

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-067

██████████
██████████)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on January 14, 2017, and assigned the decision to staff attorney ██████████ to prepare for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 22, 2017, 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 who received a bad conduct discharge (BCD)¹ on March 11, 1977, pursuant to the sentence of a Special Court-Martial,² asked the Board to upgrade his discharge. The applicant stated that he entered the Coast Guard in 1972 and that his father passed away on July 25, 1974. He stated that his mother was at home alone with his twelve year old brother, so he requested a hardship discharge from the Coast Guard and was denied. The applicant stated that at that time, the armed services were downsizing and many people were being granted early discharges. After he was denied a hardship discharge, he left his post to go home to help his mother and younger brother. He asked that the Board consider his application in the interest of justice, so that he “may be eligible for veteran’s benefits.”

¹ There are five types of discharge: 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 bad conduct discharge (BCD), and a general court-martial may award a BCD or a dishonorable discharge.

² There are three types of court-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 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 jury of military members, and the sentence may include a lengthy confinement, dishonorable discharge, and death. In all courts-martial, the convening authority retains the power to set aside findings of guilt and reduce any sentence.

In support of his allegations, the applicant submitted a copy of his discharge form DD 214, which is included in the summary below, and a copy of his father's death certificate. The death certificate states that the applicant's father died of natural causes on July 25, 1974.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on February 7, 1972, at age 17, in [REDACTED]. He served in [REDACTED] as a Steward after successfully completing recruit training. He had no disciplinary infractions until he received his first non-judicial punishment (NJP) on June 6, 1973, for dereliction of duty.³ He was awarded reduction in paygrade to E-2, fourteen days' restriction to base, and two hours of extra duty for fourteen days. In July 1973, the applicant was transferred to the CGC [REDACTED] based in [REDACTED].

Shortly after reporting aboard the CGC [REDACTED] the applicant was reported Absent Without Leave (AWOL) from August 27, 1973, to August 31, 1973. For this period he received NJP on September 10, 1973, and was awarded twenty-five days of restriction to the ship with extra duty and a \$25 forfeiture for one month. He then went AWOL again from November 12, 1973, to January 19, 1974, when he was apprehended in his hometown. He had been declared a deserter as of December 11, 1973. The applicant was tried before a Summary Court-Martial for this unauthorized absence on February 12, 1974, and was awarded confinement at hard labor for twenty days, ten days' restriction to the ship, and reduction to paygrade E-1.

On March 14, 1974, the applicant received NJP for being AWOL on March 5 and 6, 1974. He was awarded thirty days' restriction to the ship with extra duty and forfeiture of \$163 in pay for two months. The applicant again went AWOL, however, from March 18, 1974, to June 11, 1974, when he was again apprehended in his hometown. The applicant had missed the sailing of the CGC [REDACTED] on March 18, 1974. For this offense, the applicant was tried by a Special Court-Martial on July 12, 1974, and was awarded confinement at hard labor for one month and \$217 forfeiture for one month. While serving the sentence of confinement for this offense, the applicant's father passed away suddenly on July 25, 1974.

On August 12, 1974, the applicant received NJP for failing to arrive at his appointed place of duty at the prescribed time. For this he was awarded thirty-five days' restriction to ship with extra duties. On September 11, 1974, the applicant received another NJP for being AWOL and was awarded ten days of extra duties.

On October 3, 1974, the applicant submitted a request for a hardship discharge.⁴ He stated that it was imperative that he return home to assist his mother in raising his younger brother,

³ Pursuant to Article 15 of the Uniform Code of Military Justice, codified at 10 U.S.C. § 815, a commanding officer may impose non-judicial punishment (NJP) on members of the command for minor offenses, instead of referring the charges for trial by court-martial.

⁴ Pursuant to Article 12-B-13 of the Personnel Manual, the Commandant could discharge a member for hardship "when it is considered that an undue or genuine dependency or hardship exists, that the dependency or hardship is not of a temporary nature, and that the conditions have arisen or been aggravated to an excessive degree since entry into the Service." One example provided is that as "a result of the death or disability of a member of an individual's family, the release from active duty of the member is necessary for the support or care of a member or members of

who was thirteen years old. He claimed that his mother could not work because she had to stay home to take care of his brother, and so he was his family's only means of financial support. He provided the names and addresses of two people who knew about the situation. He submitted a letter from a pastor, who stated that the applicant's father had died without insurance and that, if the applicant was not discharged, his mother would have to seek work while his younger brother was still in school. He also submitted letters from his uncle and mother, who stated that she needed the applicant at home because his younger brother was not yet old enough to work.

