DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-096

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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 application was docketed on June 16, 2003, upon receipt of the applicant's completed application and military records.

This final decision, dated March 25, 2004, is signed by the three duly appointed members who were designated to serve as the Board for Correction of Military Records (Board or BCMR) in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his military record by upgrading his bad conduct discharge (BCD) to a general discharge under honorable conditions (the second best discharge characterization).

APPLICANT'S ALLEGATIONS

The applicant alleged that the court-martial at which he was sentenced to a BCD was a farce. He alleged that an attorney did not counsel him and no one testified against him at the court-martial. He also alleged that he believed that he was a victim of racial discrimination. The applicant further stated the following:

> I am a U.S. Coast Guard veteran of World War 2 from June 2, 1943 to my discharge in August 1945. My Coast Guard discharge was a Bad Conduct Discharge. I am of the opinion that my discharge was not correct. I also served in the Merchant Marines from 1951 to 1986. I believe I was

discriminated against. Black people in the 1940's, an[d] even now for that matter, did not always get a fair hearing. I only spoke with the lawyer once. The person I was supposed to have done something to never came forth to testify against me. It was only the shore policeman's word against mine. My only mistake is that when the shore policeman said someone accused me of pulling a knife I became afraid and ran. I never had a knife on me that night. Our uniform fitted so tight you could not carry a knife if you wanted to. At the hearing I never had a chance to speak in my defense. I had no witnesses come forward to testify against me. I believe I was railroaded. I have reached the age of 78 years and after all of this time it's time to set the record straight. I would appreciate your office looking into this miscarriage of justice. I deserve better.

SUMMARY OF THE RECORD AND SUBMISSIONS

The applicant enlisted in the Coast Guard on May 26, 1943 and was discharged on August 9, 1945. The record reveals that at the time of his discharge, the applicant's average marks (on scale of from 1 to 4 with 4 being highest) were 2.50 proficiency in his rating and 3.25 in conduct. The record also reveals that the applicant completed a 2-day firefighting course, a course of training at the Naval Armed Guard Gunnery School, and another course of training in Newport, Rhode Island.

On January 16, 1944, the record shows that a deck court convicted the applicant of disturbing the peace, resisting arrest, and abusive and profane language to a superior officer. He was sentenced to 10 days in solitary confinement.

On January 1, 1945, in accordance with his plea, a deck court convicted the applicant of being absent over leave (AOL) for eight days. He was sentenced to lose $18 of pay per month for two months.

On February 23, 1945, in accordance with his plea, a summary court-martial (SCM) convicted the applicant of being absent without leave (AWOL) for three days. He was sentenced to 15 days confinement suspended for six months, and to lose $25.00 per month for two months.

On March 6, 1945, the suspended confinement was vacated because the applicant refused duty and failed to obey a lawful order. He was placed in the brig to serve 15 days of confinement.

On May 21, 1945, a SCM convicted the applicant of forcibly resisting arrest by a Navy shore patrol. He was sentenced to a BCD and to lose $25 per month for six months. On May 31, 1945, the convening authority (CA) approved the sentence but "that portion of sentence pertaining to loss of pay [was] reduced to twenty-five dollars

($25) for a period of one (1) month" so that the BCD could be executed as quickly as possible.

On August 6, 1945, the applicant was taken before a captain's mast for being AWOL from August 3 to August 6, 1945. The charge was dropped to permit execution of the BCD.

On August 9, 1945, the applicant was discharged with a BCD.

Discharge Review Board (DRB)

On September 19, 1950, the applicant petitioned the DRB to review his BCD and to award him an honorable discharge instead. The DRB did not upgrade the applicant's BCD and concluded that it was legal, proper, just and equitable under applicable standards of the Coast Guard and Naval law and discipline. The Secretary of the Treasury approved the DRB decision on April 2, 1951.

VIEWS OF THE COAST GUARD

On October 30, 2003, the Judge Advocate General (TJAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request.

In recommending denial of relief, TJAG argued that the application was untimely. He stated that applications for correction of a military record must be filed within three years of the date of the alleged error or injustice was, or should have been, discovered. 33 CFR § 52.22. He said that the Board may still consider the application, however, if the applicant provides sufficient evidence to warrant a finding that it would be in the interest of justice to excuse the failure to file timely. As TJAG pointed out, in determining whether it is in the interest of justice to waive the statute of limitations, the Board should consider the reasons for the delay as well as the likelihood of the applicant's success on the merits of his claim.

