

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-004

 Apprentice Seaman (former)

FINAL DECISION

This proceeding was conducted under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. After receiving the completed application and the applicant's military records, the Chair docketed the case and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 9, 2016, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

REQUEST FOR CORRECTION

The applicant, who enlisted in the Coast Guard on January 17, 1948, and received a bad conduct discharge (BCD) on December 29, 1948, pursuant to the sentence of a general court-martial, asked the Board to upgrade his discharge to General. He stated that he received the BCD for being absent without leave (AWOL) but asked for clemency because he had lied about his age to enlist and was just 16 years old when he enlisted and when he received the BCD. The applicant explained that he had enlisted because he needed to support his family because his father was alcoholic and he had eight younger siblings, four of whom were in foster care. He went AWOL because he believed his family was in crisis and needed him. In addition, he alleged, he had been told that he would receive a General discharge for going AWOL to help his brother who was in foster care in , but he was poorly educated and inept and did not know how to pursue a more reasonable discharge, which his commanding officer (CO) had promised.

The applicant noted that he knew of the alleged injustice in 1948 and stated that he did not challenge it at the time due to his age and lack of education and his parents' lack of education. In support of his allegations, the applicant submitted copies of his military records, which are included in the summary below, and the following:

- A copy of his birth certificate, showing a date that appears to be [REDACTED] 1932, but was clearly signed by a midwife in [REDACTED], and by [REDACTED] [REDACTED] 1932.
- A summary of his family history and a letter signed by his wife state that after fathering nine children, the applicant's father left the family in [REDACTED] to work in [REDACTED] during World War II and sent money home when he could. However, some of the applicant's siblings were fostered or adopted by other families, and the applicant left [REDACTED] to help support the family at age 14. After the applicant's father was killed in a car accident when the applicant was age 15, his mother married an alcoholic stepfather, which helped the family finances, but not his home life. Therefore, the applicant joined the Coast Guard in 1932 at age 16. When the applicant went AWOL, his mother and stepfather were contacted and led to believe that he would receive a General discharge if he turned himself in, but he received a BCD instead. The history also summarizes the applicant's family life and work for a lithograph company and as an electrical contractor. She stated that the applicant never slacked in taking care of his family and would say "I've got broad shoulders" when a problem arose. He now suffers from dementia.
- A letter from a Marine Corps veteran to the applicant's wife states that when he enlisted at age 19, he never thought about what might happen if he violated the contract. The veteran states that the Coast Guard should consider the applicant's young age at the time and show [REDACTED] sensitivity and empathy. He noted that the applicant had started a successful diving school in 1966, had begun a wet and dry suit manufacturing company, and [REDACTED] an underwater contractor.
- A letter from family friends states that they have known the applicant since 1975 and that the applicant and his wife provided respite care on weekends for their child, who has Down's Syndrome. They described [REDACTED] as a "caregiver, employer, and friend ... an honest citizen leading a good and honorable life. He was so young when he made this mistake, and [REDACTED] an exemplary life since, never getting into trouble with the law or in jail, working hard, enjoying life and helping others enjoy theirs."
- A letter from a family friend states that she has known the applicant for about 40 years through their church. She described the applicant as a conscientious father, good role model, and excellent worker who prized integrity.
- A letter from the applicant's brother-in-law states that the applicant always treated his wife and her family with respect and welcome. The applicant took care of his family, invested in the community, and is "worthy of your interest and concern."
- A letter from a friend of the applicant who has known him for ten years and stated that the applicant was always willing to help his neighbors as a journeyman electrician and "always went above the call of duty."

SUMMARY OF THE RECORD

On January 21, 1948, the applicant enlisted in the Coast Guard for four years at a recruiting office in [REDACTED]. He claimed to be 17 years old, and his mother signed docu-

ments stating that his birth date was [REDACTED] 1931, and that he was [REDACTED] ld. Upon completing recruit training, he was assigned [REDACTED] based in [REDACTED] [REDACTED] [REDACTED]

On June 1, 1948, the applicant was punished at [REDACTED] for being "slow in answering call." As punishment, he was awarded ten hours of extra duties.

