


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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-023

 SK2 (former)

FINAL DECISION ON RECONSIDERATION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application and military records on October 25, 2018, and this decision of the Board was prepared pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated January 31, 2020, 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 BASIS FOR RECONSIDERATION

The applicant, a former storekeeper second class (SK2) who was discharged under other than honorable (OTH) conditions on November 20, 2012, asked the Board to reconsider his requests in BCMR Docket No. 2016-170,¹ to upgrade the character of his discharge to General, Under Honorable Conditions, and to award "all other relief as appropriate." The applicant stated that his request for reconsideration is based "upon a misapplication of the law and upon evidence not previously submitted to the Board." The remainder of the brief is essentially identical to the brief submitted in the BCMR Docket No. 2016-170, but he submitted three affidavits as new material to receive reconsideration, as required by 10 U.S.C. § 1552(a)(3)(D):

- A retired master chief petty officer (MCPO) signed a sworn affidavit dated February 5, 2018, in which she stated that she met the applicant in August 2010 and had mentored him since then. She stated that the applicant had no adverse remarks in his record until the incident in 2012 and maintained a positive attitude even while restricted to Base and

¹ In BCMR 2016-170, the applicant asked the Board to correct his record by voiding his discharge; reinstating him on active duty as an SK2/E-5 effective November 20, 2012; immediately advancing him to Petty Officer First Class as an SK1/E-6; awarding full back pay and allowances; removing a Summary Court-Martial (SCM) conviction from his military record; and removing all references to the SCM from his record. He based his claims primarily on allegations that his conviction by the SCM was erroneous and unjust because he pled guilty pursuant to a pre-trial agreement to charges that the Government could not have proven beyond a reasonable doubt and that his commanding officer had abused his discretion in recommending the applicant for an OTH discharge after the applicant requested an OTH discharge pursuant to his pretrial agreement.

throughout the criminal and administrative proceedings that followed. The MCPO stated that she attended the applicant's meetings with his military defense attorneys and

was there when he was pressured into taking a plea agreement. His defense attorney LCDR [F] stated that the ... Area Commander, VADM ..., wanted [the applicant] discharged ... under other than honorable conditions. [The applicant's] guilt and punishment was already predetermined and he never had a chance to a fair trial if he would have chosen a special court-martial instead of the plea agreement. [The applicant] was told he would not be entitled to any VA benefits with this type of discharge. He was told that the other than honorable discharge would not affect him at all in the civilian world besides the VA benefits and it was more administrative than anything else. In addition, he was also not counseled on how this type of discharge could severely cripple him in his future civilian endeavors in regard to employment, education, medical to name a few, prior to [the applicant] accepting the plea agreement.

- The applicant's father signed a sworn affidavit dated February 6, 2018, stating that he was disappointed with the applicant's two military defense attorneys, LT L and LCDR F. He stated that they repeatedly pressured him "into taking a plea agreement and no other defense was ever discussed." He stated that LCDR F told the applicant the Area Commander wanted him to receive an OTH discharge and that LCDR F made him and his wife, as well as his son, "feel that the plea agreement was his only option." LCDR F stated that refusing to take the plea deal would "piss off" the Area Commander, "and he might send the whole case back to Bahrain. That is just one example of how [the applicant] was pressured in[to] making a decision that was not in his best interest. I was also present when [the applicant] was told if he took the plea agreement that it would not affect him in any way in his civilian life."
- The applicant's mother signed a sworn affidavit dated February 5, 2018, stating that she was also disappointed with the defense lawyer and she "was there when [her] son was pressured in to taking a plea agreement. She stated that the LCDR F told the applicant that the Area Commander wanted him to receive an OTH discharge, and "he seemed more concern[ed] in making sure that happen[ed] instead of defending [her] son and looking out for his future. He made [her] son feel the plea agreement was his only option. I was also there when he assured [the applicant] that taking this plea agreement would not affect him in his civilian life at all."

SUMMARY OF THE RECORD

The official records were summarized in the decision in BCMR Docket No. 2016-170, but the following records are particularly pertinent to the request for reconsideration.

Pretrial Agreement

On October 12, 2012, the applicant and his assigned Navy JAG signed a Memorandum of Pretrial Agreement, which was signed by the Area Commander who was the Convening Authority for the court-martial on October 16, 2012. It states the following:

I, [name], USCG, the accused in a Special Court-Martial, in exchange for good consideration and after thorough consultation with my defense counsel, do fully understand and agree to the following terms and conditions.

