

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-122

██████████
MK3 (former)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on April 10, 2018, and assigned it to staff attorney ██████████ to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated February 8, 2019, is approved 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, who received a bad conduct discharge (BCD) following a court martial on December 31, 2002, asked the Board to correct his record by upgrading his discharge to General Under Honorable Conditions. He also asked that the following administrative corrections be made to his DD-214:¹

- Place of Entry: Change '██████████' to ██████████;
- Pay Grade: Change "E-3" to "E-7";
- Grade, Rate or Rank: Change "FN" to "MKC";
- Separation Date: Change December 31, 2002, to July 2, 1998;
- Last Duty Assignment: Change "CG Personnel Svce Ctr" to "US Navy Consolidated Brig: Miramar";
- Dates of Time Lost: Change "1997 October 4 Through 2002 December 31" to "9/1997 to 7/2/1998"; and
- Add a fourth Coast Guard Good Conduct Medal

The applicant stated that the charges he had been accused of were "dropped to three small charges" and were all minor offenses. He asserted that the remaining charges were not deserving of a BCD and his discharge should therefore be upgraded. He stated that after his "court martial

¹ A DD 214 is prepared to document a member's release or discharge from a period of active duty.

that was overturned,” he was promoted to MKC, E-7, which further proves that his offenses were not that serious. Regarding the timeliness of his application, the applicant stated that he was requesting these changes so that he could receive disability benefits through the Department of Veterans’ Affairs (VA).

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on April 16, 1984. He had previously served in the Army for three years. He received his third Good Conduct award for the three-year period ending on May 12, 1994.

On November 25, 1996, the applicant received a Page 7 informing him that his period of eligibility for a Good Conduct Award had terminated on that date due to an “Unsatisfactory” conduct mark on his Enlisted Employee Review.

The applicant was tried by a general court martial on October 4, 1997. He was found guilty of nineteen offenses. Specifically, he was found guilty of one specification of failure to obey a lawful general order; seven specifications of maltreatment of junior enlisted females; two specifications of assault consummated by a battery against two enlisted females; six specifications of indecent assault; one specification of indecent acts with another; one specification of obstructing justice; and one specification of soliciting another to commit an offense. He was sentenced to twelve months of confinement, reduction in pay grade from E-6 to E-3, and a BCD.

On July 5, 2001, the Coast Guard Court of Criminal Appeals made a decision on the applicant’s appeal of his court martial decision. The court overturned and dismissed one of the charges of indecent assault and lowered four of the remaining five findings of guilty of indecent assault to the lesser included offense of assault consummated by a battery. The remaining fourteen findings of guilty were affirmed. The court stated:

The sentence has been reassessed in light of the reduced findings of guilty and we are confident that, even without the offenses that we have rejected, the trial court would have imposed no less than a bad conduct discharge, confinement for six months and reduction to E-3. Upon further reassessment, with appropriate crediting of the earlier reduction to E-5 in mind, we have determined that we should approve a sentence that includes a reduction to E-4 rather than E-3.

On December 20, 2002, the applicant’s command received a memorandum stating that residual clemency in the applicant’s court-martial case was denied. His discharge was approved for execution and separation orders were issued on December 23, 2002.

The applicant was discharged on December 31, 2002, with a BCD. Block 4.a., Grade, Rate or Rank states “FN” and Block 4.b., Pay Grade, states “E-3.” Block 7.a., Place of Entry into Active Duty, states “██████████” Block 8.a., Last Duty Assignment, states “CG Personnel Svce Ctr.” In Block 13, Decorations and Medals, it states that the applicant received three Coast Guard Good Conduct Medals. Dates of time lost are listed as October 4, 1997, through December 31, 2002. The applicant received a BCD with an RE-4 reentry code, indicating that he is ineligible to reenlist in the military. He received a JJD separation code and the Narrative Reason for Separation is “Court-Martial.”

