

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2011-040**

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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 after receiving the applicant's completed application on December 2, 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 July 14, 2011, 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 February 12, 2004, bad conduct discharge (BCD). The BCD was part of his sentence following his September 21, 2001, conviction by a special court-martial on three counts: conspiring to wrongfully distribute ecstasy, an illegal drug, on or about July 22, 2001, in violation of Article 81 of the Uniform Code of Military Justice (UCMJ); wrongfully using ecstasy on divers occasions from July 20 to 23, 2001, in violation of Article 112a of the UCMJ; and wrongfully procuring his enlistment by knowingly making a false representation when he enlisted on January 30, 2001, in violation of Article 83 of the UCMJ. The applicant alleged that he discovered the injustice in his record in August 2008 because before then he "did not know [he] had an opportunity to correct [his] life."

The applicant asked the Board to upgrade his BCD based on his post-discharge conduct. He stated that he truly regrets and repents of his misconduct and has become a responsible citizen, enrolled in college, and established a business with the help of his family. In addition, he is "a very active participant in several organizations that counsel users of controlled substances." He has been the xxxxxxxxxxxx Youth Clubs, President of the xxxxxxxxxxxx Club, Vice President of xxxxxxxxxxxxxxxxxxxxxxxxxxxx, and a member of the Puerto Rico xxxxxxxxxxxxxxxx. In support of these allegations, the applicant submitted several documents and statements from people who know him, including the following:

- A certificate from the Police of Puerto Rico stating that the applicant has no penal record.
- A pamphlet and certificate show that the applicant is an active member of the xxxxxxx Club.
- Another pamphlet shows that the applicant served on a committee for a university reforestation project called xxxxxxxxxxxxxxxxxxxxxxxxxxxx.
- Certificates show that the applicant was on the Dean's List at a university and studying xxxxxxx.
- Letters show that the applicant was employed at hotels from January 17, 2003, through at least August 17, 2004, and from January 2007 to July 2008.
- A letter dated February 1, 2009, thanks for the applicant for his generosity toward a home for pregnant teens.
- A letter from the applicant's brother, who is a sergeant on active duty xxxxxxxxxxxxxxx, states that the applicant has learned from his past mistakes, has skills that would be useful in the military, and deserves a second chance.
- A letter from the applicant's father, president of xxxxxxxxxxxxxxx, states that his son works for him and has demonstrated responsibility, respect, and willingness to work hard. The letter states that his son has continued to grow and learn and has become an admirable person.
- A letter from an assistant professor at the applicant's university states that the applicant is a bright, dedicated, and resourceful student and "an outstanding human being ... a positive role model."
- A letter from a priest states that the applicant is a stable and capable person who "does not deserve this discharge. His penitence is over. He already paid for his sins. His attitude is by no means [that] of an active addict. He behaves correctly in every atmosphere, he's studying xxxxxxx in Puerto Rico with good grades, and he also helps addicts who are struggling and helps take them off the streets. I use him on my duties when I have to give people treatment as well as an example of perseverance and change for at risk youths."
- A letter from a former patient at a rehabilitation center states that he met the applicant in 2005, when the applicant came to the center to help counsel people, and the applicant thereafter visited him regularly and gave him a place to stay when he left the center. The former patient stated that he has been clean for three years and attributed this achievement to the applicant's efforts and example.
- A letter from a hospital praises the applicant for helping to show young patients that people can overcome drug and alcohol addictions.

- A letter from Narcotics Anonymous states that the applicant has been active in the fellowship and been clean and sober for many years.
- A letter from a university adviser thanks the applicant for his help with the university's drug and alcohol abuse prevention week.
- A Summary of Indebtedness shows that when he was released from confinement, the applicant owed the Coast Guard \$3,878.81, and Statements of Indebtedness shows that \$50 was debited from his bank account each month until he owed just \$16.95 on September 25, 2009.
- A U.S. Navy certificate shows that during his confinement in 2002, the applicant completed a Cook in Training program.
- An unaddressed invitation from the Presidential Inaugural Committee invites the recipient to attend the inauguration of the President on January 20, 2009.