On June 11, 1948, the cutter command reported from the port in [REDACTED], that the applicant was "[m]issing from muster, missing from ship. Absent over leave this time and date." The next day, the command assigned him the status of "straggler" because he had not removed his personal effects and there was "[n]o indication of intention to desert." However, on June 18, 1948, [REDACTED] d that the applicant was still absent over leave (AOL), that the cutter was leaving port without him on an extended cruise, and that he was being reassigned to the [REDACTED] District office in [REDACTED] for administrative purposes.

On July 11, 1948, the app [REDACTED] was declared a deserter because he had been AOL for one month. On July 16, 1948, the Coast Guard advised the applicant's mother by letter that the applicant had [REDACTED] declared a deserter because he had been AOL since June 11, 1948. The letter encouraged her to urge him to surrender himself "as soon as practicable, because his punishment will be less severe if he voluntarily surrenders himself than if apprehended."

On July 28, 1948, the applicant was apprehended by a sheriff's office in [REDACTED]. He was delivered to the cutter from [REDACTED] on July 30, 1948. The command reported that he was not in uniform when apprehended and there was "[n]o known indication of intent to return from deserter status."

On July 29, 1948, the [REDACTED] County Register of Deeds provided the Coast Guard with a copy of the applicant's birth certificate, which clearly shows that he was born on [REDACTED] 1932.

On August 12, 1948, the command reported that the applicant was "[m]issing from ship's brig where he had been confined awaiting trial. Missing from ship. Declared Absent Without Leave [AWOL] from 0400 this date."

On September 4, 1948, the applicant surrendered himself aboard his cutter. On September 9, 1948, he was transferred under guard to the brig in Norfolk, Virginia, for disciplinary action. At a mast held on September 16, 1948, the CO determined that the applicant should be tried by court-martial for being AOL from June 11 to July 30, 1948, and AWOL from August 12 to September 4, 1948.

A general court-martial was held on September 22, 1948. The applicant pled guilty to the charges of being AOL from June 11 to July 30, 1948, and AWOL from August 12, to September 4, 1948. The court sentenced him to a Dishonorable Discharge and forfeiture of two months' pay, amounting to \$160.00.

[REDACTED]

Following the trial, the applicant [REDACTED] referred to the USCGC [REDACTED] [REDACTED] ling action on the sentence. On October 20, 1948, the [REDACTED] [REDACTED] mitigat [REDACTED] [REDACTED] which would be remitted if the applicant satisfactorily completed a six-month probationary period. In addition, the forfeiture was modified to \$40 per month for four months. A legal memorandum dated October 25, 1948, states that although the applicant had requested discharge, he was placed on probation because of his youth and "on the assumption that he is possibly not fully aware of the handicap which would be placed upon him for the remainder of his life if he were separated with a Bad Conduct Discharge [REDACTED] [REDACTED] quarters directed that the applicant "be made fully aware of the difficulties he may expect to experience in civilian life if through violation of his probationary period he shall cause himself to be discharged with a Bad Conduct Discharge." This information was received aboard the applicant's cutter in [REDACTED], on October 26, 1948.

[REDACTED] November 8, 1948, the [REDACTED] applicant again became AOL when he failed to return from leave. He was declared a straggler when he had not returned by the next day. On November 15, 1948, he surrendered himself in [REDACTED]. An officer reported that he had interviewed the applicant, who "had no reason for leaving other than wanting to come home." He had traveled directly to [REDACTED] spent a few days with his mother, and then turned himself in. "In view of the repeated offences of absence without leave it is believed that he will not be amiable to discipline and will continue to take matters into his own hand." The applicant was reassigned to the Base in [REDACTED]

On December 8, 1948, the [REDACTED] Base Commander recommended to the Commandant that the applicant's probation be revoked and the BCD executed because he had been AOL for seven days from November 8 to November 15, 1948. The Base Commander noted that the applicant had been advised about the "possible difficulties he might expect to experience in civilian life if he violated his [REDACTED] ary period and received a Bad Conduct Discharge" when the command received it on October 26, 1948. The Base Commander also stated that [REDACTED] view with the applicant had shown "a definite lack of responsibility and it is believed that in the future he will not be amiable to discipline and will continue to take matters into his own hands. He states he does not have any personal difficulties to influence his actions." The Base Command attached another statement by the applicant, who wrote that he "went only for one reason and that was to be near home for I was home sick. If I may be allowed to remain in the Coast Guard I would try my best to do right and obey the rules."

