

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2019-146**

  
SR (former)

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**FINAL DECISION**

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 on June 4, 2019, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated September 4, 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 ALLEGATIONS**

The applicant, a former Seaman Recruit (SR/E-1) who received a bad conduct discharge (BCD)<sup>1</sup> on April 4, 2018, pursuant to the sentence of a general court-martial,<sup>2</sup> asked the Board to correct his record by upgrading his discharge to either general "under honorable conditions" or honorable.

The applicant argued that he served honorably during his Coast Guard career. Specifically, he stated that, as a rescue swimmer, he had been credited with saving over eighty lives. However, he argued, towards the end of his career he suffered from PTSD. He argued that PTSD inhibited

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<sup>1</sup> There are five types of discharges for an enlisted member: three administrative and two punitive. The three administrative discharges are honorable, general under honorable conditions, and under other than honorable (OTH) conditions. The two punitive discharges may be awarded only as part of the sentence of a conviction by a special or general court-martial. A special court-martial may award a BCD, and a general court-martial may award a BCD or a dishonorable discharge.

<sup>2</sup> There are three types of courts-martial: A summary court-martial consists of a single commissioned officer as the trier of fact, the decision does not constitute a criminal conviction, and the sentence is limited and cannot include a punitive discharge; a special court-martial consists of a military judge and (if a panel is requested by the accused) a panel of at least three members as the trier of fact, the decision constitutes a criminal conviction, and the sentence is less limited and may include a BCD and up to a year of confinement; a general court-martial includes a judge and a panel of at least five military members, and the sentence may include a lengthy confinement, BCD or dishonorable discharge, and death. At the time, in all courts-martial, the convening authority retained the power to set aside findings of guilty and reduce any sentence.

his judgment and caused him to remain in a toxic relationship with a fellow Coast Guard member. He argued that, when he caught the fellow Coast Guard member cheating on him, she made various false allegations against him.

To support his application, the applicant submitted copies of awards and achievements. Additionally, he submitted ten character references which are summarized below.

The applicant submitted eight character references from fellow Coast Guard members who had served with him during his career. The character references attested to the applicant's upstanding character both personally and professionally. On a personal level, the applicant was described as loyal, honest, kind, and trustworthy. The applicant was considered by many not just as a friend and co-worker, but as an extended member of their family. On a professional level, the applicant was described as highly skilled, dependable, and hard-working. He was viewed as a role model for younger Coast Guard members. Further, many of the character references spoke of the applicant's dedication to the Coast Guard and his commitment to service. His character references acknowledged the applicant's criminal conduct but emphasized that his crimes are not indicative of who he is as a person.

Another character reference is from a man who had been rescued by the applicant after a pre-dawn hunting accident had claimed the lives of two of his friends. He stated that the applicant was the senior crew member on the helicopter that was dispatched to rescue him. He explained that the applicant had spotted him, lifted him into the helicopter, and participated in his immediate resuscitation. He described the applicant's behavior as calm, methodical, and effective. He stated that after he recovered from the accident, the applicant had reached out to him and invited him and his family to tour the base. He stated that he will forever be grateful to the applicant whose clear vision and effective rescue granted him another lease on life.

The final character reference is from the Executive Director of a charity that provides athletic experiences to children, teens, adults, and veterans with disabilities. She described the applicant as a valuable volunteer who has an excellent rapport with many of the athletes and fellow volunteers. She described the applicant as organized, efficient and competent.

### **SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard on August 19, 2002. Following recruit training, he was enrolled in "A" School to become an Aviation Survival Technician.

On July 15, 2015, the applicant was tried by a general court-martial. He pled guilty and was convicted of seven offenses: two specifications of willfully disobeying a superior commissioned officer;<sup>3</sup> four specifications of assault consummated by a battery;<sup>4</sup> and one specification of violating the general article.<sup>5</sup> The two violations of willfully disobeying a superior commissioned officer were the result of the applicant initiating contact with a fellow Coast Guard member despite orders from his Commanding Officer not to initiate any contact or communication with the mem-

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<sup>3</sup> Article 90, UCMJ

<sup>4</sup> Article 128, UCMJ

<sup>5</sup> Article 134, UCMJ

ber and to remain at least five hundred feet away from her. One of the assault violations was the result of the applicant striking a civilian in the head and face with his fist. Another assault violation resulted from the applicant striking a fellow Coast Guard member in the head and face with his fist and knee. The final two assault violations resulted from the applicant unlawfully touching a fellow Coast Guard member on her breasts and in her genital area. The violation of the general article was the result of the applicant entering a fellow Coast Guard member's house on several occasions to the prejudice of good order and discipline of the armed forces and was of a nature to bring discredit upon the armed forces. The maximum punishment for willfully disobeying a lawful order of a superior commissioned officer was a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years. The maximum punishment for assault consummated by a battery was a BCD, forfeiture of all pay and allowances, and confinement for three years. The military judge sentenced the applicant to four years confinement, reduction in pay grade from E-5 to E-1, and a BCD.

On February 6, 2018, the Coast Guard Clemency Board convened to review the applicant's petition for clemency. The Clemency Board was instructed to review the applicant's petition and to make a recommendation based on equity and good conscious by considering the following factors: 1) the nature and circumstance of the applicant's offenses; 2) the applicant's military and civilian service; 3) the applicant's potential value to the Coast Guard or society at large; 4) the applicant's conduct in confinement; 5) evidence of the applicant's contrition and sincerity towards rehabilitation; 6) social factors affecting the applicant, including hardship, psychological, or personality factors; 7) sentence disparity; and 8) mercy.