The applicant's request for a hardship discharge was strongly endorsed by his CO, but the endorsement was based on the applicant's repeated offenses and marginal performance. Following review by a panel, the applicant's request was denied on November 20, 1974, on the basis that the information provided by the applicant "does not qualify under these conditions." The Commandant found that the applicant failed to show that the hardship created an undue, genuine, and permanent hardship.

The applicant was AWOL again from December 30, 1974, until April 29, 1975, when he was apprehended in his hometown. It was this absence for which he was awarded a BCD. The proceedings are summarized in a memorandum from the Chief of the Office of Personnel (COP) to the Commandant, dated February 2, 1977, which concerns the Commandant's reconsideration of the applicant's clemency request.

Synopsis of the Applicant's Case

The COP's memorandum states that the applicant was tried before a Special Court-Martial on May 13, 1975, for violating Article 86 (unauthorized absence) and Article 87 (missing movement of a ship) of the Uniform Code of Military Justice (UCMJ). The specifications for the violations state that the applicant missed the movement of CGC [REDACTED] on December 30, 1974, and was absent without authorization from December 30, 1974, to April 29, 1975. The applicant pled not guilty to both counts and was represented by military counsel, but he was found guilty on both counts. He was sentenced on May 13, 1975, to a BCD, forfeiture of \$200 per month for three months, hard labor without confinement for three months, restriction to the unit for two months, and reduction to Seaman Recruit, E-1.

According to the COP, during the proceedings, the court considered four instances of NJP,⁵ one Summary Court-Martial conviction, and one Special Court-Martial conviction. The synopsis provided a summary chart for these past NJPs and Court Martial convictions:

the family." The request must include at least two affidavits substantiating the hardship; the names and addresses of other people familiar with the situation; statements showing family members' occupations, incomes, and financial obligations; and the reasons the available resources are insufficient to provide the necessary care or support for the family. Upon receipt of the request, the claims are investigated and the request is reviewed by a panel, which makes a recommendation to the Commandant.

⁵ The applicant had been awarded five NJPs. The chart included in the synopsis does not include the first NJP the applicant received on June 6, 1973, for dereliction of duties. The NJPs included in the chart cover only instances in which the applicant was AWOL.

Date of Proceeding	Violation	Punishment Awarded
September 10, 1973	NJP – UCMJ Article 86	25 days of restriction 25 days of extra duties \$25 forfeiture for 1 month
March 14, 1974	NJP – UCMJ Articles 86, 134 ⁶	30 days of restriction 30 days of extra duties \$163 forfeiture for 2 months
August 12, 1974	NJP – UCMJ Article 86	35 days of restriction 35 days of extra duties
September 11, 1974	NJP – UCMJ Article 86	10 days of extra duties
February 12, 1974	Summary Court-Martial – UCMJ Articles 86, 87	Confinement at hard labor for 20 days Reduction to SR (E-1)
July 12, 1974	Special Court-Martial – UCMJ Articles 86, 87	Confinement at hard labor for 1 month \$217 forfeiture for 1 month

According to the COP, before the arraignment, the applicant’s defense counsel had twice moved to dismiss the Article 86 charge (alleging AWOL) on the grounds that it “was multiplicitious with” the second charge (alleging missing a movement). The judge denied the motions but stated that he would consider the Article 87 charge “as being multiplicitious for sentencing purposes.” The judge stated that the Article 86 charge was more serious for sentencing purposes, so he would only consider that charge for sentencing.

According to the COP, the judge considered reports of two psychiatric evaluations. The first, conducted on March 11, 1974, had resulted in a diagnosis of “immature personality/ situational anxiety.” The second, conducted on May 9, 1975, found that the applicant suffered from an “anti-social personality, with a long-standing history of maladaptive patterns of behavior.” The psychiatrist noted that further counseling was unlikely to change the applicant’s pattern of behavior and that it was best for the applicant to be separated from the Coast Guard as unsuitable.

The COP also commented that the applicant’s decision to plead not guilty had forced the Coast Guard to prove its case. During the trial, four witnesses testified for the prosecution and none were called by the defense. The applicant’s XO aboard the CGC ██████ testified that he had personally reminded the applicant of the sailing date two days before departure. The XO stated that the applicant had acknowledged the date and the fact that he was required to be on board. The three other witnesses all testified that the applicant had failed to return aboard prior to sailing. The judge found the applicant guilty of both charges.

