DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 1999-123

DECISION OF THE DEPUTY GENERAL COUNSEL

✓ I approve the Majority Opinion of the Board.

___ I approve the Minority Opinion of the Board.

___ I concur in the relief recommended by the Majority of the Board.

DATE: Feb. 27, 2003

[redacted]
Deputy General Counsel
Delegate of the Secretary
Department of Transportation

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FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on June 2, 1999 when the applicant filed his application with the Board. The application was complete on August 23, 1999, the date the Board received the applicant's military record.

This final decision, dated July 6, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a former seaman recruit (SR; pay grade E-1), was convicted at a special court-martial in 1990, and was sentenced to a bad conduct discharge (BCD). He asked the Board to upgrade his bad conduct discharge to an honorable discharge.

This is the third application filed by the applicant requesting that his BCD be upgraded. In the first application, BCMR No. 129-93, the Board denied that application without prejudice, telling the applicant that he should reapply for clemency no less than three years from the date of that decision. He was further advised by the Board in BCMR No. 129-93 that he should submit proof that he completed the Alcoholic Anonymous program as well as evidence of his continued sobriety.

On August 24, 1994, approximately 18 days after the Board rendered the decision in BCMR No. 129-93, the applicant sent the Board a letter explaining that he had already been sober for more than three years and requested a review of that decision. His request for a re-review of the decision in Docket No. 129-93 was treated as a request for reconsideration. It was docketed as BCMR No. 75-95.

On November 30, 1995, the Board issued a recommended final decision, in BCMR No. 75-95, that the case be denied. This recommended decision was approved by the Deputy General Counsel on January 2, 1996. The Board determined that the applicant had not waited the three year period before asking for reconsideration. It further determined that the additional information submitted would not have changed the Board's original decision in BCMR No. 129-93.

EXCERPTS FROM RECORD AND SUBMISSIONS

The applicant enlisted in the Coast Guard on March 15, 1976. He was promoted regularly and eventually reached pay grade E-5. In 1978, the applicant received a non- judicial punishment for unauthorized absence and was given 12 days extra duty. Despite his disciplinary problems, his performance as a subsistence officer (SS2) was

described by his commanding officer in 1981 as "very good." In 1983, he was reduced to pay grade E-4 for failure to perform extra work and for unauthorized absence. In 1984, he received a Letter of Appreciation for his "performance, enthusiasm, and professionalism" for assisting in a complex Coast Guard training course. However, in this same year he was reduced to an E-3 for being drunk while on duty as galley watchstander.

The applicant was tried by special court-martial on April 20, 1989. He was found guilty of five instances of unauthorized absences and one instance of unauthorized use of cocaine. He was sentenced to a bad conduct discharge and reduced in pay grade to E-1. On April 3, 1990, he was discharged in accordance with the sentence. He was issued an RE-4 reenlistment code.

On July 24, 1992, the applicant petitioned the Discharge Review Board (DRB) to review his bad conduct discharge and upgrade it to an honorable discharge. After considering all the relevant evidence, the DRB concluded that the bad conduct discharge "was appropriate and equitable." In a 4 to 1 vote, the DRB decided not to recommend clemency for the applicant. The Commandant approved the recommended decision of the DRB and denied relief. Subsequently, the applicant filed his first application with the Board.

BCMR Docket No. 129-93 (first application)

The applicant requested that his bad conduct discharge be upgraded to an honorable discharge. He contended that he was suffering from bi-polar disorder during his years of military service, and that the court-martial decision was unjust because this mental disease was never taken into account. In support of his contention, the applicant submitted medical records of examinations of his mental capacity. One of the examinations conducted after the applicant was discharged from the Coast Guard, diagnosed him as suffering from bi-polar disorder. In addition, the applicant submitted a letter from a physician who had known him since 1985, and treated him for drug dependency while he was stationed in Florida. The physician stated that, prior to becoming his patient, the applicant had been diagnosed with having "acute adjustment disorder with depression," and that his behavioral problems in the military were the result of his mental illness.

The applicant's record also indicated that he has overcome his alcohol and drug addictions. A reference from the president of a drug treatment facility noted that the applicant "has been attending 12-step meetings at the [redacted] since its opening in the spring of 1990." An April 1992 letter from the executive director of another treatment center stated that the applicant "regularly attends 12-Step support group meetings . . . and has remained sober to this day."

Numerous other testimonials were submitted attesting to the general character of the applicant. A co-worker wrote that the applicant's commitment to helping others overcome their addictions "is an indication of his humanity and compassion." The applicant's pastor stated that he "is a faithful and active member of our church, and uses his knowledge and love of God to try to help others change their lives."