### **SUMMARY OF THE RECORD**

On January 30, 2001, at age 18 (date of birth July 30, 1982), the applicant enlisted in the Coast Guard as a seaman recruit (SR/E-1). Upon enlistment, he certified that he had never used any illegal drugs and acknowledged having been counseled about the Service's drug and alcohol policies, including the policy that anyone discharged for drug abuse may receive no higher than a general discharge.

After completing boot camp, the applicant was advanced to seaman apprentice (SA/E-2) and assigned to attend xxxxxxxx "A" School at the training center in Yorktown, Virginia. However, he was disenrolled from "A" School on May 16, 2001, for cheating on an examination and so became ineligible for further training for one year. Although disenrolled, the applicant was still serving in Yorktown when he incurred an alcohol incident that was documented in his record on August 10, 2001, and when he was charged with the offenses for which he was convicted by special court-martial on September 21, 2001. His sentence, which was adjudged on March 5, 2002, included confinement for four months, forfeiture of pay for four months, reduction to SR/E-1, and the BCD. The applicant began his confinement on March 5, 2002, and was released on appellate leave on June 14, 2002, pending a clemency review. On November 10, 2003, the Commandant denied clemency on the applicant's sentence. On December 11, 2003, the Rear Admiral with court-martial jurisdiction over the applicant ordered the BCD executed. The BCD was executed on February 12, 2004.

The applicant's DD 214 shows that because of time lost while in confinement and on appellate leave, the applicant served one year, one month, and five days of active service from January 30, 2001, to March 4, 2002.

## VIEWS OF THE COAST GUARD

On February 2, 2011, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny the requested relief. In so doing, he adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

The PSC noted that the application “is not timely and should be denied due to untimeliness.” In addition, the PSC reviewed the applicant’s records and “concur[red] with the findings of the special court-martial in their entirety.” The PSC argued that relief should be denied because the applicant “has failed to substantiate any error or injustice” in his record.

## APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 16, 2011, the Chair sent the applicant a copy of the advisory opinion and invited him to respond within thirty days. No response was received.

## 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. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.<sup>1</sup> Although the applicant alleged that he became aware that he could seek correction of his discharge in August 2008, he knew that he had received a BCD upon his discharge in 2004. 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.”<sup>2</sup>

4. Regarding the delay of his application, the applicant explained that he did not previously know that he could seek correction of his BCD. This explanation is not compelling, but the Board notes that the applicant is seeking clemency based largely on how he has used the time since his discharge to improve his character and conduct.

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<sup>1</sup> 10 U.S.C. § 1552(b); 33 C.F.R. § 52.22.

<sup>2</sup> *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. A cursory review of the merits of the case shows that there is no allegation or evidence that the Coast Guard committed any error or injustice in separating the applicant with a BCD. Instead, the applicant is requesting clemency<sup>3</sup> under 10 U.S.C. § 1552(f) based on his post-discharge conduct alone.<sup>4</sup> Granting clemency by upgrading a discharge may help a veteran gain civilian employment and make him eligible for veterans' benefits for which he is not eligible with a BCD.<sup>5</sup> Past clemency reviews by the Board have determined whether it is appropriate to upgrade a punitive discharge based on such factors as the nature and number of the offenses committed; whether the applicant has performed other, honorable military service, combat, or arduous sea duty; the age of the applicant when committing the offenses; how long the applicant has borne the burden of the punitive discharge; the amount of due process provided the applicant; any mental illness of the applicant; and how the applicant has spent his time since his discharge.<sup>6</sup> In this case, the applicant was very young when he committed his offenses and he has

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<sup>3</sup> Clemency means "kindness, mercy, leniency" and does not require that a sentence be erroneous or unjust. BLACK'S LAW DICTIONARY (5<sup>th</sup> ed.)

