

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-061

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION



This proceeding was conducted 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 February 24, 2006, upon the Board's receipt of the completed application and military records.

This final decision, dated November 2, 2006, is adopted 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 is a veteran of World War II who received a bad conduct discharge (BCD) on March 15, 1944, pursuant to the sentence of a summary court martial. He apologized for the trouble he caused the Coast Guard and asked the Board to upgrade his discharge to honorable.

The applicant stated that he enlisted in the Coast Guard Reserve at age 17 and was still 17 when he got into trouble. He stated that he was the oldest of six siblings when he enlisted. When he went home on leave for a week, his father had to go into the hospital for surgery and his mother needed him to stay home to help. He felt that he had to stay to help his family, but he was afraid to call his command. When he returned to his command, he was still young and scared and so did not fight the charges.

The applicant stated that, since his discharge, he has primarily been self-employed in the xxxxxxxxxx businesses. As a small business man, he has sponsored and supported a local boys' club, Little League teams, and charitable events. He has

long been a member of the xxxxxxxxxxxx and a local church. He and his wife of xx years have xx children and xxx grandchildren.

Regarding the delay of his application, the applicant wrote that in 1967, he heard that veterans could apply to have their discharges upgraded and that he did so but never received a response. In 2002, he asked the Department of Veterans Affairs about his discharge but again never got a response.

SUMMARY OF THE RECORD

On July 30, 1943, when he was 17 1/2 years old, the applicant enlisted for three years in the Coast Guard Reserve. His enlistment papers show that he had five younger siblings at home in [REDACTED]; had completed just one year of high school; and was working to support his family. His father earned \$32 per week.

On October 10, 1943, the applicant's command in New York reported that he had failed to return from an authorized liberty period and was therefore absent over leave (AOL).

On November 10, 1943, the applicant was declared a deserter because he had been AOL for more than 30 days. The Coast Guard informed the chief of police and mayor of [REDACTED], as well as the applicant's mother, by letter. On November 19, 1943, local police delivered the applicant to the brig in [REDACTED]. The police reported that upon apprehension, the applicant's attitude was "rough" and he tried to escape. The applicant was confined pending trial.

On December 1, 1943, the applicant was tried by summary court martial and found guilty of being AOL for 39 days. He was sentenced to confinement for 30 days and forfeiture of \$25 of pay per month for four months. The Convening Authority approved the sentence on December 8, 1943. On January 18, 1944, the applicant was released from the brig.

On January 31, 1944, the applicant was apprehended after he went AWOL for an evening wearing the apparel of other Coast Guard members. He had also conspired to steal an automobile. He was returned to the brig.

On March 10, 1944, the applicant was tried by summary court martial and found guilty of (a) having been absent without leave (AWOL) from 6:30 p.m. to 8:45 p.m. on January 31, 1944; (b) having unlawfully and wrongfully conspired to steal an automobile; and (c) having in his possession and without authority the "wearing apparel belonging to other persons in the C.G." The applicant was sentenced to be separated

with a BCD¹ and to forfeit \$20 of pay per month for eight months. The Convening Authority approved the sentence that same day.

On March 15, 1944, the applicant was released from the brig and separated with a BCD. Upon his discharge, the applicant's final average marks were 2.14 (out of 4.0) for proficiency in rating and 2.0 for conduct.

VIEWS OF THE COAST GUARD

On May 19, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended denying relief. He based this recommendation on a memorandum on the case from the Commander of the Coast Guard Personnel Command (CGPC), which the JAG adopted.

CGPC stated that the Board should deny relief because the application was untimely, because the applicant did not justify his delay, and because "there does not appear to be any injustice or inequity regarding his discharge." CGPC also stated that the applicant's post-discharge conduct has no bearing on the character of his military service or on his discharge. CGPC alleged that "the awarding of a bad conduct discharge is proportionate to the nature of his offenses and his record fully supports the awarded character of service."

RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 23, 2006, 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.

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 March 15, 1944. Thus, the application was untimely by more than 55 years.

¹ Under Article 4952(6) of the Coast Guard Personnel Instructions in 1944, 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."

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.”²

4. The applicant did not provide any compelling explanation for waiting more than 55 years to seek clemency. However, there is some excuse for delay given the applicant’s youth and lack of education at the time of his BCD.

