed long, arduous sea duty in combat or having served honorably during prior enlistments; having been mentally ill; having conducted themselves well in post-discharge civilian or military life; and having endured the punitive discharge for a very long time. In this case, however, the applicant was not a teenager, as he enlisted at age 20; his offenses undermined the vital work of the Coast Guard in drug interdiction; he performed no arduous sea duty and has no other, honorable military service; and aside from a few letters from his friends, he submitted no evidence to show that he has spent the last 23 years as a “model

¹ Memorandum of the General Counsel to J. Warner Mills, et al., Board for Correction of Military Records (July 8, 1976).

² BLACK’S LAW DICTIONARY 288 (9th ed., 2009)

³ Memorandum of the General Counsel to J. Warner Mills, et al., Board for Correction of Military Records (July 8, 1976).

citizen.” Moreover, a quick review of public criminal records shows that the applicant has not been a model citizen since his discharge from the Coast Guard. The only factor favoring clemency is the long time that the applicant has suffered the burden of the BCD. Therefore, and in light of the offenses for which he received the BCD, the Board finds that clemency is unwarranted.

8. Accordingly, the Board finds that it is not in the interest of justice to excuse the untimeliness of the application and the applicant’s request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Philip B. Busch

Paul B. Oman

Dorothy J. Ulmer