⁶ UCMJ Article 134 is a “General Article” and is treated as a catch-all for miscellaneous misconduct. It is not clear from the record why the applicant was charged with violating Article 134 at this time.

During sentencing proceedings, the defense called several witnesses. Their testimony related primarily to the applicant's performance while on CGC [REDACTED]. The COP stated that the testimony "proved beneficial to the Government inasmuch as each testified that they would not wish [the applicant] to return to the ship under their supervision." The XO testified that the applicant "had flashes of good performance" and had sought out a hardship discharge, which was denied. The applicant made an unsworn statement before the judge as well. He stated that he had originally liked the Coast Guard and he had no disciplinary problems during his first nineteen months of service. He said after reporting to CGC [REDACTED] he felt he could not adapt to military life. Counseling sessions with his XO did not solve his problems. The applicant stated that "he no longer liked the Coast Guard."

The judge sentenced the applicant to receive a BCD, forfeiture of \$200 per month for three months, hard labor without confinement for three months, restriction to the unit for two months, and reduction to Seaman Recruit, E-1. He made a further [REDACTED] recommendation that if the applicant's conduct was satisfactory from that date until action was taken, that consideration be given to suspending the BCD for a probationary period and that steps be taken to process the applicant for an administrative discharge.

Review Process

According to the COP, after sentencing on May 22, 1975, the applicant was reduced in rank pursuant to the sentence and placed on appellate leave awaiting review of the Special Court-Martial. On July 31, 1975, the convening authority approved the sentence as to the BCD and reduction to paygrade E-1. The convening authority chose not to follow the judge's recommendation regarding a probationary period. The record was then forwarded for review. On January 5, 1976, the District Legal Officer assessed the evidence as to its merits and bearings on the determination of the sentence. He stated that "the charges and specifications had been legally sufficient, the [applicant's] substantial rights had not been prejudiced, the findings were correct in law and fact and that the sentence as acted upon by the convening authority was appropriate." He added that the sentence adjudged was less than the authorized maximum punishment, and he therefore found the sentence appropriate given the gravity of the offenses and the applicant's background.

On January 16, 1976, the District Commander approved the findings and sentence as acted upon by the convening authority. The record was then reviewed by the Coast Guard Court of Military Review, which considered an "extensive appellate argument." The applicant challenged the constitutionality of the trial, arguing that Congress did not have the constitutional authority to include the Coast Guard as an "armed force" within the UCMJ. The Court of Military Review affirmed the findings and sentence on July 26, 1976, after finding that repeated legislative determinations had been made that Congress was well within the scope of its constitutional powers to determine that the UCMJ applies to members of the Coast Guard. The applicant appealed this determination, but on November 16, 1976, the Court of Military Appeals denied the petition, thereby upholding the decision of the Court of Military Review and terminating the appellate review process.

Personal Profile

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The COP included in his memorandum a profile of the applicant for the Commandant's consideration. He stated that the applicant had had no apparent family problems and no record of civil offenses before he entered the Coast Guard on February 7, 1972. He had attended high school through tenth grade and then a vocational high school until "excessive truancy" led to his withdrawal in 1971. Statements provided at the time the applicant enlisted in the Coast Guard indicated that the applicant's father "was disinterested in ██████████'s development and paid little attention to him."

The COP also noted that the applicant had become thoroughly "fed up" with the Coast Guard and that the feeling was mutual. The applicant had undergone extensive counseling, rehabilitative programs, and confinement, all of which appeared to have had no effect on his behavior. During the applicant's twenty-two months aboard the CGC ██████████ he had gone AWOL five times for a total of nearly eight months. In addition, he spent nearly two months in confinement at the Naval Correctional Center. The applicant's performance during the remaining twelve months was stated to have been "considered below average." The COP also noted that the applicant's "return to that unit was not desired by those who had been his immediate supervisors."

The COP concluded by explaining that the only determination remaining was whether the circumstances measured against the standards of equity and good conscience warrant the Commandant's approval of the BCD or whether residual clemency should be granted. The COP opined that based on equity alone, the case lacked grounds for clemency. He stated that during "the period of approximately 27 months which elapsed between [the applicant's] enlistment and the departure on leave without pay, he rendered only 17 months of barely satisfactory service to the Coast Guard." In addition, the applicant's continued and repeated absences had required his shipmates to carry the burden of his assigned watches and duties. The administrative workload due to the applicant's absences was also high. The COP went so far as to state that other members "with far better records have received punitive discharges."