In this case, TJAG noted that the applicant admitted on his DD Form 149 that he discovered the alleged error on the date of his discharge in 1945. He further stated that even if the statute of limitations began to run from the date of the DRB decision, the application was filed more than 50 years late. TJAG also argued that the applicant has not provided a compelling reason for not filing his application sooner, offering that the statute of limitations should be waived because he allegedly suffered racial

discrimination, which according to TJAG is not a persuasive reason to waive the statute of limitations, particularly in the absence of corroborating evidence.

Also, the TJAG argued that the statute of limitations should not be waived because there is very little likelihood that the applicant will prevail on the merits of his claim. In this regard the TJAG offered the following:

> (1) Applicant offered no evidence to support his claim that the Coast Guard committed an injustice in separating him with a punitive discharge.
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> (2) Applicant also offered no evidence attempting to link that punishment to the fact that he is an African-American.
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> (3) Absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith. Arens v. United States, 969 F.2d 1034, 1037 (1992) . . . Moreover applicant bears the burden of proving error. 33 C.F.R. § 52.24. Here, applicant offers no evidence that the Coast Guard committed an error or injustice. To the contrary, the record shows that Applicant earned the punitive discharge he was awarded by a court-martial based on his poor-performance and criminal conduct.

TJAG stated that the BCMR may review a SCM only with respect to granting clemency on the sentence. See, 10 U.S.C. § 1552(f). However, he further stated that the applicant's commanding officer (CO), as convening authority, is charged with oversight of the entire process and has the ability to grant clemency or to set aside the decision of the SCM. He argued that absent evidence that the CO's determinations were clearly erroneous or that there was a violation of one of the applicant's substantial rights, the CO's decision should be upheld.

TJAG argued that the applicant has not presented evidence that a factual or legal error occurred in his case. Instead, according to TJAG, the applicant claimed that his punishment was inappropriately severe because of racial animus. He advised that when assessing the appropriateness of a punishment, the Board must be particularly deferential to the broad discretion of military authorities. He stated that the power of clemency like the power of pardon is intended to address extraordinary circumstances that normal legislative and judicial processes cannot effectively address. See 59 AM JUR 2d 10-11. He stated that the seriousness of the offense for which the applicant was convicted and received the BCD and the other disciplinary actions in his record supports and justifies the BCD.

Finally, TJAG compared the military justice structure that existed in 1945 with that of today, as follows:

> The military justice system in effect in 1945 differed in many respects from the current system contained within the Uniform Code of Military Justice. One of those differences is in terminology. Applicant was sentenced to a [BCD] by a [SCM]. At the time of Applicant's offense the three tiers of courts-martial available were Deck Court, Summary Court, and General Court. Today's three-tiered system consists of Summary Court, Special Court, and General Court . . . [T]he court that sentenced Applicant to a bad conduct discharge was roughly equivalent to today's Special Court-Martial. Applicant had already been to the less formal Deck Court (roughly equivalent to today's [SCM]) on two occasions and to another [SCM] . . . on one occasion before being tried before a second [SCM] for the criminal conduct that resulted in his being awarded a punitive discharge . . . The court-martial that tried Applicant was fully authorized to award a [BCD] and was roughly equivalent to today's Special Court-Martial, where a [BCD] would still be authorized for the same offense.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 3, 2003, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond. 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 section 1552 of title 10 of the United States Code.

2. The application was not timely. To be timely, an application for correction of a military record must be submitted within three years after the applicant discovered or should have discovered the alleged error or injustice. See 33 CFR 52.22. This application was submitted approximately 58 years after the discharge in question and 52 years after the DRB denied his request for an upgrade. To be timely, it should have been submitted by at least April 1, 1954, three years after the Secretary approved the action of the DRB.

3. The Board may still consider the application on the merits, however, if it finds it is in the interest of justice to do so. The interest of justice is determined by taking into consideration the reasons for and the length of the delay, and the likelihood of success on the merits of the claim. See Dickson v. Secretary of Defense, 68 F. 3rd 1396 (D.D.C. 1995).

4. The applicant did not state why he failed to file his application earlier than 2003. Thus, the Board must attempt to ascertain those reasons, and weigh them along with all the other evidence to do justice. In this regard, in past decisions granting relief, the BCMR has concluded that if the applicant did not know the BCMR existed until recently, that fact along with all the other facts in those cases justified waiving the statute. BCMR Nos. 322-91, 349-89, and 152-81. The applicant joined the Coast Guard at 18 years of age with a seventh grade education. The record is unclear as to when the applicant learned about the existence of the BCMR. However, the fact that the Board received the applicant's request through the offices of Congressman Charles Rangel (D-NY), combined with the fact that the record shows no evidence that he was advised at the time of the DRB proceedings about the BCMR, suggests that he did not. While the Board has ultimately concluded, as discussed below, that relief should be denied in this case, it finds that this case is sufficiently similar to the above-cited BCMR cases, and presents a sufficiently "close call" on the merits, that the Board should proceed to the merits of the claim and not reject it due to the applicant's noncompliance with the statute of limitations.

