DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-046

[redacted]

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 December 10, 2018, and assigned the case to the staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision dated March 25, 2022, 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 Dishonorable discharge[1] on August 6, 2018, pursuant to the sentence of a general court-martial,[2] asked the Board to correct his record by upgrading his discharge to a Bad Conduct Discharge (BCD).

The applicant, through counsel, explained that on October 23, 2015, he was convicted, pursuant to his pleas, of one specification of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ), and one specification of assault consummated by a

[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 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.

battery, in violation of Article 128, UCMJ. He was sentenced to 70 months of confinement, reduction to E-1, and a mandatory Dishonorable discharge. In accordance with the Pretrial Agreement, the convening authority approved the adjudged sentence, but suspended any confinement in excess of four years in accordance with the Pretrial Agreement. The applicant claimed that during the sentencing portion if his trial, his civilian defense attorney, Ms. F, failed to provide him with the defense he paid for. Specifically, and solely at issue here, the applicant claimed that Ms. F failed to negotiate a pretrial agreement that limited the punitive discharge to a BCD.

The applicant has put forth one argument in support of upgrading his discharge. He claimed that had it not been for the ineffective assistance of his counsel, he would have received a better discharge at the time of his sentencing.

In support of his request for a discharge upgrade, the applicant submitted a letter of reference from the victim's mother, a letter from his current co-counsel, and a Memorandum for Secretaries of Military Departments from the Department of Defense (DoD), which issued new guidance to DoD's Military Review Boards (MRB) on issues of equity, injustice, and clemency determinations:

- In the letter of reference from the victim's mother, the victim's mother expressed both her concern for how her family was treated by local investigative authorities and her support of the applicant. She further stated she does not believe applicant is a predator or a threat to society. In addition, the victim's mother implied that although she no longer has contact with the applicant, it is not because she finds him to be a threat or dangerous, but because she thought it was best for everyone involved if she did not see him. The victim's mother affirmed that the applicant "has a supportive network of family and friends" and "has a lot to offer with his many talents and will in no doubt be a positive member of society." She concluded her letter of reference by asking that these things be taken into consideration with the applicant's possibilities of parole.
- The applicant's current counsel provided a letter highlighting her knowledge and experience working as an Army Judge Advocate. She also expressed her belief that the applicant's sentence was excessively severe, that the sentiments of the victim and her family toward the applicant were "grossly exaggerated" at trial, and that the applicant received ineffective assistance of counsel during his trial. Current counsel stated that the most egregious failing of the applicant's previous defense counsel was her failure to secure a BCD for the applicant in the pretrial agreement, instead of the Dishonorable discharge he received.
- The four-page Memorandum for Secretaries of the Military Departments—issued on July 25, 2018, by DoD—provides DoD's Military Discharge Review Boards and Boards for Correction of Military Records (BCMRs) with guidance on how to handle reviews moving forward. Specifically, this memorandum provides "standards and principles to guide DRBs and BCMRs in application of their equitable relief authority."

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on July 21, 2009, at age 18 and entered the Machinery Technician rating as an MK3.

According to pretrial documents, the applicant was accused of committing the following acts in 2013 and 2014:

- On divers occasions in 2013 and 2014, the applicant committed a sexual act upon a child older than 12 but younger than 16.
- On or about the first week of September 2014, the applicant unlawfully threw the victim to the ground and spit in her face.
- On or about the last week of December of 2014, the applicant threw the victim against a truck door with his hands and forearms.

On May 21, 2015, the applicant was charged with the following:

a) Charge 1 - Sexual abuse of a child older than twelve but younger than sixteen, in violation of Article 120b of the UCMJ

b) Charge 2 – Throwing to the ground and spitting in the face of a victim of the sexual assault, in violation of Article 128 of the UCMJ

c) Charge 3 – Threats of bodily violence, which would cause discredit to the military services, in violation of Article 134.

d) Charge 4 – Threats of slander, which would cause discredit to the military services, in violation of Article 134.

e) Charge 5 – Physical violence against his own dog, which would cause discredit to the military services, in violation of Article 134.

