DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-082

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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 on February 29, 2008, upon receipt of the applicant's completed application and military record, and assigned it to staff member [redacted] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated November 6, 2008, 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 asked the Board to correct his military record by upgrading his February 17, 2005, bad conduct discharge (BCD), which was part of his sentence following his conviction by a special court-martial on July 26, 2001. The applicant alleged that the BCD was "too harsh for [his] offenses" as he was only 22 years old at the time. In addition, he stated that he requested drug treatment but was instead unfairly charged with a crime. He alleged that in the other Armed Forces, someone who uses illegal drugs is provided drug treatment and does not face criminal charges. The applicant stated that he has learned from his mistake and wants his BCD upgraded. He did not submit any evidence to support his allegations.

SUMMARY OF THE RECORD

In September 1999, at the age of 20, the applicant enlisted in the Coast Guard and signed a service record entry acknowledging that the had been counseled about the Coast Guard's drug policies. While attending bootcamp, he completed a Substance Abuse Free Environment Awareness Course.

On January 16, 2000, the officer in charge (OIC) entered a CG-3307 form ("Page 7") in the applicant's record noting that he had reported back from liberty 24.5 hours late and had made no attempt to contact the unit.

On February 14, 2000, the OIC entered a Page 7 in the applicant's record reporting that on February 10, 2000, he was found to be incoherent and losing consciousness after returning from liberty. The applicant blamed his condition on a combination of beer and Paxil even though he had been told not to consume alcohol while taking Paxil. Therefore, the applicant was referred to an addictions prevention center. The OIC documented this event as the applicant's first "alcohol incident" and noted that any further alcohol incident might result in the applicant's discharge.

On March 6, 2000, the OIC entered a Page 7 in the applicant's record noting that the applicant had made "little to no effort" to complete his boat crewmember qualifications. The OIC advised the applicant that he had to complete the qualifications by April 6, 2000, or face disciplinary measures.

A Page 7 in the applicant's record notes that on March 31, 2000, he successfully completed a four-day Navy Alcohol Impact Course.

On April 12, 2000, the OIC entered a Page 7 in the applicant's record noting that the applicant had failed to complete his boat crewmember qualification and assigning the applicant two hours of extra military instruction every day until he completed the qualifications.

On April 25, 2000, the OIC entered a Page 7 in the applicant's record noting that he had reported for work late three days in a row and had made no attempt to contact the unit. The OIC warned the applicant that any future repetition of this conduct would result in disciplinary action.

On May 8, 2000, the OIC entered a Page 7 in the applicant's record noting his failure to pay his debts and repeated failure to "make good" on one "NSF check" in particular.

On May 9, 2000, the OIC entered a Page 7 in the applicant's record noting that he had reported for duty unshaven and in a uniform in disarray. The OIC warned the applicant that any future repetition of this conduct would result in disciplinary action.

On May 17, 2000, the OIC entered a Page 7 in the applicant's record noting that a local check-cashing company had complained that the applicant had written an "NSF check" on May 16, 2000.

On May 22, 2000, the OIC entered a Page 7 in the applicant's record noting that he had reported for duty unshaven and in a uniform in disarray. The OIC required the applicant to study the Uniform Regulations Manual and present training to the unit on it on May 29, 2000. He also warned the applicant that any future repetition of this conduct would result in disciplinary action.

On May 25, 2000, the OIC entered a Page 7 in the applicant's record noting that the check-cashing company had called again to complain that the applicant had not followed through on a repayment schedule he had agreed to on May 17, 2000, contrary to a direct order. The OIC also warned the applicant that any future repetition of this conduct would result in disciplinary action.

On May 26, 2000, the OIC entered a Page 7 in the applicant's record noting that another check-cashing company had called to complain that the applicant had written an "NSF check."

On May 30, 2000, the OIC entered a Page 7 in the applicant's record noting that on May 17, 2000, when ordered to "come clean," the applicant had denied the possibility that there were any more outstanding NSF checks, which was a false statement in disobedience of a direct order.

On July 6, 2000, the OIC entered a Page 7 in the applicant's record noting that the applicant had left town without permission and contrary to orders on July 3 and 4, 2000, when he was assigned to the boat crew. In addition, he had told different lies about his whereabouts on those days.

On July 11, 2000, the applicant was charged with being absent without leave (AWOL) from July 3 to July 5, 2000, and traveling outside a 100-mile radius during hurricane season contrary to orders, in violation of Articles 86 and 92 of the UCMJ.

