DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-129

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FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the applicant's completed application on April 22, 2009, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 13, 2010, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, who received a discharge under other than honorable (OTH) conditions on January 29, 1992, asked the Board to correct his record by upgrading his discharge to honorable.

PROCEDURAL HISTORY

On April 9, 1987, the applicant was convicted by general court-martial (GCM) of various offenses he had committed in November 1986. After his sentence was set aside on appeal, the applicant requested and received an OTH discharge on January 29, 1992, in lieu of a rehearing on the sentence. On December 19, 2001, the applicant timely applied to the Coast Guard's Discharge Review Board (DRB) seeking an upgraded discharge and reenlistment code. His application was denied. On December 12, 2006, the applicant timely requested reconsideration from the DRB. His request was denied on February 26, 2007.

SUMMARY OF THE RECORD

On March 3, 1975, the applicant enlisted on active duty in the Coast Guard. He had previously served honorably on active duty in the Marine Corps for four years from November 30, 1970, to November 29, 1974. The applicant was honorably discharge and reenlisted in the Coast Guard in 1981, and his Coast Guard record contains no evidence of disciplinary problems until 1986.

On November 3, 1986, the applicant, while on watch as the Officer of the Day, broke into his unit's sickbay and the freezer where the urine specimens from a recent random urinalysis were stored. He wore gloves and brought locks to replace the ones he was cutting off. He stole the urinalysis records and specimens to try to prevent the detection of his drug use. However, after an investigation began, the applicant confessed to having stolen the specimens. As a result of his confession, he was charged with using marijuana on October 18, 1986, contrary to Article 112a of the Uniform Code of Military Justice (UCMJ); housebreaking, contrary to Article 130, UCMJ;[1] destroying military property, contrary to Article 108, UCMJ; and stealing urinalysis documents and urine specimens from a freezer, contrary to Article 121, UCMJ.

On January 2, 1987, the applicant's enlistment ended. He was retained beyond the expiration of his enlistment because of a pending court-martial. The applicant signed a consent to his retention.

On February 6, 1987, the applicant was arrested by local police and charged with burglary of a nonresidential building. Upon his release by civil authorities, the Coast Guard put him in pretrial confinement.

On February 17, 1987, the Commandant ordered that the applicant's pay be stopped. The Commandant advised the applicant's command that under sections 2-H-5.b. and 2-H-5.i. of the Pay Manual, COMDTINST M7220.29, the applicant's "pay and allowances continue past the normal date of separation since [he] has been retained in a full duty status. However, upon confinement, pay and allowances terminate since [he] is no longer in a full duty status." The command responded the next day, asking for reconsideration of the order because of the severe financial hardship it would cause. The Command responded as follows:

> 1. [Your inquiry] has been reviewed by both this office and that of the Chief Counsel. [The applicant's] enlistment expired 3 JAN 1987. Since [he] is retained awaiting trial by court-martial, his enlistment contract cannot be extended not can he reenlist. [He] was initially retained past the expiration of enlistment in a fully duty status. As such, entitlement to P&A [pay and allowances] continued. Upon confinement, [he] is no longer in a full duty status and entitlement to P&A is precluded.
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> 2. It is certainly not our intent to cause a financial hardship or deprive any [member] of P&A entitlements. However, P&A entitlements are provided for by law and statute and are not subject to administrative discretion. There are no provisions of law which authorize payment of P&A for a [member] beyond expiration of enlistment and in confinement.

On April 9, 1987, the applicant pled guilty to the four charges at a GCM. During the sentencing phase before a board of officers, the trial counsel elicited testimony from the applicant's commanding officer, who stated that the applicant had no rehabilitative potential because he had abused the trust placed in him as the Officer of the Day. The trial counsel also elicited testimony, over the objections of the defense counsel, LCDR D, to the fact that the applicant was addicted to drugs and to the fact that the applicant's pay had been stopped when he was place in pretrial confinement because of the burglary on February 6, 1987. The applicant was sentenced

[1] Under the Article 130 of the UCMJ, "housebreaking" is defined as "unlawfully enter[ing] the building or structure of another with intent to commit a criminal offense therein." 10 U.S.C. § 930.

to a bad conduct discharge, confinement for 2.5 years, and reduction from pay grade E-6 to E-1. He began serving his sentence the same day.[2]

On April 20, 1987, the applicant pled guilty in a [redacted] state court to the burglary he had committed on February 6, 1987. Pursuant to a plea agreement, the adjudication was delayed and he was fined and placed on probation.

On September 4, 1987, the convening authority approved the sentence of the GCM.

On May 30, 1988, the applicant was paroled from confinement in the Navy brig in Corpus Christi for good behavior.

On May 3, 1989, the [redacted] state court convicted the applicant of the burglary he had committed on February 6, 1987, because he had violated his probation. The order states that the court adjudged him guilty and terminated his probation without further punishment.

On August 7, 1989, he was awarded a "full term release" from his military parole and placed in involuntary appellate leave status.