1. Under the conditions set forth below, pursuant to Military Rules of Evidence 408 and 410, and in consideration of the convening authority's agreement to abide by the terms contained in Paragraph 2 of this agreement, I offered to do the following:

a. I will accept trial by Summary Court-Martial;

b. I will not be represented by counsel at the Summary Court-Martial;

c. I agree not to request, at government expense, the presence of any witness located outside a 100-mile radius ...

d. I agree not to object to the addition of the following language and element to the sole Specification of Charge V, "Which conduct was to the prejudice of good order and discipline and was of a nature to bring discredit upon the armed forces." ...

e. I agree to request a discharge under other than honorable conditions for the good of the Service per Chapter 1.B.20 of COMTINST M1000.4, which is based on any act or omission reflected in the charges and specifications that are the subject of this agreement. I fully understand the nature and purpose of an Administrative Discharge Board, and the rights that I would have at such a Board. Further, I agree to waive those rights and request discharge under other than honorable conditions.

f. If I am provided a grant of testimonial immunity, I agree to provide truthful testimony against [the member who grabbed the purse] ...

g. I will enter pleas of GUILTY to Charges III and V and the specifications thereunder referred against me on 7 August, 2012, at Summary Court-Martial.

2. In consideration of my offer contained in Paragraph 1 of this agreement, the convening authority agrees to withdraw the charges and specifications that were referred to a Special Court-Martial on 7 August, 2012, and refer the charges and specifications contained in Paragraph 1 of this agreement to Summary Court-Martial. After announcement of the sentence by the Summary Court-Martial, the convening authority agrees to dismiss with prejudice all charges and specifications referred to a Special Court-Martial on 7 August, 2012, which the accused did not plead guilty to at the Summary Court-Martial. If I do not comply with this agreement, the charges and specifications described above may be withdrawn from Summary Court-Martial and re-referred to special court-martial. The convening authority and I understand this agreement to mean that once I plead guilty at Summary Court-Martial to the charges agreed to in the Pre-Trial Agreement that jeopardy attaches within the meaning of Article 44 of the Uniform Code of Military Justice and Rules for Court-Martial 907 such that those charges could not be brought to another court-martial.

3. This agreement constitutes all the conditions and understandings of both the government and me regarding this case. There are no other agreements, written or otherwise.

4. I am satisfied with my detailed defense counsel, LT [name], JAGC, USN, and LCDR [name], USCG, in all respects and consider them qualified to represent me.

5. I am entering into this agreement freely and voluntarily. Nobody has made any attempt to force or coerce me into making this agreement.

6. I have been advised by my defense counsel of, and I fully understand and comprehend the meaning and effect of, my guilty plea and all attendant effects and consequences, including the possibility that I will be processed for an administrative discharge from the United States Coast Guard. I understand that such an administrative discharge could result in an other than honorable characterization of service unless otherwise limited by this agreement.

7. I understand that if this agreement becomes null and void, then my offer to enter into this agreement cannot be used against me in any way in determining whether I am guilty or not guilty of the charges alleged against me.

8. I understand that this pretrial agreement may become null and void, and the Convening Authority can withdraw from this agreement, in the event that any of the following occur:

- (a) I fail to plead guilty as required by this agreement;
- (b) I fail to satisfy any material term of this agreement;

9. I fully understand that if I fail to comply with any of the terms of this agreement, or if the agreement becomes null and void for any reason, then the convening authority is free to again pursue prosecution of these charges at a Special Court-Martial.

10. I understand that I must not commit any act of misconduct chargeable ...

11. I and the Government agree not to object to service record documents being offered into evidence in sentencing on the basis of hearsay, authenticity, best evidence rule or foundation.

By my signature below I acknowledge that I have read this agreement completely, discussed it with my defense counsel, understand it in all respects, and I am prepared to abide by its terms.

Request for OTH Discharge

On October 18, 2012, the applicant signed and submitted a Request for Discharge Under Other Than Honorable Conditions for the Good of the Service, which states the following:

1. Under the provisions of [Article 1.B.20., COMDTINST M1000.2], I hereby request a discharge under other than honorable conditions for the good of the Service.

2. I have consulted with LT [name], JAGC, USN, defense counsel a member of the Bar in the Commonwealth of Pennsylvania who has fully advised me of the implications of such a request. The basis for my request for a discharge under other than honorable conditions for the good of the Service stems from misconduct allegations contained in the court-martial charges preferred against me in enclosure (1). I request to be administratively discharged. I am completely satisfied with the counsel I have received.

3. I understand that if this request is approved I will receive a discharge under other than honorable conditions, which may deprive me of virtually all veterans' benefits based on my current period of active service, and I may expect to encounter substantial prejudice in civilian life in situations in which the type of service rendered in any Armed Forces branch or the character of discharge received therefore may have a bearing.

4. I understand once I submit this request, I may withdraw it only with the consent of Commander (CG PSC-EPM-1).

5. I understand I may submit a sworn or unsworn statement on my behalf. I do not desire to submit a statement.

6. I make this request voluntarily, free from any duress. This request is in conjunction with a pre-trial agreement (PTA) in which the convening authority has conditionally agreed to refer the charges to a summary court-martial. A copy of the PTA is provided as enclosure (2). I have asked my counsel, who has fully explained to me the implications of my request, to witness my signature.

7. I have retained a copy of this request for a discharge under other than honorable conditions for the good of the Service and all enclosures related thereto.

