

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-032

**XXXXXXXXXXXXX
XXXXXXXXXXXXX**

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 on November 24, 2006, upon receipt of the applicant's completed application and military records.

This final decision, dated July 31, 2007, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST FOR RELIEF

The applicant asked the Board to upgrade his under honorable conditions discharge (commonly referred to as a general discharge) to an honorable discharge. He enlisted in the Coast Guard on October 22, 1942, and was discharged on October 16, 1945.

The applicant alleged that his discharge should be changed "due to the fact that the court-martial should not have taken place" and he "should not have AWOL [absent without leave] time." The applicant stated that he was not absent from the ship but was in his bunk unable to move due to injuries incurred in action with the enemy. In this regard, the applicant stated the following:

On the morning of January 30, 1945, I was sleeping on the main deck near the bow. My ship, the [REDACTED] was hit by enemy action and the ship was hit with so much force that I was thrown about fifteen feet and hit the line spool. Not only did I suffer an injury to my upper body, I also suffered severe headaches for several years. I was discharged from the military. My military records concerning a court-martial that I was tried for on the date of February 15, 1945, states that I was AWOL for twenty-three hours and thirty minutes on February 7, 1945. I personally remember not being able to get out of my bunk at general quarters and for weeks, I felt disoriented. As of today, I still have problems, with chest pains due to the enemy attack that occurred on January 30, 1945. I never received the Purple Heart for being injured during this particular wartime. However, I was convicted of being AWOL for those twenty-three hours and thirty minutes. Please note that the [REDACTED] was at sea during this time. I believed not only did I suffer upper body injury, . . . I also suffered a concussion to the head area causing headaches and disorientation . . . I humbly submit that I was wrongly convicted of this crime because I was not in the right frame of mind to defend myself at the time of the trial.

The applicant stated that he did not discover the alleged error until September 23, 2005. He stated that he believes that he was not AWOL “due to the fact that the ship was hit by enemy action and I was not able to do the things that I needed to do at the [time].” He stated that he was on the ship, but he was unable to let anyone know where he was.

SUMMARY OF RECORD AND SUBMISSIONS

On October 22, 1942, the applicant enlisted in the Coast Guard.

On December 16, 1943, the applicant was convicted at deck court¹ of a two-hour AWOL.

On October 13, 1944, the applicant was convicted at deck court of being absent from camp without permission and for violating curfew regulations.

On February 15, 1945, the applicant was convicted at deck court of a twenty-three hour and thirty minute AWOL.

On March 30, 1945, the applicant was punished at captain’s mast for disobeying the lawful order of a superior officer.

The applicant’s military record also contains the following examples of meritorious conduct.

- On June 5, 1944, the applicant was authorized to wear the Asiatic-Pacific Area Ribbon.
- From June 16-26, 1944, the applicant participated in the initial invasion of the Island of Saipan, in the Marianas and the subsequent occupation thereof.
- From July 24 – 28, 1944, the applicant participated in the initial invasion of the Island of Tinian, in the Marianas and the subsequent occupation thereof.
- On September 1, 1944, the applicant was authorized to wear the Amphibious Force Insignia, which terminated upon his detachment from the Amphibious Forces.
- From October 20-23, 1944 the applicant participated in the initial invasion and liberation of the Island of Beyte, Philippine Islands.
- On November 18, 1944, the applicant participated in the landing of reinforcement troops, Leyte, Philippine Islands.
- From January 9-10, 1945, the applicant participated in the initial assault on Luzon, Philippine Islands at Lingayen Gulf.

¹ Deck Courts were courts-martial established to try minor offenses. See Articles for the Government of the United States Navy, 1930. They are similar to what is known today as summary courts-martial.

- On January 29, 1945, the applicant participated in the assault on Luzon, Philippine Islands at San Antonio, Zambales Province.
- On March 15, 1945, the applicant was authorized to wear one bronze star on the Asiatic-Pacific Area Campaign Ribbon for participation in the Marianas operation.
- On April 11, 1945, the applicant was authorized to wear the Philippine Liberation Campaign Ribbon with two bronze stars having participated in operations in Philippine Area, including a torpedo strike by the enemy against the applicant's vessel in the South China Sea off Luzon, Philippine Islands on January 30, 1945.