On July 21, 2000, the OIC reported to the Group Commander that although the applicant had started out with a positive attitude, his attitude deteriorated quickly and he had repeatedly gotten into conflicts with other junior personnel and his supervisors. The OIC reported that disciplinary measures had had no effect on the applicant's conduct.

On August 2, 2000, the applicant was awarded nonjudicial punishment (NJP) at mast under Article 15 of the UCMJ for his offenses from July 3 to July 5, 2000. At mast, he was sentenced to reduction in rate from E-2 to E-1 and 45 days of extra duties. However, on August 18, 2000, the Group Commander suspended the sentence for six months based upon the advice of a doctor who stated that the applicant needed rehabilitation treatment. He noted that the applicant would be placed on performance probation and that if he failed to comply with all rules and regulations during the six-month probationary period, the suspension of the sentence would be vacated and he would be recommended for discharge. The applicant also received an unsatisfactory performance evaluation with extremely low marks in many categories (marks of 1 and 2 on a scale from 1 (lowest) to 7 (best)).

On September 6, 2000, the applicant's command noted in his record that he had been diagnosed as alcohol dependent and ordered to abstain from consuming alcohol indefinitely, to attend intensive rehabilitation treatment, and to comply with an aftercare program.

On November 7, 2000, the applicant completed his intensive rehabilitation treatment and returned to duty on performance probation for inaptitude, financial irresponsibility, and not adhering to core values. He was advised on a Page 7 that if he did not show progress during the six months, the command would initiate an administrative discharge.

On February 1, 2001, the applicant received another unsatisfactory performance evaluation with extremely low marks in many categories.

On March 2, 2001, the applicant's Commanding Officer entered a Page 7 in his record noting that an investigation had revealed that the applicant had violated the cutter's telephone

and computer rules many times. In addition, the applicant had been "caught smoking on the bridge wing, sleeping in the engine room, and 'gun decking' engine room readings. The Page 7 states that the applicant had demonstrated that he was "unwilling to put forth even the minimum effort required to become a qualified contributing member of [the crew] or the Coast Guard."

On March 2, 2001, the Group Commander notified the applicant that he intended to initiate the applicant's discharge because of his "repeated absenteeism, unwillingness to perform duties, tardiness, lack of reliability in payment of financial debts, an nonconformity with Coast Guard Uniform Regulations." He noted that the applicant's performance had not improved during his probationary period and advised the applicant of his right to submit a statement.

On March 2, 2001, the applicant responded to the Group Commander's notification. He waived his right to submit a statement and to consult counsel and noted that he did not object to being discharged.

On March 5, 2001, the applicant's Group Commander asked the Coast Guard Personnel Command (CGPC) for authorization to discharge the applicant due to his "unwillingness to perform prescribed duties, inaptitude and failure to adhere to Coast Guard core values." He attached to his request, the applicant's acknowledgment of notification and waiver of rights.

On March 9, 2001, CGPC authorized the applicant's honorable discharge for unsuitability. However, on March 28, 2001, the Group command asked CGPC to delay the applicant's discharge because he was the subject of an investigation that would likely lead to criminal charges under the Uniform Code of Military Justice (UCMJ) and judicial action. On April 4, 2001, CGPC agreed to the delay of the applicant's discharge.

On July 26, 2001, the applicant was convicted by a special court-martial, having pled guilty to several charges under the UCMJ. The investigation had revealed that he had wrongfully possessed and used OxyContin on divers occasions and that he had gone AWOL again. The court's order indicates that he pled guilty to (1) wrongful possession and use of a controlled substance in violation of Article 112a, UCMJ; (2) wrongful appropriation of military property of a value in excess of $100 (a vehicle) on May 11, 2001, in violation of Article 121, UCMJ; (3) breaking restriction by leaving base on May 11, 2001, in violation of Article 134, UCMJ; (4) unauthorized absence from May 11 to 12, 2001, in violation of Article 86, UCMJ; and (5) disobeying a lawful order on May 12, 2001, in violation of Article 92, UCMJ. Some specifications were withdrawn under a pre-trial agreement. He was sentenced to reduction in pay grade to E-1 and confinement for six months to be followed by a BCD.

On July 31, 2001, the applicant received another unsatisfactory performance evaluation with extremely low marks in many categories.

On August 27, 2001, the applicant was placed on "required appellate leave pending appellate review" of his case. His notification noted that members are not entitled to pay or allowances while on appellate leave unless, on appeal, the charges are dismissed or the BCD is set aside or remitted.

