

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-087



FINAL DECISION

This proceeding was conducted according to 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 5, 2017, 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 February 17, 2016, 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, an [REDACTED] who was honorably discharged from the Coast Guard on August 1, 2013, asked the Board to correct his record to show that he received the Distinguished Flying Cross (DFC) or the Coast Guard Medal (CGM), instead of the Meritorious Service Medal (MSM) that he received on October 4, 2013. He stated that his immediate command recommended that he receive the DFC for his role in a daring rescue on [REDACTED], but that the [REDACTED] Area Commander downgraded the award to an MSM. The applicant alleged that "downgrading" the DFC to an MSM was unjust because his actions during the rescue clearly met the criteria for the DFC and he nearly lost his life during the rescue.

In support of his application, the applicant submitted a copy of the citation that was prepared by his command to accompany the proposed award of the DFC (see attached). The citation states that he was getting the award for his extraordinary heroism while participating in the dangerous rescue of an injured hiker on [REDACTED]. He also submitted a copy of the citation to accompany the award of the MSM that he received on October 4, 2013, for his heroic service in the performance of duty during the rescue of the hiker on [REDACTED] (see attached).

The applicant submitted a copy of another award, the Sikorsky Humanitarian Service Award, which states that he received it for his role in the perilous rescue of a hiker who had fallen off the south face of [REDACTED] and sustained serious injuries. He also submitted a copy

of a third award citation recognizing eight Coast Guard members (including the applicant) involved in the [REDACTED] rescue as the Coast Guard Foundation's Heroic Action Awardees. Finally, he submitted a copy of an article that was published in the Coast Guard Compass about another rescue swimmer who was one of four members of a helicopter crew awarded the Coast Guard Air Medal for his role in rescuing 12 crewmembers from a life raft near the Bahamas.

SUMMARY OF THE RECORD

On [REDACTED], the applicant was a rescue swimmer onboard two Coast Guard helicopters during the night-time rescue of a hypothermic and severely injured hiker on [REDACTED]. The applicant and another AST used climbing ropes and cold-weather survival gear to reach the hiker, a member of the Coast Guard who had fallen 400 feet down the snow-covered mountainside. After several hours and two potentially fatal falls, they reached the hiker, provided medical care to help stabilize him, moved him 100 feet down an unstable slope on a backboard, and hoisted him to the helicopter for transport to a hospital.

On April 21, 2013, the Sector [REDACTED] Commander approved and forwarded a nomination for the DFC award for the applicant. The nomination was approved and forwarded by the District [REDACTED] Commander on August 20, 2013. However, the final approving authority for the award was the [REDACTED] Area Commander, who awarded the applicant the MSM with "O" device.

[REDACTED]

The applicant was honorably discharged from the Coast Guard on August 1, 2013, and enlisted in the [REDACTED] Air National Guard on December 5, 2013, as an active duty guardsman. He is currently on active duty with the [REDACTED] Air National Guard serving as a Pararescue Specialist.

APPLICABLE LAW

Article 1.C.1. of the Coast Guard Medals and Awards Manual, COMDTINST M1650.25D, states that any active duty member who meets the eligibility criteria for an award may be recommended by competent authority who is senior to the individual being recommended.

Article 1.F. of the manual states that personal award recommendations will be addressed and forwarded via the chain of command to the "first level" delegated authority with jurisdiction over the individual at the time the act or service was performed and who is authorized to approve the recommended award.

Article 1.G.2. of the manual states that recommendations for awards previously disapproved by an awarding authority may be reconsidered only upon presentation of new and relevant material evidence that was not available at the time of the original recommendation.

Article 1.G.3.a. of the manual states that to more effectively exercise responsibility to recognize heroic or meritorious performance, an awards board shall be established by each Flag Officer or SES with awarding authority responsibilities. Responsibilities of the board include

carefully considering each case on its own merits. In doing so, the Board may recommend “[d]owngrading [REDACTED] award or returning through the chain of command to the lowest-level awarding authority with ability to approve a lower award.”