An entry in the applicant's Coast Guard medical records states that on January 30, 1945, he received an abrasion to the right wrist and forearm and a contusion to the right chest as a result of enemy action, for which he was treated in sick bay by a medical officer.

The applicant's final performance mark averages while in the Coast Guard Reserve were 2.5 in proficiency, 3.2 in seamanship, 3.4 in mechanical ability, 2.2 in ability as leader of men, and 3.5 in conduct.

On September 16, 1947, the Discharge Review Board (DRB) met to consider the applicant's request for an upgrade of his discharge under honorable conditions. The DRB noted an average proficiency mark of 2.50 and an average conduct mark of 3.15.² The DRB also noted the applicant's accomplishments and awards, as well as his disciplinary record. The DRB determined that the applicant's final average marks were below the minimum required for an honorable discharge at the time of his discharge. It also determined that the applicant's final average marks in proficiency and conduct were below those required for an honorable discharge at the time it rendered its decision. At that time, according to the DRB, to be eligible for an honorable discharge, the applicant needed to have a minimum 2.75 in proficiency and a 3.25 in conduct. The DRB reached the following conclusion:

[T]he petitioner's first year of service was good and that he was attached to floating units during almost two years of his wartime service. The Board also notes, however, the numerous offenses of which [the applicant] was convicted, and it considers that the punishment awarded and the marks assigned were sufficiently justified.

[The DRB] concludes that the Discharge Under Honorable Conditions for Convenience of the Government . . . was just, proper, and equitable under applicable standards of Naval law and discipline.

VIEWS OF THE COAST GUARD

On April 12, 2007, the Board received the views of the Coast Guard from the Judge Advocate General (JAG) recommending that no relief be granted to the applicant.

² There is a slight discrepancy between the DRB's and the Board's calculation of the applicant's average proficiency and conduct marks. However, the Board's and the Coast Guard's calculations are in agreement.

The JAG argued that the applicant has failed to show by a preponderance of the evidence why it is in the interest of justice to excuse his fifty year delay in filing an application with the Board. Despite the applicant's contention that he did not discover the alleged error until 2005, the JAG argued that the applicant should have been aware of it at the time of his discharge in 1945 and most certainly should have been aware of it in 1947 when he filed an application for an upgrade of his discharge with the DRB. The JAG asserted that based upon a cursory review of the merits it is not likely that the applicant will prevail on his claim for an upgrade of his discharge. See *Allen v. Card*, 799 F. Supp. 158, 166 (D.D.C. 1992) (In determining whether it is in the interest of justice to waive the statute of limitations, the Board should "consider the reason for the delay and the plaintiff's potential for success on the merits, based on a cursory review.") In this regard the JAG argued that a review of the record reveals that the applicant was properly separated from the Coast Guard.

The JAG stated that should the Board excuse the applicant's untimely filing of his application and conduct a full review of the merits, the Board should still deny relief. In this regard, the JAG stated that absent strong evidence to the contrary, it is presumed that Coast Guard officials carried out their duties lawfully, correctly, and in good faith. *Arens v. United States*, 969 F. 2d 1034, 1037 (D.C. Cir. 1990). According to the JAG, the record shows that the applicant was properly discharged from the Coast Guard and the applicant did not prove otherwise.

The JAG stated that he adopted the analysis provided by the Commander, Coast Guard Personnel Command (CGPC), which was attached as Enclosure (1) to the advisory opinion. In recommending denial, CGPC offered the following:

I find that the applicant's discharge and character of service awarded were in accordance with Coast Guard policy. The applicant alleges in his statement to the BCMR that his February 1945 Deck Court sentence was unjust as he was "disoriented" from the injuries he sustained during the torpedo attack on January 30, 1945. The applicant has not provided any documentation, other than his own assertion, to support that he suffered from "a concussion to the head area causing headaches and disorientation" which led to his being AWOL on February 7, 1945. The applicant's medical record reveals that on January 30, 1944, he suffered from abrasions to his right wrist and forearm and a contusion to his chest . . . Subsequent to these injuries, there is no reference to follow on care or evidence of further injury or trauma as the applicant alleges.