On November 8, 2001, the convening authority for the special court-martial approved the applicant's sentence but suspended the last month of confinement. The applicant appealed to the Coast Guard Court of Criminal Appeals, claiming that the specification of possession should be dismissed as a lesser included offense of use of a controlled substance; that the specification of unauthorized absence should be dismissed as a lesser included offense of breaking restriction; and that the BCD was "inappropriate severe for a junior enlisted member who self-referred for addiction to OxyContin when the OxyContin was initially prescribed by a Coast Guard contract physician."

On June 30, 2003, the Court of Criminal Appeals affirmed the conviction for possession but set aside the unauthorized absence charge as a lesser included offense in breaking restriction. Regarding the applicant's third assignment of error and the BCD, the court stated that he

> was initially prescribed OxyContin for a spider bite by a Coast Guard contract physician, but [he] did not seek help from the prescribing doctor for possible addiction, choosing, instead, to abuse the drug with illegal purchases upon depletion of the prescribed pills. Subsequently, at a time when [the applicant] was expecting administrative discharge from the Coast Guard for other reasons, he sought treatment for addiction to OxyContin by contacting his Command Drug and Alcohol Representative (CDAR) concerning his drug problem. As a result, [he] was hospitalized, and later enrolled in a post-hospitalization counseling program after his inpatient stay was completed. Thereafter, [he] was disenrolled from the post-hospitalization counseling program for attendance failures. In evaluating the appropriateness of [his] sentence, we have noted these circumstances, as well as his convictions for offenses other than OxyContin possession and use, such as violation of a lawful order, breaking restriction, and wrongful appropriation of military property. Contrary to the arguments advanced in the third assignment of error, we have concluded that a bad conduct discharge is not unduly severe punishment for [the applicant] and his offenses. Accordingly, that assignment of error is rejected. …
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> … The sentence has been reassessed in light of the dismissed unauthorized absence specification, and we are convinced that the adjudged sentence would have been the same if that offense had been dismissed earlier by the judge at trial. Moreover, we have concluded that the sentence approved below is appropriate for this appellant and his offenses, and on the basis of the entire record should be approved.

On July 28, 2003, the JAG certified the case for review. On March 30, 2004, the U.S. Court of Appeals for the Armed Forces issued a decision reversing the decision of the lower court because it found that the applicant's two-day unauthorized absence was a separate offense not necessarily included in the offense of breaking restriction. In so holding, the court noted the following facts:

- In March 2000, a Coast Guard civilian doctor had prescribed the drug OxyContin for the applicant.

- After his prescription ended, the applicant illegally obtained and continued to use the drug.
- After the applicant admitted his addiction to a doctor, the Coast Guard placed him in inpatient rehabilitation treatment and then daily outpatient treatment.
- After the applicant skipped several meetings that were required as part of his outpatient program, his command restricted him to base to ensure his presence at trial for alleged possession of OxyContin.
- While under restriction, the applicant requested a urinalysis to prove that he was not using OxyContin, but he failed to report for the scheduled urinalysis on May 11, 2001, and instead took a command vehicle without authorization and drove off the base. A municipal police officer stopped him the next day for driving erratically and arrested him when he discovered that the vehicle had been reported as stolen.

On November 17, 2004, the Commandant denied clemency and approved the execution of the applicant's BCD. On January 5, 2005, the Officer Exercising General Court-Martial Jurisdiction over the applicant ordered the BCD executed. On February 17, 2005, the BCD was executed.

VIEWS OF THE COAST GUARD

On July 15, 2008, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny the requested relief.

The JAG argued that the applicant's BCD was warranted not only as part of his court-martial sentence but also by the evidence of his misconduct in his military record. The JAG stated that although the applicant claims that he was punished simply for requesting drug addiction treatment, this claim is not supported in the record and he offered "no evidence, other than his self-serving declaration, to rebut the presumption afforded to the Coast Guard chain of command."

The JAG also adopted the findings and analysis provided in a memorandum on the case prepared by CGPC. CGPC reviewed the applicant's record of misconduct and stated that the BCD was "appropriate" in light of his offenses.