In August 2015, the applicant and his military and civilian counsel signed an eight-page pre-trial agreement. His military counsel was a Navy Commander and JAG. In the agreement, the applicant stated that he was satisfied with his civilian and military defense counsel "in all respects." In addition, he agreed to plead guilty to the first two charges and not guilty to the rest, and he acknowledged that he would be required to provide a DNA sample and to register as a sex offender. He acknowledged that he had been advised that "any punitive discharge that is adjudged and ultimately approved in my case may adversely affect my ability to receive retirement pay and any and all other benefits accrued as a result of my military service." The pretrial agreement does specify what character of discharge the applicant would receive from the Coast Guard. It limited his length of confinement to "not exceed four years."

At trial on October 23, 2015, the applicant, who was again represented by both civilian and military defense counsel, pled guilty to charges 1 and 2, and not guilty to all other charges. The judge accepted his pleas, convicted him on those two charges, dismissed the other charges, and sentenced him subject to the terms of the pretrial agreement negotiated on his behalf by his civilian

and military defense attorneys. The applicant was immediately transferred to a Navy brig to begin his period of confinement.

On January 26, 2016, the applicant's request for clemency was denied by the Seventeenth Coast Guard District Commander, a Rear Admiral.

The applicant appealed his sentence to the U.S. Coast Guard Court of Criminal Appeals, asserting that he was entitled to credit for time served while in confinement and restriction. He was represented by a new military attorney for this appeal. On July 31, 2017, his case was affirmed in part and denied in part.

On December 12, 2017, the applicant's conviction became final when the Court of Appeals for the Armed Forces denied applicant's Petition for Grant of Review.

On April6, 2018, the applicant was released from confinement to be processed for separation.

On May 18, 2018, the Coast Guard ruled that because the applicant and his counsel had failed to file a petition for clemency within 60 days of his court-martial conviction becoming final, the Coast Guard would perform a residual clemency review.

On June 11, 2018, the convening authority for the court-martial denied any relief in the final residual clemency review.

On August 7, 2018, the applicant was discharged.

VIEWS OF THE COAST GUARD

On June 27, 2019, a Judge Advocate (JAG) for 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. The Coast Guard stated that relief should be denied for the following reasons: The Board does not have the authority to grant the relief sought by the applicant, and the applicant's case does not warrant clemency.

The Board Does Not Have the Authority to Grant the Relief Sought

The JAG argued that under 10.U.S.C. § 1552, the Board does not have the authority to grant the relief sought by the applicant. Specifically, the Coast Guard argued that under 10 U.S.C. §1552, following a court martial conviction, the authority of the BCMR is limited to a review of the sentence for purposes of clemency. The purpose of this clemency is to provide extraordinary relief by reducing the sentence of a person convicted of a crime on the basis of equity and good conscience. According to the JAG, in the Coast Guard BCMR clemency process, a Board may not look to error that may have occurred at the trial; rather the Board may only apply leniency standards if the circumstances surrounding the conviction and sentence warrant mercy.

The JAG argued that if the Board granted relief based on the claim of ineffective assistance of counsel, it would be due to an alleged error that occurred during the sentencing portion of the

applicant's trial, not due to what society views as a disproportionate injustice. The JAG argued that the alleged deficiencies of the applicant's counsel could have been deliberate trial decisions and relate to a potential error at the trial court level, not the severity of the punishment compared to the crime the applicant was convicted for.

Finally, the JAG argued that the applicant received the full protections afforded an accused within the military criminal justice system. Specifically, after pleading guilty, the applicant participated in an appellate review (at two levels), clemency review by the convening authority, and the clemency review board. Now, the applicant asserts that due to ineffective assistance of counsel his conviction and sentence should be amended. However, the Coast Guard argued that this is not a relief the Board may grant based on the reasons alleged by Applicant.

Applicant's Case Does Not Warrant Clemency

The Coast Guard argued that the applicant's multiple sexual offenses with a child under the age of sixteen exempts him from receiving clemency. In the eyes of the military—both at the times of his conviction and in 2019—sexual assault was one of the most horrendous crimes in the military. Since the applicant's conviction, multiple government agencies, including Congress, have taken steps to directly combat sexual assault, which includes creating harsher penalties for the convicted. The Coast Guard stressed that the applicant does not deny having sex with a person under the age of 16 and has not put forth any evidence of his rehabilitation. Instead, what the applicant has submitted is a letter of forgiveness from the victim's mother. The Coast Guard argued that although this letter might be considered noble, it does not justify clemency.