The first application was denied, without prejudice, by the Board on July 29, 1994. The Board told the applicant that he could reapply to the Board for clemency three years from the date of the final decision. Noting that it could not remove a court-martial conviction, the Board stated that it could only grant clemency with respect to the court-martial sentence. The Board made the following pertinent findings:

> 6. The applicant has demonstrated that he has made many positive changes in his life since his discharge. In a letter written to the Board on August 25, 1992, his physician stated that "since the occasion of his discharge . . . (the applicant) has not only been free of drug use, but . . . has a track record of successful employment at two drug rehabilitation centers and is taking classes . . . as a math major."
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> 7. The applicant has only been out of the military for four years, however, and it is not clear at what point during this time that he overcome his addictions. A letter of reference from the president of a drug treatment facility noted that the applicant "recently began a Men's A.A. meeting." We have no proof that he ever completed this program. Without more conclusive evidence, the Board is unable to determine how long he has been free of drugs and alcohol.
>
> 8. The battle to overcome alcohol and drug dependency is often a long process. While on the road to recovery, an addict is usually confronted with many temptations to revert back to his former lifestyle. Thus, it would be premature for the Board to grant clemency to the applicant at this time given the relatively short period of his sobriety.
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> 9. The application should be denied at this time without prejudice. The applicant should reapply for clemency no less than three years from the date of this decision. He should submit proof that he completed the Alcoholics Anonymous program referenced above, as well as evidence of his continued sobriety. The Board will then reevaluate his record to determine if the bad conduct discharge should be upgraded.

BCMR No. 75-95 (second application)

On August 24, 1994, approximately 18 days after the issuance of the final decision in BCMR 129-93, the applicant submitted a letter with additional materials stating that "[his] length of sobriety has extended beyond your required period of three years into the fifth year." The applicant's letter was accompanied by correspondence from a Congressman, who stated that the applicant felt "#7 [Finding 7. In BCMR 129-93] and on are incorrect and feels this info[rmation] should clarify and requests a review of your decision." The Chairman treated the applicant's August 1994 submission as a request for reconsideration, which was docketed as BCMR No. 75-95.

With respect to the completion of AA, the applicant wrote the following:

> In reference to #7 [Findings and Conclusion in BCMR No. 129-93] . . . refer to the letter from the President of [redacted] stating that I

recently began a Sunday night men's AA 12 step meeting. I was not in an AA program.

As for the time length of my sobriety, I have already shown in documentation the period of September 1989 to the present. All programs that I was a participant in, I have completed. I have also been employed at two drug rehabilitation centers. I am presently employed at one of these centers, Operation PAR . . . As I mentioned in the above paragraph, I started a program for men at the [redacted] not as a participant but as facilitator. As of September of this year [1994], I will have five years of Sobriety.

On November 30, 1995, the Board recommended that the application for reconsideration be denied. The Board's recommended decision became final on January 2, 1996 , when it was approved by the Deputy General Counsel. The following pertinent findings were made in that case:

3. The Board in BCMR No. 129-93 declared that the applicant should reapply for clemency "not less than three years" from the date of that decision. Instead, the applicant, through his [representative], reapplied for clemency 18 days after the date of that decision.

4. The Board in this case reaffirms the decision in the original proceeding. Rehabilitation from drug and alcohol additions and exemplary conduct after leaving the Coast Guard are not sufficient to merit clemency where the period of good conduct is relatively short. The judgment was particularly correct in a case like this where the applicant's last report was dated January 1, 1993, almost three years ago. The Board in the original proceeding was correct in inviting the applicant to reapply, but reapplication 18 days after the date of a final decision is too short a period.

5. The reconsideration application does not meet the § 52.67 requirements for reconsideration. The additional information would not change the decision in the original proceeding, and this information could have been submitted before a final decision was issued in that proceeding.

BCMR No. 1999-123 (current application)

The applicant again requested that his BCD be upgraded to honorable. He stated that he has reintegrated back into society and have become productive by helping other people rebuild their lives. He further stated as follows:

I am returning my application[.] . . . [M]y allegation of injustice is that I was given a BCD as opposed to a general under honorable, which I still wish to have corrected. I was never given an opportunity to appear before a board which would [have] included doctors, until discharge. Even then no consideration was given to my mental state and no doctor was present on the board, even though the evidence fully indicated I was suffering from a psychiatric condition per DSM III – R. At the time of my

court-martial, my doctor . . . would have had the chance to bring this evidence to my trial. It may have change[d] my discharge. Probably I was eligible for a medical discharge but was never afforded counsel on this issue.