On February 8, 2018, the Coast Guard Clemency Board unanimously recommended that the applicant's petition for clemency be denied. On March 6, 2018, the Personnel Service Center was notified that the applicant's petition for clemency was denied. The applicant's case was considered final and his punitive discharge was self-executing.

On April 4, 2018, the applicant was discharged by sentence of court-martial in accordance with Section 1.B.18. of the Coast Guard Military Separations Manual. His DD-214 shows "bad conduct" as the characterization of discharge; "court martial" as the narrative reason for separation; JJD (court martial) as his separation code; and RE-4 (ineligible for reenlistment) as his reenlistment code.

### **VIEWS OF THE COAST GUARD**

On November 6, 2019, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC argued that the Coast Guard did not commit an error or injustice in discharging the applicant by reason of court-martial. PSC argued that the applicant's characterization of service was appropriate and in accordance with policy.

The JAG argued that the applicant failed to provide any evidence to support his allegations. First, the JAG argued that the applicant failed to provide evidence that he was suffering from PTSD

at the time he committed the underlying criminal actions. Second, the JAG argued that the applicant failed to provide evidence that he was subjected to false allegations.

The JAG argued that the court-martial is the proper body for determining guilt or innocence and any appropriate punishment. The JAG argued that, since the court-martial had the opportunity to view the evidence, its decisions and findings are entitled to substantial deference. The JAG argued that, absent evidence that the court-martial's determinations were clearly erroneous, or that a substantial right of the applicant was materially prejudiced by clear procedural error, the court-martial's decisions should be upheld.

The JAG argued that there is no compelling reason to grant clemency in this case. While the applicant argued that he served honorably and the JAG acknowledged that the applicant received a number of accolades for his service prior to his court-martial conviction, the JAG argued that such positive conduct does not excuse the applicant's subsequent criminal conduct. Further, the JAG argued that clemency should be reserved for unusual cases in which the lawful sentence of a court-martial shocks the conscience or conflicts with notions of fundamental fairness.

The JAG concluded by arguing that the severity of the applicant's offenses weighs strongly against granting clemency. The JAG stated that the applicant pled guilty to and was convicted of several serious offenses, including two specifications of assault for unlawfully touching a Coast Guard member's breasts and genitals with his hand.

### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On November 8, 2019, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. No response was received.

### **APPLICABLE LAW AND POLICY**

Rule 1003.b. of the Manual for Courts-Martial discusses punishments that a court-martial may adjudge:

(8) *Punitive Separation*. A court-martial may not adjudge an administrative separation from the service.

...

(C) *Bad conduct discharge*. A bad-conduct discharge applies only to enlisted persons and may be adjudged by a general court-martial and by a special court-martial which has met the requirements of R.C.M. 201(f)(2)(B). 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 based on 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. Although the application was not filed within three years of the applicant's discovery of the alleged error or injustice, it is considered timely because it was filed within three years of his separation from active duty.<sup>6</sup>
3. The applicant alleged that his BCD is erroneous and unjust and should be upgraded. 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 the military record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>7</sup> 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."<sup>8</sup> And under the "liberal consideration" guidance, when deciding whether to upgrade the discharge of a veteran based on an alleged mental health condition, the Board must liberally consider the evidence, including the applicant's claims, and decide whether the preponderance of the evidence shows that the veteran had a mental health condition while in the Service that could excuse the veteran's misconduct; whether the mental health condition actually excused the behavior that adversely affected the discharge; and, if not, whether the mental health condition outweighs the misconduct or otherwise warrants upgrading the veteran's discharge.<sup>9</sup>
4. In his application to the Board, the applicant based his request on claims that he served honorably as a rescue swimmer, he suffered from PTSD, and he was falsely accused by a fellow Coast Guard member. The Board finds that these claims to do not constitute grounds for upgrading his discharge from the Coast Guard either separately or in combination:
  - a. The applicant argued that his discharge should be upgraded because he served honorably as a rescue swimmer. The record shows that the applicant pled guilty to seven offenses and was properly awarded a BCD pursuant to his court-martial sentence. After the applicant was sentenced, the Coast Guard Clemency Board reviewed his petition for clemency. In reviewing the applicant's petition, the Clemency Board considered his military record and unanimously recommended that his petition be denied. Similar to the decision of the Clemency Board, this Board finds that the applicant's military record does not excuse his criminal conduct. Specifically, the applicant's accolades as a rescue swimmer do not excuse his four assault charges against a civilian and at least one fellow member of the Coast Guard.
  - b. The applicant argued that an upgrade in his characterization of service is warranted because he suffered from PTSD. However, there is no evidence in the applicant's military record that he suffered from PTSD, and the applicant has not provided any

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<sup>6</sup> *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

<sup>7</sup> 33 C.F.R. § 52.24(b).

<sup>8</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

<sup>9</sup> *Id.*

evidence to support this allegation. Even if the applicant had provided evidence that he suffered from PTSD while in the Coast Guard, he failed to demonstrate how his alleged PTSD caused or contributed to his criminal conduct. The applicant argued that his PTSD inhibited his judgment and caused him to remain in a toxic relationship. However, this explanation does not explain how his alleged PTSD caused or contributed to his four assault charges.

c. The applicant argued that his discharge should be upgraded because a fellow Coast Guard member, presumably the female victim of his assault, made false allegations against him. First, the applicant did not specify what false allegations the Coast Guard member supposedly made against him and has submitted no evidence to support this allegation. Second, the applicant pled guilty to all of the offenses of which he was convicted. If the applicant believed that false allegations were made against him, he should have raised that as a defense at his court-martial.

5. The applicant has not proven by a preponderance of the evidence that his BCD was erroneous or unjust. Accordingly, his request to upgrade his discharge should be denied.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

**ORDER**

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

September 4, 2020