In addition, the JAG argued that there was nothing disproportionate about the applicant's Dishonorable discharge for the crimes he committed. The JAG stated that the Coast Guard views the applicant's conduct as reprehensible, having brought dishonor to the Coast Guard, and completely contrary to the core values of the Coast Guard. The JAG argued that nothing within the applicant's military service or conduct since his convictions justifies an upgrade.

Finally, the Coast Guard argued that the applicant's reliance on the Department of Defense's Memorandum on Clemency is misplaced and not authoritative because the Coast Guard does not follow the DoD's policy on clemency, but instead must follow its own policy. To support their position, the Coast Guard submitted a copy of the 1976 Memorandum on Clemency from the General Counsel of the Department of Transportation (DOT), predecessor to Department of Homeland Security, who was the delegate of the Secretary at the time. The Coast Guard concluded that the applicant has failed to present facts that support the type of relief requested.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 19, 2019, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited him to respond within thirty days. The applicant was granted extensions of the time to respond and submitted his response to the advisory opinion on February 28, 2020.

In his response, the applicant contested the Coast Guard's claims that he is asking the Board to review his court-martial on the grounds of legal error. The applicant argued instead that he is asking the Board to grant clemency, and in support of his request he is asking the Board to take

into consideration the legal errors as a factor under COMDTINST 5814.1. The applicant claimed that the Coast Guard conceded in their response that the list of factors presented in COMDTINST 5814.1 is not limiting or binding. In addition, the applicant stated that under *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988), the Board can grant clemency for any reason it wants and can consider legal errors under a sub-category of "mercy" under COMDTINST 5184.1(10).

The applicant argued that the Coast Guard's claim that the 2018 Memorandum on Clemency from the DoD does not apply to Coast Guard is unconvincing because the Memorandum is directed to *all* BCMRs and the USCG Board's authority to grant clemency is derived from Title 10 of the United States Code, which covers the DoD and the UCMJ. As such, the applicant believes the Coast Guard's reliance on this argument is unconvincing. However, the applicant argued that even if the Coast Guard were to rely solely on the 1976 DoT Memorandum, the applicant would still qualify for clemency in the form of an upgraded discharge.

The applicant also claimed he is not seeking clemency solely on the basis of post-service conduct but is seeking clemency relating back to the errors he experienced during his court-martial.[3] Additionally, the applicant argued that the "community norms" have changed significantly since 1976 and taking these changing norms into consideration, a Dishonorable discharge for someone who has pled guilty and taken responsibility for his conduct is disproportionally severe. According to the applicant, "community standards," as outlined in Article 60(c)(4)(C)(i) of the UCMJ,[4] indicate a BCD is appropriate.

Finally, the applicant argued that although the Coast Guard is correct and sexual assault within the military is a persistent and serious problem, the applicant's case is not a case of non-consensual sexual contact, but rather a consensual relationship with a 15-year-old who turned 16-years-old during her relationship with the applicant. Furthermore, on September 5, 2019, the applicant successfully completed his parole and has become a productive member of society. He holds two jobs and is renting an apartment and maintaining a productive relationship. He continues to meet with his support group and maintain his sobriety, and his supervisor intends to send him to obtain additional training certifications which would continue to increase his pay. An upgraded discharge would only help the applicant in his current endeavors. The applicant believes that the continued support from his friends and family only strengthens his argument for clemency. The applicant concluded his response to the Coast Guard's advisory opinion by stating he does not deserve to endure a lifelong stigma of a Dishonorable discharge.

In addition to the above referenced arguments, to supplement his case, the applicant submitted a letter of reference on his own behalf and letters of reference from family members and his current partner. In summary, these letters state the following:

1. The applicant asked for clemency on the basis that he has accepted responsibility for his actions, completed his parole, rehabilitated himself, and found stable employment.
2. The applicant's brother asked the Board to grant clemency to the applicant based on the applicant's change in conduct and behavior, the fact the applicant has gained and

[3] This contradiction in the applicant's arguments is addressed in the last paragraph of Summary of the Record.
[4] The Board was unable to locate or verify this UCMJ citation.

maintained stable employment, the completion of applicant's parole, and the remorse the applicant has expressed in private for the things he has done.