On December 17, 1948, the Commandant recommended to the Acting Secretary of the Treasury that the applicant's probation be terminated and that he be discharged with a BCD. The Acting Secretary approved this action on December 20, 1948. The BCD was executed on December 29, 1948. The applicant was given \$25.00 to buy civilian clothing.

In a letter dated December 27, 1949, the applicant's stepfather asked the Coast Guard if he could be reinstated to clear his name. The stepfather wrote that the applicant had matured and "sees his mistake. He wants to rectify same by reenlisting – so to clear his name and conscience." On January 5, 1950, the Assistant Chief of the Enlisted Personnel Division replied and stated that the [REDACTED] eligible to reenlist but noted that he could apply to the BCMR.

He enclosed a BCMR application. (The [redacted] staff cannot find a [redacted] g that the applicant ever applied to the BCMR.) [redacted]

In November 1951, the applicant requested a transcript of his service because he intended to join the Merchant Marine and needed to prove he had served aboard a ship for at least six months. On December 5, 1951, the Coast Guard mailed him a transcript showing his periods of sea service, which was inaccurate because it included periods during which he was AWOL. [redacted]

VIEWS OF THE COAST GUARD

On February 25, 2016, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion [redacted] commended denying relief. He adopted the findings and analysis provided in a memorandum on the case submitted by the Commander of the Coast Guard Personnel Service Center (PSC).

PSC stated that the application [redacted] is extremely untimely and should not be considered beyond a cursory review. PSC stated that less than two months after his court-martial, the applicant violated [redacted] probation by going AWOL again. Therefore, PSC stated, his BCD was equitable and his request should be denied.

RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 7, 2016, the Chair [redacted] the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days. No response was received.

APPLICABLE LAW

Article 459 of the Personnel Instructions in effect in 1948 provided that “[u]pon [redacted] tion from the Coast guard for any reason other than death, an enlisted man shall be entitled to receive a discharge, the character of which shall be determined by the reason for discharge and/or the character of service rendered during his period of enlistment.”

Under Article 4952(1) and (2), members could receive an honorable discharge if—

- (a) they had a final average proficiency in rating mark of “not less than 2.75” and a final average conduct mark of at least 3.0;
- (b) they were “[n]ever convicted by general Coast Guard court or more than once by a summary Coast Guard court, or more than twice by a Coast Guard deck court”; and
- (c) they were being discharged for one of the following reasons: expiration of enlistment, convenience of the government, minority, hardship, or physical or mental disability not the result of own misconduct.

Members being discharged for the reasons listed in paragraph (c) above could receive a general discharge under honorable conditions if their marks did not meet the minimums required [redacted]

for an honorable discharge or if they had been convicted once by a General Court Martial, twice or more by a Summary Court-Martial, or at least three times by a deck court.

Under Article 4952(6), a member could receive a BCD if he was “[d]ischarged in accordance with the approved sentence of a general or summary Coast Guard court, as mitigated.”

Under Article 1.B.13.c. of the current Military Separations Manual, if a CO learns that a minor has enlisted and misrepresented his age, the CO shall inform PSC with documentary evidence of the member’s age and “[i]f the minor is 17 years of age or older, the commanding officer’s statement of his or her opinion whether the minor is sufficiently mature for retention.” Article 1.B.13.e. notes that the minimum enlistment age is 17 years (as it was in 1948) and that anyone under the age of 17 must be discharged.

Article 1.B.13.f. states that a “minor enlisted without proper consent or who misrepresented his or her age is subject to trial by court-martial for breaches of regulations to the same extent as other enlisted members. The Service may hold such minors for trial and punishment if they commit an offense before release, notwithstanding the custodial parent or legal guardian’s request for discharge.” Paragraph i states that a member discharged due to minority may receive a general or honorable discharge and must be afforded an opportunity to consult counsel prior to a general discharge.

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. 10 U.S.C. § 1552(b). The applicant received his BCD on December 1948. Thus, the application was untimely by more than 60 years.
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.”¹
4. A cursory review of the merits of this case indicates a reasonable possibility that the claim has some merit given the applicant’s very young age at the time of his enlistment and

¹ *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).

offenses, and there is some excuse for delay given his youth and lack of education at the time of his BCD. Therefore, although the application is more than 60 years late, the Board finds that it is in the interest of justice to excuse its untimeliness and consider it on its merits.