Acknowledgement of Rights – Acceptance of Summary Court-Martial

On November 8, 2012, the applicant signed an acknowledgment of rights and accepted trial by SCM. The applicant acknowledged that he had the right to refuse an SCM and that he had the right to consult an attorney prior to deciding whether to accept an SCM, but he had no right to an

appointed attorney during the SCM. During the SCM, he had the right to be represented by a civilian attorney at his own expense, to remain silent and plead not guilty therefore “placing upon the government the burden of proving [his] guilt beyond a reasonable doubt,” to have witnesses called to testify on his behalf, to cross-examine witnesses against him, and, if found guilty, to present mitigating evidence in his favor. If he refused trial by SCM, he acknowledged, his CO could refer the charges to a Special or General Court Martial, and he would have additional rights in those fora, including the right to legal representation. The acknowledgement also discussed the maximum punishments that could be awarded at a Summary, Special, or General Courts-Martial. The maximum punishment at the SCM could be two months restriction, forfeiture of two-thirds of one month’s pay, reduction in pay grade, and reprimand. At the end of the document, the applicant acknowledged having consulted his Navy and Coast Guard counsel about the decision and initialed next to “I accept summary court-martial.”

The Record of Trial by Summary Court-Martial shows that the SCM was held the same day, November 8, 2012. The applicant received the OTH discharge on December 17, 2012.

VIEWS OF THE COAST GUARD

In accordance with 33 C.F.R. § 52.42, the Chair forwarded a copy of the request for reconsideration to the Coast Guard. On May 22, 2019, a judge advocate (JAG) recommended that the Board deny the request because, she alleged, it is untimely, no new relevant facts or law have been alleged, and his submission does not meet the requirements for reconsideration under 33 C.F.R. § 52.67.²

The JAG claimed that the applicant did not identify the alleged “misapplication of law” by the Board “or what new evidence has been submitted.” The JAG noted that the applicant’s brief is nearly identical to his prior brief except for stylistic differences, such as bolding, underline, and spacing. The JAG stated that “all 23 pages of evidence that were submitted with the Request for Reconsideration could [have been] and/or were presented with the original BCMR application. If they could not have been, there is no explanation as to why they were not available.” The JAG concluded that the applicant “has failed to present any evidence that the BCMR Board committed a legal or factual error” in its prior decision and so his request should be denied.

The JAG also adopted a memorandum on the case submitted by Commander, Personnel Service Center (PSC), who recommended denying relief. PSC stated that the applicant “has not provided any further corroborating or substantial evidence in which his discharge was erroneous or unjust.” PSC noted that the records show that the applicant signed his pre-trial agreement and request for OTH discharge “voluntarily and freely without any coercion.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

In response to the views of the Coast Guard, the applicant submitted the following letters of reference from supervisors at his current civilian job:

² Limitations on reconsideration in 33 C.F.R. § 52.67 have been voided by the enactment of 10 U.S.C. § 1552(a)(3)(D).

- A letter of reference dated April 15, 2019, from the Purchasing Manager at the applicant's current place of work states that the applicant has a "beyond excellent" work ethic and attitude and had been a model employee who works well with others and leads by example.
- A letter of reference from the Director of Finance and Operations at the applicant's workplace states that the applicant had "proven himself to be an outstanding young man of exceptional character," who was always on time and ready to work with a positive attitude and willingness to help others.
- A letter of reference dated April 11, 2019, from the Order Fulfillment Manager states that the applicant takes personal initiative on the job, prioritizes daily tasks to increase productivity, has shown leadership abilities, and has a reliably positive attitude and strong work and personal ethics.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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. The request for reconsideration was properly filed with new material evidence as required by 10 U.S.C. § 1552(a)(3)(D).

2. The applicant has not submitted evidence or arguments that warrant reopening any of the issues that were decided in the Final Decision in BCMR Docket No. 2016-170. The affidavits of his parents and the MCPO about what the JAG's counsel said when the PTA was signed do not persuade the Board that the Navy or Coast Guard JAG lied to him about the nature of an OTH discharge. JAGs are officers of the court and entitled to a presumption of regularity,³ and their meetings with the applicant were being witnessed by an experienced MCPO. Although the applicant was faced with an undesirable choice—sign the PTA, request an OTH, and accept the SCM *or* be tried by special or general court-martial—there is no evidence of coercion or duress. On his request for an OTH discharge, the applicant acknowledged that it might cause "substantial prejudice in civilian life." And he could have refused to submit that request on October 18, 2012, and/or refused to sign the acceptance of the SCM on November 8, 2012, even though he had already signed the PTA, as paragraph 7 of the PTA stated, "I understand that if this agreement becomes null and void, then my offer to enter into this agreement cannot be used against me in any way in determining whether I am guilty or not guilty of the charges alleged against me." Nor is the applicant's post-discharge conduct, as attested to by three civilian supervisors, grounds for upgrading his military discharge.

3. Accordingly, the applicant's requests for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

³ 33 C.F.R. § 52.24(b).

ORDER

The application of former SK2 [REDACTED], USCG, for correction of his military record is denied.

January 31, 2020