The applicant submitted several medical reports that were considered by the Board in his first application, BCMR No. 129-93. Pertinent information from that application is discussed below.

The applicant submitted a copy of the 1985 medical report from [redacted] Hospital. It stated that the applicant was admitted for severe anxiety and depression. The report noted that the applicant had encountered various family problems. The doctor's assessment of the applicant at that time included "alcohol abuse, history of vertigo with nystagmus and normal neurologic exam, history of right sciatica . . . history of tension headaches. . . ." The report stated that the applicant was treated with Lithium for signs of tachycardia and withdrawal. Discharge medications at the time included Antabuse and Thiamine. His prognosis was fair. [A later medical report indicated that after the applicant's discharge from [redacted] Hospital he was transferred to the Naval Alcohol Rehabilitation Center, [redacted] This medical report also indicated that the applicant's alcohol problems existed prior to 1985 and that his drug use began in 1985.]

A psychiatrist who treated the applicant sometime in 1985/86, subsequent to his discharge from [redacted] Hospital, wrote the following:

> At the time [1985/86] of my initial work with [the applicant] I felt his prognosis was good for a full and complete rehabilitation on a program of individual investigative and supportive psychotherapy with adjunctive pharmacotherapy which I instituted on his behalf. However, subsequent transfer to Station [redacted] interrupted our work, only to be then followed by several enterprises of therapy beginning with a confinement at the [redacted] Memorial Psychiatric Hospital in June 1989 [subsequent to his court-martial conviction], followed by mental health services treatment at the [redacted] in July 1989, with ten months confinement in a half-way house . . . in September of 1989 on medical leave from the Coast Guard with no pay, followed then again by a [redacted] center confinement for treatment . . . in July 1990, as well as extended stay for further services at the [redacted] Center.[1]
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> It is my contention at this time that the significant series of medical/psychiatric events . . . establishes the validity of [the applicant's]

[1] The applicant's military record contains a message indicating that the applicant was not on medical leave, but had in fact begun another period of unauthorized absence. The message stated that after the applicant was sentenced at the special court-martial, he "again went AWOL and remained so until he was seen by a station [redacted] crew member and returned to station [redacted] on 26Jun89." The message further stated that "because of severe weight loss, admitted crack cocaine addiction, and poor physical condition, SNM was admitted to [redacted] Hospital. . . . He is currently in-patient with an expected duration of 4-5 days.

argument that his failure to perform properly as an E-5 in the U.S. Coast Guard was due primarily to the presence of severe mental illness and that his discharge should accordingly reflect that. . . .

A medical discharge summary from the [redacted] Center, dated January 23, 1990, reveals the applicant's diagnosis as "1. - Cocaine Dependence 2. – Alcohol Dependence 3. – Rheumatic Arthritis."

The psychiatric case summary from the [redacted] Center, dated February 2, 1990, stated that the applicant also suffered from "Bipolar Disorder, Mixed" and "Paranoid Personality Disorder," as well as "Cocaine Dependence" and "Alcohol Dependence."

Character References

The applicant submitted numerous other letters from colleagues and friends with respect to his community service. The president of a social service group wrote that the applicant is on the board of directors for this group, which helps individuals with chemical dependency. He stated that the applicant has worked in the 12 step recovery program for several years and continues to do so.

The applicant also submitted a statement, dated February 12, 1999, from his previous employer, the Executive Director of a social service group. This individual stated that the applicant was a very dependable worker. She stated that she was sad to see the applicant leave her organization to accept a new position on the board of directors for another agency. She stated that in the applicant's new position, he is assuming a significant leadership role.

The applicant submitted numerous statements like the following:

I'm writing this letter in reference to [the applicant]. I've known [the applicant] for around 2 years. He has been a very virtuous inspiration for me during my struggles. He has always demonstrated a positive disposition, and never allowing anything to remove him from his steadfast position. [The applicant] is one of the leaders that I would truly follow to the road for success.

* * *

[The applicant] has been a very close and personal [friend] of mine for the past five years. I personally feel that he is a man of exceptional character! He has always been an upstanding member of the community and devotes a majority of his time to helping others. His nature is very kind and compassionate and he has definitely been a role model in my life, to the members of C. A. [cocaine anonymous] and to the community. Please feel free to call at any time.

* * *

> I have known [the applicant] for approximately two years. He was and still is an inspiration to me and my recovery. [The applicant] not only had devoted numerous hours to his own recovery, but he has also helped countless others with their program of recovery. Words cannot express the gratitude I have for this man in helping me with my recovery. I would not hesitate to give [the applicant] a recommendation. I am quite sure whatever goal [the applicant] has set for himself, he will attain this and more. If you should have any further questions, please feel free to contact me at [place of employment].