Article 2.A.8. of the manual provides the following eligibility criteria for a Distinguished Flying Cross:

[The medal may] be awarded to a person who, while serving in any capacity with the [REDACTED] distinguishes him or herself by heroism or extraordinary achievement while participating in aerial flight. To justify this decoration for [REDACTED] heroism, an act in the face of great danger, well above normal expectations, such as to distinguish the individual above those of comparable grade or rate performing similar service, is required. For achievement, the results accomplished must be so exceptional as to render the individual conspicuous among those of comparable grade or rate performing similar services. In considering the appropriate award for the various members of a flight crew, it is normally understood that the aircraft commander is responsible for the control and flying of the aircraft. Therefore, the aircraft commander is generally eligible for a higher award than other members of the flight crew. The remainder of the flight crew engaged in operations for which the aircraft commander receives recognition will receive recognition if the acts and/or services clearly merit an award. This is not intended to imply a crewmember [REDACTED] could not receive the same award as the aircraft commander. When the award is recommended for the operators of an aircraft in flight, the [REDACTED] “aeronautical skill” will be used in the closing remarks. When heroic or extraordinary achievement [REDACTED] is sufficient to warrant the award of the DFC, the Air Medal should be considered.

Article 2.A.9. of the manual provides the following eligibility criteria for the Coast Guard Medal:

[The medal may] be awarded to a person who, while serving in any capacity with the Coast Guard, distinguishes him or herself by heroism not involving actual conflict with an enemy. To justify this decoration, individuals must have performed a voluntary act of heroism in the face of great danger to themselves and such as to stand out distinctly above normal expectations. For acts of lifesaving or attempted lifesaving, the Coast Guard Medal requirements parallel those of the Gold Lifesaving Medal in that one displays extreme and heroic daring at the risk of one’s own life. See Chapter 4 for additional guidance on lifesaving medals.

Article 2.A.12. of the manual provides the following eligibility criteria for the Meritorious Service Medal:

[This medal may] be awarded to persons who have distinguished themselves by outstanding noncombat meritorious achievement or service to the United States. To justify this decoration, the acts or service rendered must have been comparable

to that required for the LOM but in a duty of lesser, though considerable, responsibility [REDACTED] should not be interpreted to preclude the award to any individual regardless of rank or rate, whose outstanding meritorious achievement or service meet the requirements. The MSM is the noncombat counterpart of the Bronze Star Medal and the non-aerial counterpart of the Air Medal. Therefore, acts of heroism of lesser degree than the Coast Guard Medal, and single acts of merit under operational conditions may justify this award. For Coast Guard personnel in a leave or liberty status, if deemed appropriate, the Silver Lifesaving Medal [REDACTED] counterpart in cases of heroic acts involving the saving of life from perils of the water. When the degree of meritorious achievement or service [REDACTED] [REDACTED] is not sufficient to warrant the award of the MSM, the Coast Guard Commendation Medal (CGCM) should be considered.

VIEWS OF THE COAST GUARD

On September 7, 2016, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that [REDACTED] relief in accordance with a memorandum submitted by the Commander, Personnel Service Center (PSC). The JAG argued that relief should be denied [REDACTED] because the Board should adhere to Coast Guard policy which states that disapproved awards [REDACTED] be reconsidered based on new information. The JAG noted that the applicant has not provided any new information to support his argument that he should have received the DFC and stated that the [REDACTED] Area Commander had the authority to determine the award nomination. Moreover, the JAG argued, the actions for which the applicant was awarded the MSM do not [REDACTED] the criteria for the DFC because the cited actions do not qualify as "aerial" in nature despite being effected by helicopter [REDACTED]

In its memorandum, PSC stated that the DFC is awarded to a member who, while serving in any capacity with the Coast Guard, distinguishes himself by heroism or extraordinary achievement while participating in aerial flight. In considering the appropriate award for the members of a flight crew, it is normally understood that the aircraft commander is generally eligible for a higher award than the other members of that flight crew. The remainder of the flight crew engaged in operations for which the aircraft commander receives recognition will receive recognition if the acts and/or services clearly merit an award.