5. A cursory review of the merits indicates that less than three months after he enlisted, the applicant failed to return to his unit from leave and was therefore determined first to be AOL and then, after being AOL for 30 days, to have deserted. When police found him 39 days later, they reported that he resisted arrest and attempted to escape. He was convicted by summary court martial of being AOL and sentenced to a month in the brig. He was released from the brig on January 18, 1944, but was returned to the brig on January 31, 1944, after he took the apparel of fellow Coast Guard members without authorization, conspired to steal an automobile, and went AWOL. On March 10, 1944, he was convicted by a summary court martial of being AWOL on January 31, 1944, of wrongfully conspiring to steal an automobile, and of possessing without authority the apparel of other members. He was sentenced to a BCD and forfeitures of pay totaling \$160. This Board does not have the authority to overturn a conviction by court martial, but it may grant clemency on the sentence of a court martial.³

6. A cursory review of the record indicates that it is unlikely that the applicant can prevail upon the merits. Ten weeks after he enlisted, the applicant deserted his unit, and he resisted arrest when the police found him almost six weeks later. Then less than two weeks after being released from the brig, he misappropriated the apparel of other Coast Guard members and conspired to steal an automobile. With two summary court martial convictions and final average marks of 2.14 for proficiency in rating and 2.0 for conduct, the applicant certainly did not meet the criteria for an honorable discharge.⁴ Nor do the applicant’s marks meet today’s requirements for an honorable discharge.⁵

² *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).

³ 10 U.S.C. § 1552(f)(2).

⁴ Under Article 4952(1) and (2) of the Personnel Instructions in 1944, members could receive an honorable discharge only 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

7. In seeking clemency, the applicant cited his long history of support for charitable organizations. With respect to upgrading discharges, the delegate of the Secretary 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 Coast Guard argued in the advisory opinion that “the awarding of a bad conduct discharge is proportionate to the nature of his offenses and his record fully supports the awarded character of service.” Today, the maximum punishment a member may receive under the Uniform Code of Military Justice for conspiracy to steal a non-military automobile is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.⁶ Therefore, the Board is not persuaded that the applicant’s BCD was disproportionately severe in light of today’s standards.

8. The Board does not, however, construe the standard in the delegate’s 1976 letter 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.”⁷ 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. The Board has sometimes upgraded discharges by exercising its clemency authority, rather than by strictly applying the 1976 guidance.⁸

9. In the aftermath of World War II, this Board denied most applicants’ requests to upgrade BCDs absent evidence of procedural errors or psychiatric illness.⁹ However, the Board has sometimes upgraded BCDs to general discharges under honorable conditions when applicants were young, had committed only one major offense, had performed extensive sea duty during war, and had explanations for

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 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.

⁵ Article 12.B.2.f.1.c. of the current Personnel Manual states that, to receive an honorable discharge prior to 1983, a “member must have made a minimum final average of 2.7 in proficiency and 3.0 in conduct.”

⁶ MANUAL FOR COURTS-MARTIAL UNITED STATES, 1995 ed., Part IV-70.

⁷ BLACK’S LAW DICTIONARY (5th ed.)

⁸ See, e.g., cases listed under footnote 11, below.

⁹ 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.

committing their offenses.¹⁰ 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.¹¹

10. The applicant in this case was 17 years old when he enlisted and stayed AOL and 18 when he committed the offenses for which he received the BCD. He has

¹⁰ 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).

¹¹ 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 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).

suffered under the burden of the BCD for a very long time. In addition, he may have received less due process in 1944 than a member in similar circumstances would today. However, the applicant did not prove that his family's situation required him to be AOL, and he provided no reasonable explanation for taking the apparel of others and conspiring to steal an automobile on January 31, 1944. From his enlistment on June 30, 1943, until his discharge on March 15, 1944, he spent more time in the brig and being absent without leave than he did actually serving his country. The record shows that the applicant was a significant administrative and disciplinary burden to the Coast Guard rather than an asset. In light of these considerations, the Board finds that it is unlikely that the applicant can prevail upon the merits as there is no evidence of error or injustice¹² in the record, and the Board is not persuaded that clemency is due in this case.

11. Accordingly, the Board should not waive the statute of limitations in this case. The applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

¹² According to *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577, and *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."

ORDER

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