Views of the Coast Guard

On March 30, 1998, the Board received the advisory opinion from the Chief Counsel of the Coast Guard. He recommended that the Board deny relief in this case.

The Chief Counsel stated that this case should be dismissed because BCMR No. 129-93 was reconsidered by the Board, in BCMR No. 75-95. He stated that that decision represented the final decision of the Board and the current application should be dismissed for lack of jurisdiction. The Chief Counsel stated that the applicant ignored the Board's decision to reapply for clemency no earlier than three years after the 1994 decision and instead filed a reconsideration request 18 days after the final decision in the first BCMR application. The Chief Counsel stated that regardless of his reasons, the applicant had the right to request reconsideration as he did and the Chairman had the right to docket the request as one for reconsideration. The Chief Counsel stated with that review on reconsideration, the applicant received all the due process to which he was entitled.

With respect to the merits of the current application, the Chief Counsel stated that the Board's consideration of the case is limited to a clemency review. He stated, as set out in BCMR No. 1993-129, the Board has no jurisdiction to review a court-martial decision for error.

The Chief Counsel stated that the power of clemency, like the power of pardon, is intended to address extraordinary circumstances that normal legislative and judicial processes cannot effectively address. See 59 AM JUR 2d. 10-11, and cases cited therein. The Chief Counsel stated that clemency should only be exercised to relieve an individual from a severe injustice due to extraordinary facts and circumstances peculiar to the particular case.

The Chief Counsel stated that the applicant's evidence of post-service conduct is insufficient to upgrade his BCD. He stated the following:

> In the absence of error or injustice, the Board should not upgrade any element of a discharge based solely on post-service conduct. See, Department of Transportation Memorandum from the General Counsel dated 07 July 1976 (BCMR and Clemency). . . . Of course, the decision to upgrade Applicant's discharge may be based on changes in community mores, civilian as well as military, since the time his discharge was rendered. Id. A discharge may therefore be upgraded if it is found to be unduly severe in light of contemporary standards. Id. In this case,

however, his discharge should not be viewed as severe by today's standards. The Coast Guard, as well as the other armed services, continues to court-martial members for the wrongful use of controlled substances, including cocaine. . . . The wrongful use of cocaine is punishable today by a maximum of a Dishonorable Discharge, forfeiture of all pay and allowances, and confinement for five years. . . . Indeed, the maximum punishment has not changed since Applicant was convicted, despite two major revisions to the Uniform Code of Military Justice (UCMJ) 1994 and 1998. Applicant's punishment for cocaine use, the result of a pre-trial agreement agreed to by Applicant, was far less than the maximum punishment he might have received, then and now. Nor have civilian community mores changed regarding the use of cocaine. If anything, the United States has intensified its efforts to combat illegal drug distribution, possession, and use.

In addition, his unauthorized absences were and are still considered serious matters within the armed forces. Those absences, many of them for extended periods of time, placed a heavy burden on his colleagues and further taxed the Coast Guard's limited resources in fulfilling its many missions. Applicant's testimonials, while numerous, lack the substantial evidence of Applicant's "reformed" life. Some witness[es] statements are stale; some are recycled from previous applications; others are cursory in content. Furthermore, Applicant provides no proof of completion of an Alcoholics Anonymous program that the Board in Docket No. 1993-129 saw as important evidence in its clemency consideration. In summary, the evidence presented by Applicant against the backdrop of the serious nature of his offenses and current military and civilian standards of behavior, is not sufficiently compelling to warrant clemency in this case.

Applicant's Response to the Views of the Coast Guard

On April 3, 2000, a copy of the Coast Guard views was mailed to the applicant with an invitation for him to respond. He did not submit a response.

FINDINGS AND CONCLUSIONS

The Board makes the following findings of fact and conclusions of law on the basis of the submissions of the applicant and the Coast Guard, the applicant's military record, and applicable law:

1. The Chairman has recommended disposition of the case without a hearing. 33 CFR 52.31 (1993). The Board concurs in that determination.

2. With regard to a court-martial conviction, the Board may only act to grant clemency. 10 U.S.C. § 1552(f)(2). Therefore, the Board's jurisdiction in reviewing the merits of this case is limited to clemency.

3. In BCMR No. 129-93, the applicant's case was denied without prejudice. The applicant was told he should reapply for clemency no less than three years from the

date of that decision. The Board would at such time reevaluate the applicant's record to determine if the bad conduct discharge should be upgraded. The applicant was advised to submit proof that he completed the Alcoholics Anonymous program, as well as evidence of his continued sobriety.