5. The Board finds no evidence of error in this case because the 1945 SCM had the authority to issue a BCD as part of its sentence at that time.[1] Nor, although it is clear that the applicant takes issue with the SCM's finding that he forcibly resisted arrest, is there evidence in the record sufficient to permit the Board to conclude that the applicant has met his burden to overcome the presumption that the SCM carried out its duties correctly, lawfully, and in good faith when it found him guilty of that charge. Therefore, whether the applicant's BCD should be upgraded because of alleged injustice must be judged as a matter of clemency, under the standard set forth in the Department of Transportation General Counsel's memorandum of July 2, 1976. The General Counsel stated that the Board may upgrade a discharge if it is "adjudged to be **unduly severe** in light of contemporary standards,"(emphasis added) but, "the Board should not upgrade a discharge unless it is convinced, after having considered all the evidence [including changes in community mores, civilian as well as military, since the time of discharge, as well as post-service conduct, in addition to the applicant's record], that in light of today's standards, the discharge was disproportionately severe vis-à-vis the conduct in response to which it was imposed." As discussed below, application of this standard to the facts of applicant's case does not warrant relief.

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[1] We note that today, SCMs are prohibited from imposing BCDs.

6. There are several prior BCMR cases that are instructive in applying the standard outlined in the General Counsel's 1976 memorandum. These are BCMR No. 35-95, No. 322-91, No. 349-89, No. 89-78, No. 152-81, No. 24-81, and No. 8-80.

7. Some of these prior Board cases discuss the differences in rights enjoyed by an accused at a World War II-era court-martial as compared to those enjoyed by an accused at a present day court-martial. Unquestionably, today an accused enjoys many more rights under the Uniform Code of Military Justice (UCMJ) and Manual for Courts Martial than those who were court-martialed in World War II under the Articles of the Government of the Navy, 10 USC ch. 36 (1934). However, this difference in rights is not itself sufficient justification to upgrade a BCD. It is, however, one of the factors that motivated the Board to proceed to the merits.

8. The Deputy General Counsel, in upgrading a BCD to a general discharge in BCMR No. 322-91, considered, in addition to the forum at which that applicant was convicted, his young age, his limited (tenth grade) education, his AWOL offenses (the applicant also had a civil conviction for petty theft of a mate's uniform), and the length of time he had suffered under the onus of his BCD (48 years). The instant applicant's situation is somewhat similar. He joined the Coast Guard at 18 years of age with a seventh grade education. Moreover the applicant has suffered under the onus of his BCD for 58 years.

9. The other factor considered by the Deputy General Counsel in BCMR No. 322-91 was the type of offenses committed by that applicant, namely absence offenses. The Deputy General Counsel stated, "upgrades from bad conduct discharges have been customarily granted by the Board where absences were involved." She noted that Chapter 12 (Separations from the Service) of the Personnel Manual did not prohibit awarding a general discharge under the circumstances in BCMR No. 322-91.

The offenses committed by the applicant in the instant case were in some respects not that different from those of the applicant in 322-91. The applicant in 322-91 was convicted at court-martial of AWOL offenses, but he had a civil conviction for theft. The applicant in the current case was twice convicted by a Deck Court: once for disturbing the peace, resisting arrest, and abusive language to a superior officer, and once for being AWOL. He also had an SCM conviction for a short AWOL prior to the SCM that awarded the BCD for his conviction for forcibly resisting arrest of a shore patrol officer. The applicant's disciplinary history is also somewhat similar to the applicants whose BCDs were upgraded in BCMR Nos. 152-81[2] (deck court and SCM

[2] In BCMR 152-81, the applicant was convicted at deck court for being AOL for six days and violating a station order. On February 3, 1945, he went AWOL and was apprehended on February 24, 1945. On April 5, 1945, he was convicted in a city court of two counts of theft. On June 1945, he was convicted by a summary court-martial of being AWOL for 126 days and for wearing civilian clothes while AWOL. He was sentenced to a BCD. In addition, the decision noted that the applicant's final average marks were 1.7

convictions for AWOLs, an orders violation, with a civilian conviction for two counts of theft) and 349-89[3] (captains mast and SCM convictions for creating a disturbance, AWOLs and missing ship's movement).