5. The record shows that the applicant received the BCD pursuant to the sentence of a court-martial for repeated periods of AWOL, and while this Board does not have the authority to overturn a conviction by court-martial, it may grant clemency on the sentence of a court-martial.² The BCD was executed because the applicant went AWOL for a third time in November 1948, and so he did not meet the terms of his probation period following the court-martial. Although the applicant was a minor, there is no evidence that the Coast Guard did not follow the laws and policies for minors in effect at the time. Based on the evidence of record, the Board cannot conclude that the Coast Guard committed an error in executing the BCD.

6. Under 10 U.S.C. § 1552(a), however, 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 has been committed on a case by case basis.³ Therefore, the Board must consider whether the applicant’s BCD 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 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 Board does not, however, construe this standard 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 today’s Coast Guard standards. Such a construction would be inconsistent with the very nature of “clemency,” which means “kindness, mercy, leniency.”⁴ 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 service member 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.

7. The applicant was just 16 years old when he enlisted on January 21, 1948, and was still 16 years old when he received his BCD on December 29, 1948. The Coast Guard did not address this fact in the advisory opinion. In light of the regulations in Article 1.B.13. of the current Military Separations Manual, the Board is persuaded that under current mores and policies, the applicant would have received a swift general administrative discharge had his age been discovered during a lengthy unauthorized absence today as the applicant’s age was discovered during his first unauthorized absence in 1948. Therefore, it appears to the Board that in light of

² 10 U.S.C. § 1552(f)(2).

³ Decision of the Deputy General Counsel, BCMR Docket No. 2001-043. According to *Sawyer v. United States*, 18 Ct. Cl. 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 BLACK’S LAW DICTIONARY (5th ed.)

today's standards and the applicant's age of 16, his "discharge was disproportionately severe vis-à-vis the conduct in response to which it was imposed" as required by General Counsel's 1976 memorandum.

8. Moreover, the Board has sometimes upgraded discharges by exercising its clemency authority, rather than by strictly applying the 1976 guidance.⁵ In the aftermath of World War II, this Board denied most applicants' requests to upgrade BCDs absent evidence of procedural errors or psychiatric illness.⁶ However, the Board has sometimes upgraded BCDs to general discharges under honorable conditions when applicants were very young, when they had committed only absence offenses or only one major offense, when they had performed extensive sea duty during war, and when they had explanations for committing their offenses.⁷ In addition, the Board has sometimes upgraded BCDs to general discharges under honorable conditions based on the fact that the veteran has suffered the burden of his BCD for many years and on the fact that the veteran was young when he committed the offense for which the BCD was awarded.⁸

⁵ See, e.g., cases listed under footnotes 7 and 8, below.

⁶ 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.

⁷ For 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).

⁸ 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 (World War II veteran with 2 masts for creating a disturbance and being AOL 2 days, 1 SCM for 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

9. The applicant in this case committed only absences offenses and he was just 16 years old when he enlisted, committed the offenses, and received the BCD. In addition, he has suffered under the burden of the BCD for a very long time. Therefore, although the record shows that the Coast Guard committed no legal error in executing the BCD and that the applicant—at age 16—was an administrative and disciplinary burden to the Coast Guard rather than an asset, the Board finds that it is in the interest of justice to grant clemency and upgrade the applicant’s discharge from a BCD to a general discharge under honorable conditions.

10. Accordingly, the Board will excuse the application’s untimeliness, waive the statute of limitations, and grant clemency by upgrading the applicant’s character of discharge from bad conduct to general under honorable conditions, as he requested. The Coast Guard should correct the applicant’s Notice of Separation in his military record to show that he received a general discharge under honorable conditions, enter a copy of this decision in his record to explain the upgrade, and send him a General Discharge Certificate (DD-257CG)

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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).

ORDER

The application for correction of the military record of former apprentice seaman [REDACTED], USCG, is granted as follows: The Coast Guard shall correct his military record, particularly his Notice of Separation, to show that he received a general discharge under honorable conditions; enter a copy of this decision in his record to explain the upgrade; and send him a General Discharge Certificate (DD-257 CG).

September 9, 2016