The Applicant's Appeal

On behalf of the applicant, LCDR B, his appellate counsel, had filed an appeal with the Coast Guard Court of Military Review (CMR) based on five allegations of error. On September 30, 1989, the CMR affirmed the GCM's finding of guilty but set aside the sentence based on two of the alleged errors.[3] First, the CMR found that it was error for the trial judge to allow the applicant's CO to testify about his potential for rehabilitation. The CMR noted that under *United States v. Gunter*, 29 M.J. 140 (CMA, 1989), and *United States v. Ohrt*, 28 M.J. 301 (CMA 1989), "notwithstanding the apparent authority of RCM 1001(b)(5), the government may not call an accused's commanding officer at the sentencing stage of trial to testify that an accused lacks rehabilitative potential, unless it is in rebuttal to matters presented by the defense. Furthermore, such opinion testimony must always have a proper foundation based on accused's character and potential in order to be admissible."[4]

Second, the CMR found that the trial judge had improperly allowed the trial counsel, over the objection of the defense counsel, LCDR D, to ask the applicant whether he had been addicted to speed when he was ordered into pre-trial confinement. The CMR noted that the judge later instructed the court members to disregard that testimony, which might have been adequate to expunge any prejudicial effect of the testimony had other uncharged misconduct not been erroneously elicited as well. The CMR found that after the applicant's wife mentioned the hardship caused but the stoppage of the applicant's pay, the trial judge should not have allowed to trial counsel to elicit testimony about the applicant's arrest for burglary on February 6, 1987, when, as LCDR D had argued, the pay stoppage could have been explained simply by noting the provisions of the Pay Manual that call "for termination of pay when confinement is coupled with expi-

[2] *United States v. Xxxxx*, 25 M.J. 623-24 (CGCMR, 1987).
[3] *United States v. Xxxxx*, 29 M.J. 667 (CGCMR, 1989).
[4] *Id.* at 668.

ration of enlistment."[5] The CMR found that "[t]he clear import of the Deputy Group Commander's testimony was that appellant had committed misconduct separate and apart from the charged offenses which was serious enough to warrant confinement. Moreover, this uncharged misconduct may have led the court members to believe that the severe action of termination Coast Guard pay was related in some way to the appellant's acts."[6] The CMR found that the unfair prejudicial effect of this testimony far exceeded any probative value and that "the cumulative effect of these errors together with the improper opinion testimony of the Commanding Officer compel a sentence rehearing rather than a sentence reassessment by this Court."[7] Therefore, the CMR returned the case for a sentence rehearing and ordered the Coast Guard to restore to the applicant "[a]ll rights, privileges and property of which the accused ahs been deprived by virtue of the sentence we have set aside … pending further action in this case." In a footnote to the decision, the CMR wrote the following:

> As a separate matter, we are concerned by possible issues inherent in the accused's "no-pay" status which have not been raised before this Court. For example, does confinement without pay before conviction of any offense amount to unlawful punishment before trial, in violation of Article 13, Uniform Code of Military Justice, 10 U.S.C. § 813? If deemed punishment, may it possibly be characterized as "cruel and unusual" punishment under the circumstances of this case, considering the disintegrating impact it has had on the accused's family, in contravention of Article 55, Uniform Code of Military Justice, 10 U.S.C. § 855? Moreover, does involuntary retention on active duty without pay, somehow divest a court of personal jurisdiction over an accused? These matters, not having been raised by counsel, while of concern, need not be addressed in arriving at an appropriate result since our action returning the record for a rehearing on the sentence affords full opportunity for development of these matters. The lawfulness of pretrial confinement without pay may be litigated at the trial level if deemed appropriate by appellant as bearing on the sentence. Moreover, if the court lacked jurisdiction based on these facts, that, too, can be litigated at the sentence rehearing since jurisdictional issues can always be raised at any stage of the proceedings. Finally, aside from Articles 13 and 55, Uniform Code of Military Justice, the basic question whether it was a legally correct decision to terminate this accused's pay, upon the imposition of pretrial restraint at a time when the accused may have been on a lawfully extended enlistment, can also be addressed at any rehearing. In so doing, the difference between the facts of this case and those in which an accused's enlistment expires while serving adjudged confinement can be fully considered.

On January 31, 1990, the CMR reaffirmed its decision after the Government requested reconsideration and again a rehearing on the sentence.

On August 22, 1990, the applicant was arrested in [redacted]L, for burglary, grand theft, and check fraud. On November 1, 1990, the applicant pled guilty to the charges and was placed on probation for 2.5 years, the terms of which required him to successfully complete substance abuse rehabilitation treatment.

On March 27, 1991, the U.S. Court of Military Appeals affirmed the CMR's decisions and order for a rehearing on the sentence. The Coast Guard scheduled a rehearing on the sentence.

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[5] *Id.* at 670.
[6] *Id.* at 669.
[7] *Id.* at 670.

Applicant's Request for an OTH Discharge

On November 8, 1991, after consulting counsel, the applicant submitted a request for an OTH discharge "for the good of the Service in lieu of a court-martial sentence rehearing under circumstances which could lead to a bad conduct discharge." The applicant acknowledged having consulted counsel, who "fully advised [him] of the implications of such a request," and being "completely satisfied with the counsel [he had] received." He also acknowledged that an OTH discharge would deprive him of virtually all veterans' benefits based on his final enlistment and that he could "expect to encounter substantial prejudice in civilian life." In addition, the request states that it was submitted "voluntarily free from any duress or promises of any kind." The applicant was informed of his right to submit a separate statement and opted not to do so.