CGPC stated that even if the Board waives the statute of limitations, relief should be denied because a "complete review of the applicant's record does not reveal an error or injustice with regards to his processing for separation." CGPC stated that the applicant's bad conduct discharge was part of his sentence upon conviction of several serious offenses and that the Commandant denied clemency upon review and ordered that the BCD be executed. CGPC stated that the BCD was "just and commensurate … with the nature of the applicant's offenses. … There is no justification for upgrading his character of service." CGPC submitted copies of several documents from the applicant's military record, including the August 28, 1975, clemency memorandum recounting the applicant's offenses and testimony about racial tension.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 17, 2008, the Chair sent the applicant a copy of the advisory opinion and invited him to respond within thirty days. No response was received.

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(a) and (f)(2), which authorize the Board to take "action on the sentence of a court-martial for purposes of clemency."

2. Under 10 U.S.C. § 1552(b), an application to the Board must be filed within three years after the applicant discovers the alleged error in his record. The applicant's BCD was executed on February 17, 2005, and the Board received his DD 149 within three years of that date. Therefore, his application is timely.

3. The applicant alleged that his BCD was unduly harsh in light of his circumstances and offenses. The record indicates that the applicant was first prescribed OxyContin, an addictive drug, by a Coast Guard contract physician in March 2000 because of a spider bite. He became addicted and, after his prescription ended, bought and used OxyContin illegally. When he eventually advised a Coast Guard doctor of this problem, the Coast Guard provided him with intensive inpatient rehabilitation followed by outpatient treatment. However, he apparently failed rehabilitation, began missing his outpatient meetings, broke restriction, misappropriated a Government vehicle, and went AWOL for two days before he was arrested by municipal police. The Board also notes that Page 7s in the applicant's record indicate that, even before he was prescribed OxyContin, he was not a good performer: During his first three months following bootcamp, he had returned more than a day late from liberty, incurred his first "alcohol incident," and made "little to no effort" to complete his boat crewmember qualifications.

4. 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 record is erroneous or unjust.[1] 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."[2]

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[1] 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)).

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

5. The applicant submitted nothing to support his contention that his BCD was too harsh in light of the circumstances of his case and his offenses. Moreover, although the applicant claimed that he should have been sent to rehabilitation because he admitted his addiction, the record shows that the Coast Guard did in fact provide both inpatient and outpatient rehabilitative treatment. However, he failed rehabilitation and missed his outpatient meetings. In addition, he broke restriction, misappropriated a Government vehicle, and went AWOL until he was apprehended by local police.

6. The record shows that the applicant was represented by an attorney throughout the proceedings, that he received all due process, and that the Coast Guard committed no error in separating him with a BCD. However, under 10 U.S.C. § 1552(a), the Board may "remove an injustice"[3] from a veteran's record, as well as correct an error in the record. Therefore, the Board's review should consider whether the applicant's BCD now constitutes an injustice. With respect to upgrading discharges, the General Counsel of the Department of Transportation informed the BCMR on July 7, 1976, that it should not upgrade a discharge based on post-discharge conduct alone 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." The record indicates that the circumstances of the applicant's case, in particular the way he became addicted to Oxy-Contin and the fact that he originally admitted his problem and requested and received rehabilitation treatment, were taken into consideration by the judge in determining his sentence, the convening authority in approving the sentence, the Commandant in reviewing the sentence, and the appellate courts, which affirmed his BCD. The Board is not persuaded that the applicant's BCD is unfair simply because of the circumstances of his addiction and treatment. The applicant has not proved by a preponderance of the evidence that his BCD was disproportionately severe in light of today's standards.[4]

7. The Board does not, however, construe the 1976 guidance as prohibiting it from exercising clemency in court-martial cases under 10 U.S.C. § 1552(f), even if the discharge was not disproportionately severe in light of today's standards. Such a construction would be inconsistent with the nature of "clemency," which means "kindness, mercy, leniency."[5] Clemency does not necessarily require that a sentence have been unjust or wrong; on the contrary, it can be (and often is) forgiveness of punishment that is otherwise appropriate. An analysis under the 1976 guidance primarily considers whether the past discharge was unjust at the time or would be unjust if applied to a similarly situated servicemember today; a clemency analysis considers, instead, whether it is appropriate today to forgive the past offense that led to the punishment and to mitigate the punishment accordingly. However, there are no grounds in the record for granting clemency. The applicant has presented no evidence of facts that were not known at the time

[3] 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).

[4] Under the sentencing guidelines of the UCMJ, the applicant would likely receive a BCD if he were convicted of the same offenses today. *See* Manual for Courts-Martial United States (2008).

[5] BLACK'S LAW DICTIONARY (5th ed.)

of his trial and appeal or of post-discharge conduct that would warrant forgiving his several offenses under the UCMJ.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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