VIEWS OF THE COAST GUARD

On September 25, 2018, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial relief in this case. The JAG stated that the Coast Guard Court of Criminal Appeals specifically ordered a BCD as the appropriate characterization of service for the applicant's discharge. The applicant claimed in his application that he advanced to MKC/E-7, but the JAG noted that the court also specifically ordered that he would be reduced in rank to E-4. The JAG noted, however, that the applicant's DD-214 does currently state that his rate was "FN" whereas it should have been MK3 to coincide with the E-4 pay grade. The JAG therefore recommended making these changes and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC stated that the application is not timely and therefore should not be considered on its merits. However, PSC noted that there are several errors on the applicant's DD-214 that should be corrected. His pay grade is stated as E-3, but according to the Coast Guard Court of Criminal Appeals it should be an E-4. In addition, Block 4.a., should state "MK3" instead of "FN" and Block 7.a. should state [REDACTED]. PSC stated that the applicant was not eligible for a fourth Good Conduct award due to receiving a mark of Unsatisfactory on his Enlisted Employee Review on November 25, 1996. PSC noted that there is no documentation of the applicant's court martial in his record or any reference of his last duty assignment. However, PSC stated that it would assume the applicant was correct in stating that the Naval Consolidated Brig Miramar was his last duty assignment and recommended making this change on his DD-214 as well. PSC recommended denying all other requests.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 2, 2018, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond. The applicant replied and stated that he "adamantly disagree[d] with the Coast Guard's advisory opinion."

The applicant asserted that according to his counsel during the proceedings, in order to receive a BCD, a member must be reduced to E-3 or less and be sentenced to confinement for one year or more (as opposed to twelve months). He argued that the type of "horseplay" he was found guilty of happened often on board and was often "reciprocated by the alleged victims." The applicant asserted that during trial, one of the witnesses testified "any one of the crew members on board ... could be sitting where [the applicant] is sitting, and they would all be convicted." The applicant pointed out that he was never accused of "horseplay" on other assignments, although women were present there as well.

The applicant claimed that his legal rights had been violated during the proceedings. He provided a quote without a proper citation that he claimed to have been from two Coast Guard manuals to bolster this claim. He also provided a quote without a proper citation which appears to be paraphrased from the decision in his own appeal. He reiterated his request that his characterization of discharge be upgraded to General, Under Honorable Conditions or Honorable. He stated that he is attempting to access "military retirement benefits, because there has been a great injustice due to the lack of appropriate defense counsel, the multiplicity of charges, which led to

overreaching, spillover, and bootstrapping by the government in an effort to set an example and attack [his] character.”

APPLICABLE REGULATIONS

The Manual for Courts-Martial, Rule 1003(b)(4), states that “a court-martial may sentence an enlisted member to be reduced to the lowest or any intermediate pay grade.”

Rule 1004(b)(8)(C) states:

A bad-conduct discharge applies only to enlisted persons and may be adjudged by a general court-martial and by a special court-martial... A bad-conduct discharge is less severe than a dishonorable discharge and is designed as a punishment for bad-conduct rather than as a punishment for serious offenses of either a civilian or military nature. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary.

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 submission 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 or injustice.² The applicant was discharged and received his DD-214 in 2002. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged errors in his record in 2002, and his application is untimely.
3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.³ In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without “analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review”⁴ to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted 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.”⁵ Although the applicant in this case long delayed filing his application, the evidence reveals administrative errors in his record, as explained below, and so the Board finds that it is in the interest of justice to excuse the untimeliness of the application so that those errors may be corrected.
4. The applicant alleged that his BCD should be upgraded and that several other entries on his DD-214 should be changed. When considering allegations of error and injustice, the Board begins its analysis 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

² 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

³ 10 U.S.C. § 1552(b).

⁴ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁵ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

preponderance of the evidence that the disputed information is erroneous or unjust.⁶ 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.”⁷

5. The applicant has proven by a preponderance of the evidence that certain administrative entries on his DD-214 are erroneous. Block 4.a. states that the applicant was an “FN” at the time of his discharge, but he was an MK3. Block 4.b. states that he was in paygrade “E-3,” whereas the appellate court’s decision specifically stated that he was reduced to E-4. In addition, Block 7.a. states that he entered active duty in [REDACTED],” which should be changed to [REDACTED].”

6. The applicant asked that Block 8.a., last duty assignment, on his DD-214 be changed from “CG Personnel Svce Ctr” to “US Navy Consolidated Brig: Miramar.” The Coast Guard recommended that the Board assume the applicant was correct regarding his last duty assignment and that relief be granted on this request. However, the applicant’s record is presumptively correct,⁸ and there is no evidence in his record to indicate that his last duty assignment was the U.S. Navy Consolidated Brig in Miramar vice PSC. Therefore, this request for relief should not be granted.