On December 13, 1991, the District Commander forwarded the applicant's request to the Commandant and strongly recommended approval of the request as follows:

> 2. [The applicant's] problems go back more than five years. The crime that begins [his] sad story took place on 19 October 1986. That night, [he] argued with his wife. He left home and went to the [redacted] There he saw his brother-in-law. As the bar was closing, the two men smoked some marijuana. Four days later, [the applicant] provided a urine sample for the Coast Guard's drug testing program. He had every expectation that the results of his urinalysis would reveal the unlawful use of marijuana.
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> [The applicant] took action to avoid the Coast Guard's detection of his crime by discrediting the urinalysis program. During the early morning hours of 3 November 1986, he was on duty as the watch captain at Coast Guard Air Station [redacted]. Watch captain is a position of trust and responsibility within the engineering section of an air station. In this position, [he] was in charge of the station's security and all maintenance performed by the duty station. At about 0200 on 3 November 1986, [the applicant] used his duty keys to enter the air station's sickbay. Using flight gloves and a set of bolt cutters from the surface engineering department, [he] cut the locks off a freezer in sickbay. He removed a package of urine samples, knowing one of the samples was his. [He] then replaced the old locks with new ones he had purchased earlier at a local hardware store. He opened sickbays' filing cabinet and removed the urinalysis logs, one of which contained his records.
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> [The applicant] removed this evidence from sickbay and took it to the avionics supply shop. There he opened several urine bottles, placing both them and the logs in a cardboard box. He hoped no one would find them. [He] returned the bolt cutters to surface engineering. On his way home the next day, [he] threw the locks he had cut off sickbay's freezer out the window of his truck somewhere along [redacted]
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> The next day, on 4 November 1986, [a first class avionics technician] found the urine samples and logs. Coast Guard investigations was called into the case on 5 November 1986 and, on 7 November 1986, the accused confessed his crimes to [an investigator].
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> 3. Charges were preferred against [the applicant] and his case was referred to a General Court-Martial. See the charge sheet in enclosure (1). While [he] was awaiting trial, he was arrested by civilian authorities in Corpus Christi for breaking into a school building. The conviction that resulted from this offense is included as enclosure (2). [The applicant] was returned to the Coast Guard and placed in pretrial confinement. At his Coast Guard trial, [he] was found guilty and sentenced to a bad conduct discharge, two and one-half years in confinement, and reduction to the lowest enlisted pay grade. See the attached promulgating order, enclosure (3). [He] served about a year in confinement and, on 30 May 1988, was released on parole.

4. After several hearings before the Coast Guard Court of Military Review and the Court of Military Appeals, [the applicant's] convictions were affirmed but his sentence was disapproved. See the attached appellate court opinions, enclosures (4) through (6). His case was remanded to me for a rehearing on the sentence. I ordered the rehearing and it was originally scheduled for 10 December 1991. When [the applicant] submitted this request for discharge, the military judge continued the rehearing until 31 March 1992.

5. After his release from confinement, but while his court-martial convictions were still being appealed, [the applicant] moved to [redacted]. There he was caught burglarizing the homes of civilians. He pled guilty to burglary, grand theft, and obtaining property for worthless checks, and was sentenced. See enclosures (7) through (9). In addition to serving time in prison for his court-martial convictions, I understand [he] has served the sentence from his [redacted] convictions, has completed a program for people addicted to cocaine, and is currently living in a half-way house while holding a job at a shoe repair stand.

6. [The applicant's] request for a discharge under other than honorable conditions indicates to me that he'd like to leave this chapter of his life behind. After at least four convictions for burglary and theft related charges, lengthy stays in prison, and over five years of litigation, I imagine [he] is not eager to open any old wounds and start the appeals process anew. I agree with that view. The Coast Guard has made its point in this case and [the applicant] has, in large measure, served his original sentence. The only people who would ever know or care about the results of a sentencing rehearing are [the applicant] and the lawyers involved on either side.

7. For all these reasons, I believe an other than honorable discharge is the right way to end this case. I therefore forward [his] request with my strongest recommendation that you approve it. I shall hold any further military justice action in abeyance while this request is pending.

On January 3, 1992, the Commandant ordered the applicant's expedited OTH discharge within 30 days for the good of the Service in lieu of trial by court-martial under Article 12-B-12 of the Personnel Manual with separation code KFS.

On January 17, 1992, the District Commander, as the OECGMJ, issued an order canceling the rehearing on sentencing, affirming the findings of the applicant's GCM, but imposing no punishment.

On January 29, 1992, the applicant received the OTH discharge. His discharge form DD 214 shows that he was discharge "under other than honorable conditions" and "for the good of the service."

On May 11, 1992, the CMR issued a decision in its final review of the case and addressed four allegations of error by the applicant's counsel. The first three allegations concerned the validity of the trial judge's and appellate judges' appointments and argued that the conviction had to be overturned because their appointments were not valid. The CMR rejected these three allegations and stated that the findings of guilty had become final by operation of law. The applicant's fourth allegation was that the Coast Guard had failed to restore to him "all rights, privileges and property of which he [had] been deprived by virtue of the sentence [the CMR] set aside." The CMR found that the Coast Guard had complied with this order because no bad conduct discharge had been imposed and the applicant's rating had not been reduced to E-1 since he was discharged as an E-6. The CMR concluded that "nothing from Applicant's sentence remains to be restored." The CMR noted that the applicant had requested back pay but stated that the stoppage of the applicant's pay did not result from his GCM sentence and so setting aside the

sentence did not cause the Coast Guard to owe him back pay. The CMR noted that the applicant's back pay could have been litigated at a sentence rehearing had the applicant chosen a rehearing instead of requesting an OTH discharge and that his pay could still be litigated in the Claims Court.