10. The Board in the cases cited above did not treat the "other offenses" as a bar to relief or to a finding that under today's standards those BCDs were unduly harsh. While the instant request is a close case, the offenses committed by this applicant are distinguishable from the ones in the other cases cited. In the other cases, some of which involved civil offenses of theft and the military offense of creating a disturbance, none involved a conviction involving the use of force. In this case, on the other hand, the applicant, following a history of military infractions for which he was subjected to increasing punitive measures, was convicted at SCM of forcibly resisting arrest by a shore patrol officer. In BCMR 322-91, the Acting General Counsel, acting under delegated authority from the Secretary, disagreed with the majority and agreed with the minority that a BCD should be upgraded to a general discharge because, the offenses for which the BCD was awarded "did not involve moral turpitude, *use of force*, nor were they heinous enough to likely result in a bad conduct discharge under contemporary Coast Guard standards." (Emphasis supplied).

11. Moreover, contrary to the Board decisions in which clemency powers had been exercised to upgrade a discharge from a BCD to a general discharge, the majority, if not all, involved principally AWOL or AOL offenses. The records in some of those cases revealed civil convictions for other non-absence related offenses, but in the instant matter all the prior offenses for which applicant was convicted were against the Coast Guard and the one for which he received the BCD, forcibly resisting arrest, involved violence, which in the Board's opinion supported the more severe punishment. In recent cases, the Board has refused to upgrade BCDs awarded for conduct that included breaking arrest, illegal use of cocaine, and having an inappropriate relationship with a subordinate in the chain of command. See BCMR Nos. 1997-180, 1999-123, and 2002-046. The applicant committed a violent offense and that makes his conduct comparable in seriousness to the offenses in those cases where the Board refused to upgrade the BCD. In the Board's opinion the offense of forcibly resisting arrest falls into that class of cases warranting a BCD as determined by the Deputy General Counsel in BCMR No.

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for proficiency and 2.4 for conduct. Also, the decision noted that the applicant was then incarcerated in a state prison for passing checks, according to the applicant.

[3] In BCMR 349-89, the applicant's disciplinary history is described as follows: "on January 23, the applicant was brought to captain's mast for creating a disturbance ashore . . . On April 6, 1943, he was tried by [SCM] for having been [AWOL] for sixteen days . . . On September 5, 1943, he was brought to captain's mast for [AWOL] for two days. On December 21, 1943, he was tried by [SCM] and received a [BCD] for missing the sailing of his ship and for being AWOL for ten days . . ." It is noted that one member dissented in BCMR 349-89, and argued that missing ship's movement added an element that distinguished that case from the other AWOL or AOL cases in which the Board had granted relief.

322-91. The applicant's situation is further aggravated by the fact that he already had three other court convictions when he was convicted by the SCM that awarded the BCD. Further, in upgrading the applicant's BCD in BCMR No. 322-91, the Deputy General Counsel relied, in part, on Articles 12.B.2 and 12.B.12 of the CG Personnel Manual, which permitted members who engaged in repeated absenteeism to be discharged with a general discharge. The CG Personnel Manual contains no such express provision for the offense of forcibly resisting arrest by a shore patrol officer.

12. Under current Coast Guard standards, a bad conduct discharge is authorized for the offense of which applicant was convicted in 1945. The fact that such punishment is authorized does not by itself mean, of course, that it necessarily is imposed in such cases. The Board believes that the applicant's case might well have a different and less punitive outcome in today's Coast Guard, especially in light of the substantially improved procedural protections now in place. The possibility of a different outcome is not the standard the Board must apply, however. The Board must be convinced that a bad conduct discharge for the offense of forcibly resisting arrest, and in light of the previous record of misconduct compiled by the applicant, is disproportionately severe under current standards, and as discussed above it is not so convinced.

13. The Board also considered the fact that the applicant served thirty-five years in the Merchant Marine, combined with the absence of any record evidence suggesting any negative equities with respect to the applicant's conduct since 1945. Post service conduct may be considered in deciding whether to upgrade a BCD, but it alone may not form the basis for doing so. See General Counsel's memorandum, BCMR and "Clemency", July 2, 1976.

14. For the foregoing reasons, the application is denied.

ORDER

The application of former xxxxxxxxxxxxxxxxxx USCG, for correction of his military record, to upgrade his discharge from the Bad Conduct Discharge to an honorable discharge under general conditions, is denied.