7. The applicant requested that his separation date in Block 12.b. be changed from December 31, 2002, to July 2, 1998. He likewise asked that his Dates of Time Lost in Block 29 be changed from “1997 October 4 Through 2002 December 31” to “9/1997 to 7/2/1998.” It is not clear why the applicant believes that he was separated on July 2, 1998, but his record clearly indicates that he was discharged on December 31, 2002. A punitive discharge by court martial may not be executed until the conviction is deemed final (after the appeal is complete) and the record of trial has been reviewed for clemency purposes.⁹ The applicant has not proven by a preponderance of the evidence that the date of discharge or amount of time lost shown on his DD-214 is erroneous or unjust.

8. The applicant asked for a fourth Good Conduct Medal. The applicant was informed on November 25, 1996, that his eligibility period for a Good Conduct Medal had terminated due to receiving an “Unsatisfactory” conduct mark on his Enlisted Employee Review. He did not qualify for a fourth award of the medal because his third was earned for the period ending on May 12, 1994, and a Good Conduct Medal is awarded for three consecutive years of good service.¹⁰ The applicant has not proven by a preponderance of the evidence that he is entitled to a fourth Good Conduct Medal. Therefore, this request for relief should not be granted.

9. The applicant asked the Board to upgrade his discharge from a BCD to a General Under Honorable Conditions. He asserted that after his appeal only three charges remained and

⁶ 33 C.F.R. § 52.24(b).

⁷ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁸ *Id.*

⁹ COMDTINST M1000.6A, Personnel Manual, Article 12.B.19.; COMDTINST M5810.1, Military Justice Manual, Article 5.D.4.

¹⁰ COMDTINST M1650.25, Article 5.B.1.a.

that those charges were minor offenses. Perhaps the applicant has misremembered what the Coast Guard Court of Criminal Appeals held in his case, because while it is true that the court overturned one charge and lowered four charges to lesser included offenses, the court affirmed the remaining fourteen findings of guilty, leaving the applicant guilty of a total of eighteen charges. The court also specifically found at the time that, even with the amended findings, the applicant should still receive a BCD. The Board finds no evidence of error or injustice with respect to the BCD and therefore will not upgrade the applicant's discharge characterization.

10. The applicant, in his response to the advisory opinion, added an argument that his discharge characterization should be upgraded because his legal rights were violated at his proceedings. He included one quotation that could not be verified and one quotation that appears to be paraphrased from the appellate court's decision on his own appeal. Had the applicant or his counsel believed his legal rights were being violated, the issue could have been brought up on appeal. However, his appeal contained no complaints of insufficient due process and the record shows that the applicant received all due process throughout the proceedings, including defense counsel. The applicant has submitted no evidence supporting his claim that his legal rights were violated, and so the Board will not grant relief on this ground.

11. In his response to the advisory opinion, the applicant also argued that his counsel told him that two different Coast Guard manuals state that in order to receive a BCD, a member must be reduced to E-3 or lower and must be sentenced to one year or more of confinement, rather than twelve months. Again, the applicant provided no specific citations, and the Board has been unable to find any such law or policy. Instead, the Manual for Courts-Martial in effect at the time states that "a court-martial may sentence an enlisted member to be reduced to the lowest or any intermediate pay grade." Further, the applicant was originally reduced to an E-3 paygrade by the court-martial. If he is arguing that he was no longer eligible for a BCD when, on appeal, his rate was changed to an E-4, he did not provide a proper citation for this argument, and the Board cannot locate any law or policy supporting this argument. As for his "one year" versus "twelve months" argument, the Board cannot find any regulation in any of the manuals suggesting there is a difference in the meaning or legal effect of "one year" versus "twelve months," which are equivalent. The Board finds no grounds to upgrade the applicant's discharge characterization.

12. Accordingly, partial relief should be granted by correcting the applicant's DD-214 to show that his rate is MK3, his paygrade is E-4, and the place where he entered active duty is [REDACTED]. No other relief is warranted.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of former MK3 [REDACTED], USCG, for correction of his military record is granted as follows: His military records shall be corrected and he shall receive a DD-215 with the following corrections:

- His Grade, Rate or Rank shall be “MK3.”
- His Pay Grade shall be “E-4.”
- His Place of Entry into Active Duty shall be [REDACTED]

No other relief is granted.

February 8, 2019