On October 15, 1992, the applicant's attorney acknowledged that the applicant had received a check for $68,806.76 and intended to cash it "without waiving any of his rights to any additional back pay and benefits that may have been overlooked or miscalculated in his particular situation. He also specifically reserves his right to claim an appropriate military pension and related benefits for his twenty-one (21) plus good years of service in the Coast Guard and Marine Corps. … The purpose of this letter is to apply for [the applicant's] military retirement benefits based on his good years of service.

On December 10, 1992, the Chief of the Enlisted Career Branch responded to the applicant's request for retirement pay stating that although the applicant had 20 years of service creditable for retirement purposes, he requested and accepted a discharge in lieu of further court-martial processing. He stated that because the applicant's discharge terminated his status as an enlisted member, he was no longer entitled to apply for retirement.

On December 19, 2001, the applicant applied to the DRB for an upgraded discharge and reenlistment code. On October 10, 2002, the DRB informed the applicant that his application for an upgraded discharge and reenlistment code had been denied and that the OTH and RE-4 would "stand as issued." The DRB informed the applicant that he could apply to the BCMR and provided him with the address of the BCMR and a DD 149 BCMR application form.

In its report, the DRB summarized the evidence and the testimony elicited at a hearing. The applicant told the DRB that there was no pretrial agreement because he "[j]ust wanted to throw [him]self on the mercy of the court." While he was in the brig, he received substance abuse treatment. Later, he requested the OTH even though a resentencing hearing and had been scheduled and his attorney explained the prejudice he would face with an OTH because he "didn't think it would be easy to do another court martial [and] didn't understand the prejudice." The summary indicates that the applicant had received $68,000 in back pay in 1992.

The DRB voted 4 to 1 to deny relief, finding that the discharge was proper and equitable. One member thought that the OTH was inequitable because he believed that the applicant had "20 years of service with honor," which "outweighs his offenses" and because he knew "lots of people that have done worse." The Commandant approved the DRB's recommendation against relief.

On December 12, 2006, the applicant reapplied to the DRB. On February 26, 2007, the DRB informed the applicant's attorney that his case had already been reviewed and denied and that the decision had been mailed to the applicant with a DD 149 and information about applying to the BCMR on October 10, 2002. The DRB's letter included the statement, "This letter constitutes exhaustion of administrative remedies internal to the Coast Guard."

On April 22, 2008, the Governor of [redacted] restored the applicant's civil rights, except the right to possess a firearm, for all felony convictions in [redacted] state courts and restored his civil rights within the State of [redacted] except the right to possess a firearm, for all felony convictions in any other state, federal, or military court.

APPLICANT'S ALLEGATIONS

The applicant admitted that he made mistakes while serving in the Coast Guard. However, he alleged, his discharge should be upgraded to honorable because he was treated very unfairly and suffered hardships as a result of the Coast Guard's many errors in handling his case.

First, the applicant alleged that his assigned military attorney, LCDR D, was ineffective. He complained that LCDR D advised him to plead guilty and "did not assist [him] in trying to negotiate a pretrial agreement that would have allowed me obtain substance abuse treatment and stay in the Coast Guard." The applicant alleged that if he had been offered treatment for his cocaine addiction as part of his plea agreement, he could have continued his military career. LCDR D also did not challenge the fact that only officers served on his court-martial board, even though he wanted enlisted members on it. LCDR D also did not object to his CO testifying that he had no rehabilitative potential.

Second, the applicant alleged that his sentence was too severe in light of his "over 20 years of spotless service" and in comparison with the sentences of other members who committed similar offenses. Moreover, he served almost 18 months in confinement even though his sentence was set aside because the CMR determined that prejudicial evidence had been improperly admitted at trial and thus exacerbated his sentence. He alleged that the CO gave him an overly harsh sentence because he wanted to make an example of him.

Third, the applicant alleged that the Coast Guard illegally stopped his pay during his pretrial confinement, which was cruel and unusual punishment in violation of Articles 13 and 55 of the UCMJ and the Eighth Amendment of the Constitution. He alleged that the loss of pay caused his marriage to disintegrate, and he had to remove his son from the psychiatric facility where he was being treated. In addition, the loss of pay prevented him from hiring civilian counsel. Moreover, even though the courts had repeatedly ordered the Coast Guard to restore to him all rights, privileges, and property of which he had been deprived by virtue of the sentence, the Coast Guard required him to file a claim for his back pay and he did not receive it until July 9, 1992.

Fourth, the applicant alleged that when the case was returned for a rehearing, he was coerced into requesting an OTH even though he wanted an honorable discharge. He alleged that he was told that the District Commander would not entertain any other request and that he was threatened with a BCD and an even longer sentence—i.e., more time in confinement—if he did not request the OTH. The applicant alleged that at the time, he "had no idea how this type of discharge would handicap" him in civilian life.

Fifth, the applicant alleged that in considering his request for an OTH, the District Commander improperly took into consideration his civil convictions. He argued that consideration of

his civil convictions was improper because the courts had said that it was improper for such evidence to be considered in the sentencing phase of his GCM. In addition, he argued that in approving his request for an OTH and not giving him a better discharge, the District Commander was clearly confused about the circumstances of his case because he stated in his endorsement to the applicant's request that the applicant had broken into "homes" whereas the applicant had been convicted of breaking into only one residence. "There is a big difference from claiming [he] burglarized multiple homes when in fact it was a single burglary." In addition, the District Commander stated that the applicant had served about a year of the original sentence in confinement, whereas in fact he had been confined almost 18 months.