As far as good conscience, the COP stated that the applicant's entire military record, his satisfactory service, the sudden loss of his father, "and the Commandant's seemingly arbitrary disapproval of his request for hardship discharge" must be taken into account. The applicant had performed satisfactorily from February 1972 until August 1973, advancing to an E-3 while stationed in ██████████. However, the applicant's declining performance was well documented after he was assigned to the CGC ██████████ before the death of his father. The COP stated, however, that good conscience had already been shown in this case when the convening authority exhibited leniency by approving only the punitive discharge and the reduction to paygrade E-1, and remitting the \$200 forfeiture, hard labor without confinement, and restriction. "There can be no doubt that [the applicant] was aware of the ultimate consequences through his continued misconduct." The COP noted that the applicant had not shown any contrition or remorse for his conduct. Due to the applicant's "repetitive offenses, his refusal to correct his behavior and his testimony," the COP concluded that he had earned a BCD and therefore recommended that the Commandant not grant clemency and allow the applicant to be discharged with a BCD.

On February 8, 1977, the COP informed the applicant that the Commandant had reviewed the applicant's case and that clemency was not granted. The applicant was therefore to be discharged with a BCD in accordance with the Special Court-Martial sentence.

The applicant was discharged with a BCD on March 11, 1977. The character of service is "Under Other Than Honorable Conditions." The remarks section states "Reason for separation: sentence of a Special Court Martial 75MAY13... Placed home in a leave without pay status from 75MAY22 to 77MAR11." The applicant signed the DD 214.

VIEWS OF THE COAST GUARD

On June 26, 2017, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC) and recommended denying relief.

PSC stated that the application is untimely and should be dismissed for extreme untimeliness. PSC reviewed the facts of the case and recommended that no relief be granted. PSC stated that the applicant has failed to show that the character of discharge was erroneous or unjust. The applicant's discharge proceedings were conducted correctly and in accordance with Coast Guard policy, as evidenced by the COP's February 2, 1977, memorandum to the Commandant. The applicant received his DD 214 in 1977 with a characterization of service as "Under Other Than Honorable Conditions," which is the appropriate characterization for a BCD in accordance with Coast Guard policy COMDTINST M1900.4 (series). PSC stated that there is no justification for upgrading the BCD and therefore recommended denying relief.

RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 29, 2017, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a response 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.
2. An application to the Board must be filed within three years of the discovery of the alleged error or injustice in the record.⁷ The applicant did not provide any compelling explanation for his failure to timely dispute the character of his discharge. He asked that the Board consider his application in the interest of justice so that he may now receive veteran's benefits. The applicant was discharged in 1977 and signed his DD 214 at that time. Thus, the application is very untimely.

⁷ 10 U.S.C. § 1552(b).

3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.⁸ In *Allen v. Card*, the court stated that the Board should not deny an application for untimeliness without “analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review”⁹ to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted that “the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review.”¹⁰

4. The applicant did not justify his long delay in challenging his discharge, and the Board’s cursory review of the merits shows that his claim cannot prevail. The records show that he was AWOL on at least six occasions totaling nine months, and some of his absences occurred before his father died. The record also shows that he received due process pursuant to his final court-martial. The convening authority showed leniency by approving only the BCD and reduction in paygrade, and the convictions and sentence were upheld by the Court of Military Review and the Court of Military Appeals. The Commandant reviewed the applicant’s request for clemency, declined it, and approved the sentence. Although the applicant alleged that he should have received a hardship discharge because his father had died and his mother needed to stay at home with his brother, the record shows that his brother was 13 years old at the time; there was no evidence of disability; and his mother stated that she needed the applicant at home because his brother was too young to work, not because she was unable to work. Based on these records, the Board cannot conclude that the denial of the applicant’s request for a hardship discharge was erroneous or unjust. The Board has found no evidence of any error or injustice in the applicant’s military records, which are presumptively correct.¹¹

5. Accordingly, the Board will not excuse the untimeliness of the application or waive the statute of limitations. The applicant’s request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁸ *Id.*

⁹ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

¹⁰ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

¹¹ 33 C.F.R. § 52.24(b).

ORDER

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

September 22, 2017