3. The applicant's father asked the Board to grant clemency to the applicant on the grounds that the applicant has shown genuine remorse for his actions, experienced tremendous personal growth, successfully completed his parole, participated in group and individual counseling, and maintained employment since his release from confinement.
4. The applicant's mother asked the Board to grant clemency to the applicant on the grounds that the applicant has completed his parole and maintained employment.
5. The applicant's girlfriend asked the Board to grant clemency to the applicant on the grounds that she believes people can change, become better people, and learn from their mistakes. She stated that the applicant is a hard worker and has shown her that he wants to be a productive member of society.

APPLICABLE LAW AND POLICY

R.C.M. 1001 of the Manual for Courts-Martial discusses matters to be presented by the defense to aid the court-martial in determining an appropriate sentence in relevant part:

> (1) *In general.* The defense may present matters in rebuttal of any material presented by the prosecution and may present matters in extenuation and mitigation regardless whether the defense offered evidence before findings.
>
> (A) *Matter in extenuation*. Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.
>
> (B) *Matter in mitigation*. Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency. It includes the fact that nonjudicial punishment under Article 15 has been imposed for an offense growing out of the same act or omission that constitutes the offense of which the accused has been found guilty, particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember.

R.C.M. 1103 of the Manual for Courts-Martial discusses the punishments that can be handed down by the convening authority in relevant part:

> (a) *In General.* Subject to the limitations of this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of an offense by a court-martial.
>
> (b) *Authorized Punishments.* Subject to the limitations of this manual, a court-martial may adjudge only the following punishments:
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> **…**
>
> (8) *Punitive Separation.* A court-martial may not adjudge an administrative separation from the service. There are three types of punitive discharges.
>
> **…**

> (B) *Dishonorable Discharge*. A dishonorable discharge applies only to enlisted persons and warrant officers who are not commissioned and may be adjudged only by a general court-martial. Regardless of the maximum punishment specified for an offense in Part IV of this Manual, a dishonorable discharge may be adjudged for any offense of which a warrant officer who is not commissioned has been found guilty. A dishonorable discharge should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment; and
> (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;

R.C.M. 1105 discusses the matters that can be submitted by the accused after a sentence is adjudged in relevant part:

> (a) *In General*. After a sentence is adjudged in *any* court-martial, the accused may submit matters to the convening authority in accordance with this rule.
>
> (b) *Matters Which May Be Submitted*.
> (1) The accused may submit to the convening authority any matters that may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence except as may be limited by R.C.M. 1107(b)(3)(C). The convening authority is only required to consider written submissions.
> (2) Submissions are not subject to the Military Rules of Evidence and may include:
> (A) Allegations of errors affecting the legality of the findings or sentence;
> (B) Portions or summaries of the record and copies of documentary evidence offered or introduced at trial;
> (C) Matters in mitigation that were not available for consideration at the court-martial, except as may be limited by R.C.M. 1107(b)(3)(B);
> (D) Clemency recommendations by any member, the military judge, or any other person. The defense may ask for any such recommendation.
> (c) *Time periods.*
> (1) *General and special courts-martial.* After a general or special court-martial, the accused may submit matters under this rule within the later of 10 days after a copy of the authenticated record of trial or, if applicable, the recommendation of the staff judge advocate or legal officer, or an addendum to the recommendation containing new matter is served on the accused. If, within the 10-day period, the accused shows that additional time is required for the accused to submit such matters, the convening authority that authority's staff judge may, for good cause extend the 10-day period for not more than 20 additional days; however, only the convening authority may deny a request for such an extension.

R.C.M. 1107 of the Manual for Courts-Martial discusses the actions that may be taken by the convening authority in relevant part:

> (1) *Discretion of convening authority*. The action to be taken on the findings and sentence is within the sole discretion of the convening authority. Determining what action to take on the findings and sentence of a court-martial is a matter of command prerogative. The convening authority is not required to review the case for legal errors or factual sufficiency.
>
> **…**
>
> (3) *Matters considered.*
>
> **…**
>
> (d) *Action on the sentence.*
>
> (1) *In general.* The convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased. The convening or higher authority may not increase the punishment imposed by a court-martial. The approval or disapproval shall be explicitly stated.
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> (2) *Determining what sentence should be approved*. The convening authority shall approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused. When the court-martial has adjudged a mandatory punishment the convening authority may nevertheless approve a lesser sentence.