Sixth, the applicant alleged that his discharge should be upgraded because he has greatly reformed in the past 18 years, has not committed any more crimes, and has become a good citizen. He pointed out that the Governor of [redacted] has restored his civil rights in that state and that the civil convictions at issue were considered by the District Commander in the determination of what type of discharge he should receive. The applicant further stated that his offenses in 1986, 1987, and 1990 were caused by his addiction to drugs, but he underwent rehabilitation in 1992 and has been clean and sober ever since. He stated that he is a hard worker but is often rejected by potential employers after he explains his military discharge. He has worked as a dispatcher for a film express company, a shoe repairman, and a painting contract estimator and has been the manager of a storage facility for more than ten years.

In support of his allegations, the applicant submitted documents from his military record and court cases, which are included in the summary of the record below and statements in support of his application:

- On October 31, 1995, a [redacted] parole officer wrote to the applicant's attorney that according to his memory, the applicant had not violated the terms of his parole while being supervised by the parole officer.

- On February 2, 1996, the applicant's son wrote that after his father was transferred to [redacted], he experienced stress because of the son's behavioral problems and his wife's discontent and turned to drugs. However, after his father's "rehabilitating incarceration," their relationship slowly improved. The son wrote that his father had become an exceptional person who performs volunteer work for charities.

- On February 12, 1996, the pastor of the applicant's church wrote that the applicant had attained a remarkable achievement by freeing himself from and staying free of drugs and alcohol. The applicant was an effective counselor for people entering the church's drug and alcohol rehabilitation program because he knew what it was like "to lose his way, his job, and his family" because of drug abuse.

- On February 12, 1996, a member of the applicant's support group wrote that he attended their biweekly meetings "without fail," performed community service, worked hard, and was a caring friend.

- On February 21, 1996, another member of the applicant's support group wrote that in the five years he had known him, the applicant had made great strides, taken on responsibilities in helping others, and become a good member of the community.

- On March 1, 1996, a director of operations for a property management company stated that the applicant had worked for the company as a business associate for four years and had proved to be an honest and reliable businessman who had earned her respect and admiration.

- On November 28, 2006, Ms. D stated that the applicant was a very kind man who had visited her during her recovery from a back operation even though he had not previously met her and who had become a dear friend who was very honest and honorable. She stated that he deserves an honorable discharge.

- On November 29, 2006, the [redacted] area manager of a storage facility company wrote that the applicant had worked for her company since July 8, 2004; that he had been promoted from assistant manager of a storage facility to manager; and that he was dependable and a hard worker.

- On December 1, 2006, Mr. M, a childhood friend of the applicant, wrote that has a commercial superintendent for the second largest contractor in [redacted] he has supervised hundreds of people over the years and is a good judge of character. He stated that the applicant is a "man of great integrity, dedicated to his family and work, and a good friend I know I can count on."

- On December 1, 2006, Mr. N, who has been a friend of the applicant for more than 40 years, wrote that he greatly respects and admires the applicant, who is a good husband and father.

- In an undated letter, Ms. G wrote that the applicant had been a close friend for more than two years, that he was conscientious, trustworthy, and very responsible.

- In an undated letter, Mr. J, who has known the applicant for more than 35 years, wrote that the applicant was proud to have served in the Marine Corps and the Coast Guard for so many years and is deeply sorry for his mistakes.

- On December 7, 2006, the applicant's ex-wife (they divorced in 1991) stated that his discharge should be upgraded to honorable because from 1970 until 1986 his service was unblemished. She stated that he has been clean and sober for many years and is a good father and a good citizen.

- On December 12, 2008, the director of the [redacted] wrote that the applicant had worked for the foundation for more than three years, was trusted, and had always been "extremely courteous, professional and helpful."

VIEWS OF THE COAST GUARD

On June 4, 2009, the Judge Advocate General of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case.

The JAG noted that the application was not timely filed because the applicant was discharged in 1992, applied to the DRB in 2001, and received a decision from the DRB in October 2002, which informed him of his right to apply to the BCMR. The JAG stated that the applicant had provided no rationale for his seven-year delay in applying to the BCMR.

The JAG alleged that on November 8, 1991, after consulting counsel, the applicant requested an OTH discharge "to avoid the strong possibility of a punitive discharge at rehearing." He further alleged that a "review of the Applicant's record does not reveal any error or injustice with the processing of his discharge."

The JAG alleged that the applicant's allegations of error and injustice are meritless. Although "he did have a number of years of good service both with the US Marines and the US Coast Guard, his decisions in October of 1986 giving rise to his blatant violations of the UCMJ, CG policy & procedure as well as state laws in more than one state are inexcusable." The JAG alleged that "[b]ased on CG standards then and now, the applicant's record fully supports the assigned character of service that he requested."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 15, 2009, the applicant submitted his response to the JAG's advisory opinion. He argued that his application is timely filed and that it is in the interest of justice for the Board to provide a full and complete review of the merits of his case because his claims are particularly meritorious and because the restoration of his civil rights within the State of [redacted] occurred in 2008 and constitutes newly discovered evidence that was not known to him in 2002. He alleged that the decision that the DRB issued in 2002 did not begin the tolling of the BCMR's three-year statute of limitations because the letter forwarding him that decision did not state that by virtue of the DRB's denial of his request, he had exhausted his administrative remedies, whereas the reply he received upon applying to the DRB in 2007 states that the "letter constitutes exhaustion of administrative remedies internal to the Coast Guard." The applicant argued that even if the Board finds that his application is not timely filed, the Board should find it in the interest of justice to waive the statute of limitations because unlike the plaintiffs in the case of *Dickson v. Sec'y of Defense,* 68 F.3d 1396 (D.C. Cir. 1995), the applicant performed many honorable years of service before his discharge and has been a "law-abiding, hard-working and honest person" both before and after his offenses.