<sup>4</sup> In 1976, the delegate of the Secretary informed the BCMR that it "should not upgrade discharges solely on the basis of post-service conduct. The situation in which a man is granted a less than honorable discharge under circumstances all agree were just, and then goes on to become Albert Schweitzer, is one that—if it ever occurs—is properly handled by an exemplary rehabilitation certificate or a Presidential pardon. . . . My point is simply that the Board 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." Memorandum of the General Counsel to J. Warner Mills, *et al.*, Board for Correction of Military Records (July 8, 1976). However, in 1983, Congress enacted 10 U.S.C. § 1552(f), expressly authorizing the Board to grant clemency on sentences resulting from court-martial convictions. Military Justice Act of 1983, Pub. L. 98-209, § 11, 97 Stat. 1393 (1983). Therefore, the Board does not construe the 1976 guidance as prohibiting it from exercising clemency in court-martial cases.

<sup>5</sup> See U.S. Department of Veterans Affairs, *Federal Benefits for Veterans, Dependents and Survivors* (2010 ed.), at [http://www.va.gov/opa/publications/benefits\\_book.asp](http://www.va.gov/opa/publications/benefits_book.asp).

<sup>6</sup> 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; No. 2007-144, in which the Board refused to upgrade a 1975 BCD because, although the applicant had borne the BCD for more than 30 years, 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 submitted nothing to show that his conduct following his discharge from the Coast Guard had been satisfactory; No. 2006-061, in which the Board refused to upgrade a 1944 BCD because, although the applicant was 18 years old when he committed the offenses, had suffered under the burden of the BCD for a very long time, and may have received less due process in 1944 than a member in similar circumstances would today, he did not prove that his family's situation required him to be AOL, he provided no reasonable explanation for taking the apparel of others and conspiring to steal an automobile, and he "was a significant administrative and disciplinary burden to the Coast Guard rather than an asset" during his eight months in the Service. 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 (approved by the delegate of the Secretary) (World War II veteran with 2 masts and 2 special courts-martial for absence offenses); No. 104-89 (1 special court-martial (SCM) for 4 absence offenses totaling 71 days); No. 387-86 (1 SCM for being absent over leave (AOL) 29 days and missing ship's movement, and another SCM for being AOL 2.5 days, theft, and "scandalous [homosexual] conduct"); No. 143-81 (1 SCM for petty theft of camera during boot camp); No. 27-81 (1 SCM for 2 periods of being absent without leave (AWOL) for 9 days and 32 days; 1 general

submitted documentation showing that since his discharge, he has attended college; volunteered as an addiction counselor and for xxxxx, a service organization; worked at various jobs; and kept a clean police record. On the other hand, his misconduct began before he even completed training, he has no honorable military service, and he performed no sea duty or combat. Because even members whose sole offense is to use an illegal drug receive a general discharge,<sup>7</sup> the applicant's BCD for lying to gain his enlistment, conspiring to sell illegal drugs, and using illegal drugs cannot be considered severe.<sup>8</sup> In light of these factors, the Board finds that the applicant's request for clemency cannot prevail because his military service and discharge should not be characterized as honorable or under honorable conditions.

6. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations. The applicant's request should be denied.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

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court-martial (GCM) for being AWOL 27 days); No. 159-79 (1 mast for neglect of duty; 1 SCM for being AWOL for 2 months; 1 GCM for being AOL 75 days); No. 149-79 (2 deck courts for being drunk and disorderly; 3 SCMs for being AWOL 59 hours, 20 days, and then 1 day). 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).

<sup>7</sup> U.S. Coast Guard Personnel Manual, Article 12.B.18.b.4. (2010).

<sup>8</sup> Under the sentencing guidelines of the UCMJ, the applicant would likely receive a BCD if he were convicted of the same offenses today. *See* MANUAL FOR COURTS-MARTIAL UNITED STATES (2008), Appendix 12, p. A12-1.

**ORDER**

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

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Troy D. Byers

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Francis H. Esposito

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Dana Ledger