4. Notwithstanding the fact that an earlier request by the applicant for a review of the final decision in BCMR 129-93 was treated as a request for reconsideration, it could very well have been treated as a request for clarification. In that case, BCMR No. 75-95, the applicant pointed out that he had already been sober for more than three years and he thought the Board was unaware of this when it determined that he should reapply for clemency not earlier than three years from the date of the final decision in Docket No. 129-93, with evidence of continued sobriety. The true basis for the denial on reconsideration was the fact that the applicant did not wait the three years before requesting a further review of his case.

5. Accordingly, the Board will treat this current application as the re-review that was promised to the applicant when it reached the final decision in BCMR No. 129-93, on June 29, 1994.

6. This Board reaffirms the Board's decision in BCMR No. 129-93 with respect to the applicant's contention that at the time of his court-martial, he was suffering from a mental illness. As the Board stated in that case, it does not have jurisdiction to review a court-martial conviction for error; it can only review the court-martial in terms of granting clemency. Mental illness, if it existed at the time of the commission of the offenses or at the time of trial and not raised before the court-martial, is a factor that can be considered by the Board in deciding whether clemency should be granted to the applicant.

7. However, the evidence presented by the applicant does not show that he was suffering from a bipolar disorder at the time of the commission of the offenses. The bipolar disorder was not discovered until after his court-martial conviction. While the psychiatrist who treated the applicant in 1985/1986 stated that the applicant's failure to perform in the Coast Guard was due to severe mental illness, the Board finds that this psychiatrist was not the physician who diagnosed the bipolar disorder, nor is there evidence that he was treating the applicant around the time the applicant committed the offenses or around the time of his court-martial. Additionally, the applicant had alcohol and drug dependency problems dating back to 1985 or earlier. The psychiatrist has not addressed what part, if any, these conditions played in the applicant's commission of the offenses for which he was court-martialed. The evidence is insufficient for the Board to grant clemency on the ground that the applicant's actions in committing the offenses for which he was court-martialed were due to bi-polar disorder.

8. The Board notes that there is evidence that the applicant was diagnosed as having an "acute adjustment disorder with depression" several years prior to his court-martial. This diagnosis was made in 1985, but there is no evidence that this "acute adjustment disorder with depression" existed at the time the applicant committed the offenses or at the time of court-martial in April 1989.

9. The applicant was represented at the court-martial by military counsel, as are all accused facing a special court-martial. The Board has no way of knowing whether

the applicant's defense attorney presented evidence at the trial of the applicant's adjustment disorder, and if not why not. The Board cannot blindly assume that the matter of the applicant's adjustment disorder and depression were not considered by the defense counsel in the representation of the applicant or by the court when it entered its sentence, if such issues were raised by the evidence. Accordingly, the applicant has not shown that the 1985 diagnosis for adjustment disorder and depression were not already considered when the BCD was imposed.

10. The applicant complied with the Board's request in the earlier case and submitted additional evidence of his good post-service conduct and continued sobriety. (The Board expresses concern whether the applicant's sobriety continues, since he failed to respond to the advisory opinion.) However, as the 1976 General Counsel Memorandum declares post-service conduct alone is not a sufficient basis for upgrading a less than honorable discharge. Although from the evidence presented in this case, the applicant appears to have lived an exemplary life since his discharge from the Coast Guard, good post-service conduct does not mean that the applicant's BCD was in error or unjust.

11. The 1976 General Counsel Memorandum states that "[t]he Board is entirely free to take into account changes in community mores, civilian as well as military, since the time of discharge was rendered, and upgrade a discharge if it is judged to be unduly Severe in light of contemporary standards." The Chief Counsel of the Coast Guard stated that the maximum punishment for wrongful use of cocaine includes a Dishonorable Discharge, which is a harsher discharge than the BCD. The maximum punishment for wrongful use of cocaine has been the same, since before the applicant's discharge. There is no evidence in the record that the BCD awarded to the applicant was unduly severe in light of contemporary standards. The Board finds good post-service conduct alone insufficient evidence on which to upgrade the applicant's BCD. At the time the Board rendered its earlier decision in BCMR No. 129-93, it was not aware of the guidance provided in the 1976 General Counsel Memorandum with respect to upgrading less than honorable discharges.

12. The Board finds insufficient evidence exists on which to grant clemency with respect to the applicant's BCD. Accordingly, the applicant request for relief is denied.

ORDER

The application former [redacted] for the correction of his military record is denied.

[redacted]

*see dissenting opinion

[redacted]