In addition to his arguments regarding the timeliness of his application, the applicant reiterated the following allegations:

- It was improper for the District Commander to consider his civil criminal felonies "in forcing him to accept [an OTH] discharge" and that he did so only because the Coast Guard had not yet paid him so he did not have the money to hire a civilian attorney.

- The Coast Guard failed to follow the orders that all of his rights, privileges, and property be restored pending further action on his case.

- The applicant has been clean and sober for 16 years and, if the Coast Guard had given him proper rehabilitation treatment in 1986 and awarded him reasonable punishment, he could have continued his Coast Guard career and retired.

- His trial counsel was ineffective since he failed to obtain a plea agreement so that the applicant could stay in the Coast Guard after an appropriate reduction in rank.

- The stoppage of his pay was both illegal and cruel and unusual punishment since it deprived his family of any income from him, caused his son to be discharged from a psychiatric facility, and caused his family to disintegrate.

- He "performed over twenty (20) years of outstanding military service, four years in the Marine Corps and then sixteen years in the Coast Guard," which "outweighed the sentence he was forced to accept."

- He voluntarily confessed his crime, which might have remained unsolved had he not confessed. In addition, he pled guilty without a pretrial agreement and served prison time on a sentence that was set aside. He served approximately 18 months in the Navy brig.

- When he requested the OTH discharge, he was unaware of the prejudice he would face in the civilian world as a result of an OTH discharge.

- The restoration of his civil rights within the State of [redacted] has "completely removed any criminal findings against [him] and without the consideration of the criminal findings, a reasonable and prudent officer would not have discharged [him]."

APPLICABLE LAW

Article 20-F-1.a. of the Personnel Manual in effect in 1986,[8] entitled "Disposition of Drug Abusers," stated that "[a]ny member involved in a drug incident as defined in 20-A-3 will be processed for separation from the Coast Guard." A "drug incident" and "drugs" were defined in Article 20-A-3 to include the illegal use of marijuana. Article 12-B-18.b.(4) stated that "[a]ny member involved in a drug incident will be separated from the Coast Guard with no higher than a general discharge." Under Articles 20.C. and 12.B.18. of the Personnel Manual in effect today, a member involved in a drug incident is separated with no higher than a general discharge.

Article 20-F-1.b. of the manual stated that "[r]egardless of the required discharge action, members who commit drug offenses under the Uniform Code of Military Justice are subject to disciplinary action as appropriate. Such action must be completed before discharge processing is initiated."

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[8] U.S. COAST GUARD, COMDTINST M1000.6, COAST GUARD PERSONNEL MANUAL (Change 27, 1986).

Article 12-B-21, entitled "Discharge for the Good of the Service," stated the following:

> a. An enlisted member may request a discharge under other than honorable conditions for the good of the Service in lieu of action under the UCMJ if punishment for alleged misconduct could result in a punitive discharge. A request for a discharge under other than honorable conditions for the good of the Service may be submitted by the member at any time after court-martial charges have been preferred against him/her.
>
> b. A request for a discharge under other than honorable conditions for the good of the Service does not preclude or suspend disciplinary proceedings in a case. Whether such proceedings will be held in abeyance pending final action on a request for discharge is a matter to be determined by the officer exercising general court-martial jurisdiction over the member concerned. Requests for discharge under other than honorable conditions for the good of the Service shall be forwarded through the officer exercising general court-martial jurisdiction for personal review and comment.
>
> c. A member who indicates a desire to submit a request for a discharge under other than honorable conditions for the good of the Service will be assigned a lawyer counsel. If the member elects to have civilian counsel at his/her own expense, the record shall indicate the name, address, and qualifications of the civilian counsel.
>
> d. A member who persists in the desire to request a discharge under other than honorable conditions in accordance with this article after consultation with counsel shall personally sign the following request in proper letter format: … [The format is the same as that used by the applicant in this case.]
>
> e. The request for discharge shall be forwarded via the chain of command to the Commandant (G-PE). The member's commanding officer shall recommend approval or disapproval of the member's request with appropriate justification for his/her recommendation, certify accuracy of the court-martial charges, and enclose the following in the forwarding endorsement: …
>
> f. The reason for discharge shall be for the good of the Service and the member shall not be recommended for reenlistment. If the Commandant is of the opinion that, based on the facts of the case, the member warrants a more favorable type discharge than discharge under other than honorable conditions, the Commandant may direct issuance of an honorable or general discharge.

The rules for requesting OTH discharges in effect under Article 12-B-21 today are essentially the same.

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. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers, or reasonably should have discovered, the alleged error or injustice. The applicant clearly knew of his OTH discharge in 1992. However, under *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994), the Board's three-year statute of limitations did not begin to run until the Discharge Review Board issued its decision in 2002, when the DRB sent the applicant a copy of the decision denying his request

and informing him of his right to apply to the this Board. Therefore, the Board's statutory limitations period expired three years thereafter, in 2005.