The applicant's record fully supports the character of service he was awarded. The applicant's case was reviewed by the DRB and found to be "just, proper and equitable" . . . The Applicant's record indicates that he received punishment at three deck Courts and one Captain's Mast . . . In addition to the applicant's repeated misconduct, his enlisted evaluations did not support the award of an honorable discharge. Applying today's standards, his evaluations do not meet the minimum standards for an honorable discharge. The applicant's discharge was proper and the character of service is not disproportionate to his conduct and performance during his enlistment.

The applicant's average proficiency mark was 2.57 and his average conduct mark was 3.50. According to CGPC, Article 12.B.2.f. of the current Personnel Manual specifies a minimum evaluation average mark of 2.7 in proficiency and 3.0 in conduct prior to June 30, 1983 to qualify for an honorable discharge.

APPLICANT'S REPLY TO THE COAST GUARD VIEWS

On April 17, 2007, the Board sent the applicant a copy of the views of the Coast Guard and granted him 30 days to submit a response. The Board did not receive a reply from the applicant.

FINDINGS AND CONCLUSIONS

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

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10 of the United States Code.

2. To be timely, an application for correction must be filed within three years of the date the alleged error or injustice was, or should have been, discovered. *See* 10 U.S.C. § 1552; 33 CFR § 52.22. This application was submitted to the Board over fifty years after the applicant's discharge and the decision by the DRB denying his request for an upgrade of his under honorable conditions discharge. The applicant stated that he did not discover the alleged error until September 2005. However, he was aware of the alleged error as early as 1947 because he applied to the DRB for an upgrade of his discharge at that time. Therefore, his application was not timely.

3. Although the application is untimely, pursuant to 10 U.S.C. § 1552, the Board may waive the three-year statute of limitations if it is in the interest of justice to do so. To determine whether it is in the interest of justice to waive the statute of limitations, the Board should consider the reason for the applicant's delay and conduct a cursory review of the merits of the case. *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992). Although the applicant did not explain why he did not apply sooner for the requested correction, a cursory review of the merits of this case indicates that his WWII service was particularly meritorious and probably supports an honorable discharge. Therefore, although the application is more than fifty years late, the Board finds that it is in the interest of justice to excuse its untimeliness and consider it on the merits.

4. The Board finds that the applicant's discharge under honorable conditions is an injustice and should be upgraded to an honorable discharge. Despite the applicant's one overall below average performance mark in proficiency and his minor disciplinary infractions, the Board finds that his excellent, meritorious service during WWII far outweighs these two negative aspects of his service. In this regard, the applicant's military record shows the following meritorious service, conduct, and accomplishments:

- On June 5, 1944, the applicant was authorized to wear the Asiatic-Pacific Area Ribbon.
- From June 16-26, 1944, the applicant participated in the initial invasion of the Island of Saipan, in the Marianas and the subsequent occupation thereof.
- From July 24 – 28, 1944, the applicant participated in the initial invasion of the Island of

Tinian, in the Marianas and the subsequent occupation thereof.

- On September 1, 1944, the applicant was authorized to wear the Amphibious Force Insignia, which terminated upon his detachment from the Amphibious Forces.
- From October 20-23, 1944 the applicant participated in the initial invasion and liberation of the Island of Beyte, Philippine Islands.
- On November 18, 1944, the applicant participated in the landing of reinforcement troops, Leyte, Philippine Islands.
- From January 9-10, 1945, the applicant participated in the initial assault on Luzon, Philippine Islands at Lingayen Gulf.
- On January 29, 1945, the applicant participated in the assault on Luzon, Philippine Islands at San Antonio, Zambales Province.
- On March 15, 1945, the applicant was authorized to wear one bronze star on the Asiatic-Pacific Area Campaign Ribbon for participation in the Marianas operation.
- On April 11, 1945, the applicant was authorized to wear the Philippine Liberation Campaign Ribbon with two bronze stars having participated in operations in Philippine Area, including a torpedo strike by the enemy against the applicant's vessel in the South China Sea off Luzon, Philippine Islands on January 30, 1945.