Finally, PSC argued that the applicant did not provide sufficient evidence to prove that his recommendation for an MSM instead of the DFC is erroneous or unjust. The awarding authority reviewed the summary of action and determined that the MSM was more appropriate based on the policy in the Medals and Awards Manual. Furthermore, PSC added, because the applicant's actions in support of the rescue did not occur in aerial flight, the applicant does not qualify for the DFC per the requirements in the Medals and Awards Manual.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 27, 2016, the BCMR sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. On October 24, 2016, the Chair granted the

applicant's request for a 30-day extension to respond to the Coast Guard's recommendations, and he submitted his response on November 2, 2016.

In his response, the applicant stressed that his "main desire" in responding to the Coast Guard's recommendation is for the Board to understand the actual magnitude of the rescue mission that he was involved in and emphasized that the rescue "surpassed the limitations expected of a rescue swimmer in technical ability, intensity, and duration." He also disagreed with the JAG's argument that because he was on the ground instead of in the air during the rescue he is not eligible to receive the DFC. The applicant agreed that based on context, the DFC is not warranted in this case but argued that the "exceptional skill" he exhibited during the rescue should justify the DFC. He noted that rescue swimmers are typically in the water or on the ground and are never truly engaged in aerial flight and that denying the DFC to rescue swimmers and flight mechanics is unfair to these members. The applicant asserted that even though he was on the ground during the rescue mission, he was in fact "participating in aerial flight" as a contributing member of the crew to save a life in extremely hazardous conditions and that the DFC can be awarded to "a person who, while serving in a capacity with the CG distinguishes themselves by heroism or extraordinary achievement."

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. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.¹ 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.²

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.³

3. The applicant alleged that the Coast Guard erroneously downgraded the Distinguished Flying Cross that he had been recommended for given that he nearly lost his life during the rescue on [REDACTED]. 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 preponderance of the evidence that the disputed information is erroneous or unjust.⁴ Absent

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

² *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).

³ *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

⁴ 33 C.F.R. § 52.24(b).

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.”⁵

4. The record shows that the applicant played a key role in the perilous rescue of an injured hiker on [REDACTED] on [REDACTED], and was recommended by his immediate command and the district commander for the DFC. The narrative summaries of the rescue contained in the record paint a vivid picture of a perilous rescue which clearly required an immense amount of skill, daring, courage, and fortitude on the night of [REDACTED], and that the applicant was instrumental in reaching the injured hiker, providing medical care, and getting him to safety.

5. The Board finds that the applicant has not proven by a preponderance of the evidence that the [REDACTED] Area Commander abused his discretion or committed an error or injustice in not awarding the applicant a DFC. The criteria for the DFC, which requires courage and heroism in aerial flight and is primarily given to pilots (who fly aircraft into combat and other dangerous situations) rather than other aircrew members, strongly support the Coast Guard’s argument that the DFC would not be an appropriate medal for the courage, skill, and heroics shown by the applicant on [REDACTED].

6. Why the [REDACTED] Area Commander decided that the applicant’s actions did not meet the eligibility criteria for a CGM is not apparent in the record. The CGM requires that a member “perform[] a voluntary act of heroism in the face of great danger to themselves and such as to stand out distinctly above normal expectations” and show “extreme and heroic daring at the risk of one’s own life.” However, after receiving the recommendation of an Awards Board, the Area Commander found that the applicant’s heroism and performance deserved the MSM, which is “the noncombat counterpart of the Bronze Star Medal and the non-aerial counterpart of the Air Medal,” and signifies “acts of heroism of lesser degree than the Coast Guard Medal.” The Area Commander’s assessment is entitled to a presumption of regularity⁶ and should not be overturned absent new evidence or a clear abuse of discretion. There is no new evidence in the record, and the Board is not convinced that the Area Commander abused his discretion in awarding the MSM, instead of the CGM.

7. Accordingly, the applicant’s request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁶ 33 C.F.R. § 52.24(b); see *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties “correctly, lawfully, and in good faith.”).

ORDER

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

February 17, 2017