3. The applicant, however, did not apply to the BCMR within that three-year period. Instead, he waited until December 2006 and requested reconsideration from the DRB. The DRB has a 15-year statute of limitations,[9] and the DRB's rules for reconsideration[10] provide no other time limit. Because the applicant was discharged on January 29, 1992, his request for reconsideration by the DRB, dated December 12, 2006, was timely filed. The DRB effectively denied the applicant's request for reconsideration by declining to consider it. The applicant filed his first application to this Board within three years of the DRB's denial of reconsideration. Thus, although *Ortiz* does not expressly address the timeliness of the application in this case, it appears to the Board that the application was timely filed. In this regard, the Board notes that in *Ortiz*, the court held that "given the remedial nature of the administrative scheme for correction of erroneous or unjust dismissals and discharges, there is a presumption in favor of having the merits of such claims heard."[11]

4. The applicant alleged that his OTH discharge should be upgraded to honorable because the Coast Guard committed several errors and injustices in handling his misconduct. The Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[12] Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."[13]

5. The applicant alleged that because he had served honorably on active duty for more than 15 years in 1986, the Coast Guard should have offered him substance abuse rehabilitation so that he could continue his career in the Coast Guard. However, Articles 20-F-1.a. and 12-B-18.b.(4) of the Personnel Manual then in effect required that members who abused drugs be processed for separation and receive no better than a general discharge.[14] This rule has not changed,[15] and it is not unreasonable given the Coast Guard's major role in drug interdiction. In addition, the record shows that the applicant did receive substance abuse treatment while he was incarcerated in the Navy brig. The Board finds that the Coast Guard's decision not to retain the

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[9] 10 U.S.C. § 1553(a) ("A motion or request for review must be made within 15 years after the date of the discharge or dismissal.").

[10] 33 C.F.R. § 51.9(h) states that the "decision of the DRB may not be reconsidered unless--(1) The only previous consideration of the case was on the motion of the DRB; (2) Changes in discharge policy occur; or (3) New, substantial, relevant evidence, not available to the applicant at the time of the original review, is submitted to the DRB."

[11] *Ortiz v. Secretary of Defense*, 41 F.3d 738, 745 (D.C. Cir. 1994).

[12] 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R.§ 52.24(b)).

[13] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

[14] U.S. COAST GUARD, COMDTINST M1000.6, COAST GUARD PERSONNEL MANUAL (Change 27, 1986).

[15] U.S. COAST GUARD, COMDTINST M1000.6A, COAST GUARD PERSONNEL MANUAL, Arts. 12.B.18. and 20.C.4.1. (Change 41, 2007).

applicant on active duty after his illegal drug use and other crimes was neither erroneous nor unjust.

6. The applicant alleged that he received ineffective assistance of counsel because his counsel allowed him to plead guilty without a pretrial agreement and did not require that any enlisted members serve on his GCM panel. However, the record shows that the applicant had already confessed to having abused drugs and destroying locks to break into the medical freezer to steal urine samples and documents. In addition, the applicant told the DRB that he pled guilty without a pretrial agreement because he "[j]ust wanted to throw [him]self on the mercy of the court." Furthermore, the court decisions on his appeals show that the applicant's defense counsel timely objected to all but one of the trial judge's decisions that were successfully appealed and that one decision—to allow the CO to testify about the applicant's rehabilitative potential based on the charged crimes—was overturned on appeal based on what was then new case law.[16] While it is curious that the applicant's GCM panel was apparently composed of all officers, the judge—as well as the defense counsel—presumably informed the applicant of his right to have enlisted members on the panel. If they had not, his appellate counsel certainly could have appealed on that basis, but he did not. The applicant's new claim that he was unfairly denied trial by enlisted peers is insufficient to overcome the presumption that the trial judge, defense counsel, and appellate counsel acted correctly in this regard. The Board finds that the applicant has failed to prove by a preponderance of the evidence that his defense or appellate military counsel were ineffective.

7. The applicant alleged that his discharge should be upgraded because he was treated unjustly since he served a period of confinement that was set aside on appeal and his pay was stopped illegally after his enlistment ended, which was cruel and unusual punishment under the Constitution. The record shows that the applicant was appropriately retained in the Service after his enlistment ended and was also appropriately placed in pretrial confinement after he committed a burglary while the charges for his prior crimes were pending. The record shows that the Chief Counsel found that the law prevented the Coast Guard from paying the applicant while he was in confinement, whether pretrial or pursuant to his sentence, because his enlistment had ended. The applicant failed to cite any law to the contrary, and the fact that members in pretrial confinement are not entitled to pay after their enlistments end has been upheld in court.[17] In addition, while it is clear that the applicant's family suffered because of his loss of income, his loss of income is entirely attributable to the burglary he committed in February 1987, which made his pretrial confinement necessary. With respect to the applicant's sentence, the record shows that he began serving his sentence on the date of his conviction, April 9, 1987, and was paroled from confinement less than 14 months later, on May 30, 1988. Because the applicant avoided a rehearing on his sentence by requesting an OTH discharge, it cannot be known what sentence he otherwise would have received.

8. The applicant alleged that his discharge should be upgraded because he was coerced into requesting the OTH discharge and he did not understand the prejudice he would face in civilian life. However, the applicant's written request for the OTH discharge shows that

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[16] *United States v. Ohrt*, 28 M.J. 301 (CMA, 1989) (citing *United States v. Horner*, 22 M.J. 294 (CMA 1986)).
[17] *Williams v. Inch*, 2007 WL 6892149 at *4 (D. Kan., 2007); *United States v. Fischer*, 61 M.J. 415, 416-17 (CAAF, 2005).

he requested it voluntarily in accordance with Article 12-B-21 of the Personnel Manual because he did not want to attend a rehearing on the sentence and that he was advised of the prejudice he would face in civilian life, although he apparently did not believe the advice. Although the applicant alleged that he was threatened with an even longer period of confinement, that allegation is not credible given the courts' determinations that the improper testimony during the original sentencing phase had increased the period of confinement under the original sentence. In requesting an OTH discharge, the applicant avoided undergoing the rehearing and the possibility of a BCD. The Board is not persuaded that the applicant's request for an OTH discharge was coerced, misinformed, or involuntary.