5. Moreover, Article 12.B.2. of the Personnel Manual states that “[t]he Service will not necessarily deny a member an honorable discharge solely for a specific number of court-martial convictions or actions under Article 15 [captain's mast], UCMJ during his or her current enlistment or obligated service.” The previous Secretary's Delegate noted in Docket No.322-91 that “upgrades from bad conduct discharges have been customarily granted by the Board where absences were involved. See BCMR 89-78, BCMR 154-85; BCMR 8-80; BCMR 24-81; and BCMR 240-85.” In BCMR 8-87, the Board upgraded an applicant's bad conduct discharge to a general discharge despite the fact that he had been tried and convicted of disobeying a lawful order. More recently in BCMR 2006-139 and BCMR 2005-105, the Coast Guard recommended upgrading the discharges for those applicants despite their convictions for short absence offenses. In light of the above, the Board finds that the applicant's three deck court convictions for short AWOLs and his one NJP for disobeying an order do not so blemish or diminish the quality of his service as to bar him from an honorable discharge.

6. More problematic is the fact, as noted by the Coast Guard, that the applicant does not have the necessary overall average performance mark in proficiency for an honorable discharge. However, Article 12.B.2.f. of the Personnel Manual realized that this situation might occur and made exceptions to this rule. Subsection 12.B.2.f.1.f.(1) allows an honorable discharge in place of a general discharge under honorable conditions if the member earned certain awards, including the bronze star medal. The applicant apparently meets this requirement having earned the Philippine Liberation Campaign Ribbon with two Bronze Stars and the Asiatic-Pacific Area Campaign Ribbon with one bronze star.

7. In addition, subsection 12.B.2.f.1.f.(5) states that if warranted, the Commandant may direct the issuance of an honorable discharge in lieu of a general discharge. The Board having reviewed the applicant's record finds that his excellent, meritorious service during WWII permits an upgrade his discharge to an honorable one under this provision of the Personnel Manual.

8. The applicant stated that he never received the Purple Heart for injuries he sustained during the January 30, 1945 enemy attack of his ship. However, he did not ask to have his record corrected to show that he earned this Award. It appears to the Board that under Article 2.A.6. of the Medals and Awards Manual,³ the applicant is eligible for the Purple Heart having been wounded as a result of enemy action for which he received medical treatment. A note in the applicant's medical records states that on January 30, 1945, he received an abrasion to the right wrist and forearm and a contusion to the right chest as a result of enemy action, for which he was treated in sick bay by a medical officer. The Board finds probable merit with respect to the Purple Heart issue and will direct the Coast Guard to review the applicant's record to determine if he is eligible for the Purple Heart, and if he meets the requirements for such an award the Coast Guard should make the necessary corrections to his record.

9. The Board is not in possession of the complete set of regulations that were in effect when the applicant was discharged in 1945 and therefore has applied the current regulations. Precedent exists for the application of current standards in considering whether to upgrade an earlier discharge. The previous Secretary's Delegate stated "the Board should upgrade a discharge if it is convinced that in light of today's standards the discharge was disproportionately severe vis-à-vis the conduct in response to which it was imposed." See General Counsel's Memorandum of July 2, 1976.

9. To summarize, the Board finds that as a matter of equity and justice the applicant's discharge should be upgraded to honorable. In this regard, the Board notes that he served for two years and three months *and was not separated due to any misconduct*; that he actively participated in a number of invasions; that he earned a number of awards and ribbons for his service; and that he suffered an injury during an enemy attack. Further, the Board is persuaded that under today's standards, based on the entirety of his record, the applicant would have been awarded an honorable discharge.

10. Accordingly, the applicant should be granted the relief directed below.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

³ This provision states in pertinent part that the Purple Heart is awarded by the Commandant to any member of the Coast Guard or any member of the Armed Force under the jurisdiction of the Department or to any civilian national of the United States, who while serving under competent authority in any capacity with the Coast Guard has been or may hereafter be wounded or killed in any action against an enemy of the United States.

ORDER

The application of former XXXXXXXXXXXX, USCGR, for correction of his military record is granted. The Coast Guard shall correct his record to show that he received an honorable discharge. In addition, the Coast Guard shall review the applicant's record to determine if he is entitled to the Purple Heart. If the Coast Guard determines he meets the requirements for a Purple Heart, the Coast Guard shall award him the Purple Heart and correct his record to show that he earned the Purple Heart during his service in the Coast Guard Reserve.