9. The applicant alleged that his discharge should be upgraded because the District Commander, who endorsed his request, considered crimes he committed that were prosecuted in state courts, rather than by the Coast Guard, and that were found to have been impermissibly entered into evidence during the sentencing phase of his GCM. However, the applicant's request for an OTH discharge was an administrative matter under Article 12-B-21 of the Personnel Manual, and the rules of evidence did not apply. The applicant committed the crimes that were prosecuted by the states of [redacted] while he was a member of the Coast Guard, and so they were clearly relevant to what type of discharge he should receive. The Board finds that the applicant has not proved that the Coast Guard committed any error or injustice in considering all of the misconduct he committed while he was a member of the Coast Guard in determining what type of discharge he should receive after he requested the OTH discharge.

10. The applicant alleged that his OTH discharge was unjust because in positively endorsing his request for the OTH discharge, the District Commander stated that he "served about a year in confinement" and that he was "caught burglarizing the homes of civilians" in [redacted] after his release from parole. The applicant alleged that these statements show that the District Commander was confused and that he would have received a better discharge had the District Commander fully understood the circumstances of his case. The record shows that the applicant was confined from February 6, 1987, through May 30, 1988, which included about two months of pretrial confinement and about 14 months of confinement under the sentence that was set aside. The record also shows that the applicant was convicted of just one home burglary in [redacted], but the record does not show and the applicant did not state how many home burglaries he actually committed. The Board finds that the District Commander's endorsement is not so imprecise or inaccurate as to constitute an injustice against the applicant. The Board is not persuaded that had the District Commander's endorsement been more exact, the applicant would have received a better discharge.

11. The applicant alleged that his OTH discharge was unjust because he was treated unfairly in that the Coast Guard failed to restore to him rapidly all rights, privileges, and property of which he had been deprived by virtue of the sentence that was set aside by the courts. However, this issue was litigated before the Court of Military Review, which held on May 11, 1992, that the Coast Guard had complied with the order to restore to him all the rights, privileges, and property of which he had been deprived as a result of the sentence and that the applicant would have to file a claim for back pay since his loss of pay did not result from his sentence. The record shows that the applicant received his back pay in July 1992 after filing a claim as the

court suggested. The Board finds that the applicant has not proved by a preponderance of the evidence that the Coast Guard committed any error or injustice in this regard.

12. The applicant argued that his OTH discharge should be upgraded to honorable because he had many years of honorable service before his misconduct and has been a good, sober citizen since his discharge and the Governor of [redacted] has restored most of his rights within that state. The applicant's records show that he was honorably discharged from the Marine Corps in 1974, received an honorable discharge upon completion of his first Coast Guard enlistment in 1981, and received several consecutive Good Conduct awards from the Coast Guard. In addition, he has submitted substantial evidence showing that he has indeed been a law-abiding, hard-working citizen for many years.

13. With respect to upgrading discharges, the deputy of the Secretary informed the BCMR on July 7, 1976, that it "should not upgrade discharges solely on the basis of post-service conduct" and "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."[18] Under current regulations, members who abuse drugs are discharged with no better than a general discharge.[19] The applicant not only abused drugs but committed several other felonies as well. As in 1992, members today often request and receive OTH discharges in lieu of further processing under the UCMJ. The fact that one member of the DRB claimed that the applicant had "20 years of service with honor,"[20] thought that this service outweighed his offenses, and knew "lots of people that have done worse" does persuade the Board that the applicant's OTH discharge is disproportionately severe vis-à-vis the conduct in response to which it was imposed. Many members have received BCDs for drug offenses[21] and for "housebreaking" under Article 130 of the UCMJ.[22]

14. The Board finds that the applicant has not proved by a preponderance of the evidence that his OTH discharge is erroneous or unjust[23] given the circumstances of his case or that it is disproportionately severe.

15. Accordingly, the applicant's request should be denied.

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[18] Memorandum of the General Counsel to J. Warner Mills, et al., Board for Correction of Military Records (July 8, 1976).

[19] U.S. COAST GUARD, COMDTINST M1000.6A, COAST GUARD PERSONNEL MANUAL Art. 12.B.18. (Change 41, 2007).

[20] However, the applicant enlisted in the Marine Corps in 1970 and was first charged with serious criminal offenses in 1986.

[21] *See, e.g., Matias v. United States*, 923 F.2d 821 (Fed. Cir. 1990); *Garrett v. Lehman*, 751 F.2d 997 (9th Cir. 1985); *Bowling v.United States*, 713 F.2d 1558 (Fed. Cir. 1983).

[22] *See, e.g., Scarborough v. U.S. Marine Corps*, 2006 WL 1880084 (M.D.Tenn.); *Aldridge v. West*, 16 Vet. App. 41 (Table), 1998 WL 136883 (Vet. App.); *United States v. Turner*, 2009 WL 4917899 (N.M.Ct.Crim.App.).

[23] For the purposes of the BCMRs, "'[i]njustice', when not also 'error', is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976). The Board has authority to determine whether an injustice exists on a "case-by-case basis." Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

ORDER

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