The discussion section of R.C.M. 1107(2) of the Manual for Courts-Martial states the following: "In determining what sentence should be approved the convening authority should consider all relevant factors including the possibility of rehabilitation, the deterrent effect of the sentence, and all matters relating to clemency."

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. The application was timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

3. The applicant alleged that his Dishonorable Discharge should be upgraded because he suffered from ineffective assistance of counsel in that he qualified for a BCD, which his attorneys should have negotiated as a part of his pretrial agreement but did not. 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.[5] Absent evidence to the contrary, the Board presumes that

[5] 33 C.F.R. § 52.24(b).

Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."[6]

4. Under 10 U.S.C. § 1552(a), the Board may "remove an injustice" from a veteran's record, as well as correct an error in the record. The Board has authority to determine whether an injustice has been committed on a case-by-case basis.[7] Therefore, the Board must consider whether the applicant's Dishonorable discharge constitutes an injustice. With respect to upgrading discharges, the General Counsel and delegate of the Secretary of the Department of Transportation informed the BCMR on July 7, 1976, that it "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 Board does not, however, construe this standard as prohibiting it from exercising clemency in court-martial cases under 10 U.S.C. § 1552(a) and (f), even if the discharge was neither disproportionately severe compared to the misconduct, nor clearly inconsistent with today's Coast Guard standards. Such a construction would be inconsistent with the very nature of "clemency," which means "kindness, mercy, leniency."[8] 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 service member today; a clemency analysis considers, rather, whether it is appropriate today to forgive the past offense that led to the punishment and to mitigate the punishment accordingly.

5. The JAG argued that the Board has no authority to upgrade the applicant's Dishonorable discharge under 10 U.S.C. § 1552(f). That statute states the following:

> (f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under subsection (a) may extend only to—
>
> (1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or
>
> (2) action on the sentence of a court-martial for purposes of clemency.

Therefore, the Board finds that it does indeed have the authority to take "action on the sentence of a court-martial for purposes of clemency" by upgrading a punitive discharge.

6. The applicant argued that his Dishonorable discharge is unjust because he suffered from ineffective assistance of counsel. Specifically, he argued that he qualified for and should have received a BCD at the time of his plea hearing because under Article 60(c)(4)(C)(i) of the UCMJ

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

[7] Decision of the Deputy General Counsel, BCMR Docket No. 2001-043. According to *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577, and *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976), purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is "treatment by military authorities that shocks the sense of justice."

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

the convening authority "can" approve a BCD when a servicemember pleads guilty, but his defense counsel failed to ask for and negotiate for this as part of the pretrial agreement. However, the applicant has failed to show that his civilian and military counsel never considered or attempted to obtain a BCD for him, and his military counsel is presumed to have acted lawfully, correctly and in good faith.[9] The fact that the signed pretrial agreement does not mention or require a BCD for the applicant is not evidence that his military and civilian attorneys' negotiations with the prosecuting attorney failed to address the possibility of a BCD.

The record shows that the applicant was represented by qualified and certified counsel at his General Court Martial. He made a knowing and conscious decision to enter into a pretrial agreement. The Board presumes that the military judge conducted an appropriate inquiry into the plea and to the pretrial agreement. In addition, the applicant received the benefit of his bargain. His adjudged sentence of 70 months' confinement was lessened to suspend all confinement in excess of 48 months. This represents a significant benefit to the applicant in sentencing. And the approved sentence was affirmed on appeal. The applicant would have had ample opportunity to contest the adequacy of his representation during the appellate review process, when he was represented by a different attorney, had he chosen to do so. Based on the Board's reading of the opinion from the United States Coast Guard Court of Criminal Appeals, CGCMC 0341, 31 July 2017, this issue was not raised on appeal. We decline to adjudicate it at this level. The applicant has not demonstrated any legal error, insufficiency, or injustice occasioned by ineffective assistance of counsel.

Finally, although the applicant is arguing ineffective assistance of counsel, his pretrial agreement indicates that at no time during his court-martial hearing and sentencing was he unsatisfied with the representation he received. On the contrary, within his pretrial agreement he signed and attested to the following, "I am satisfied with Ms. [F], my civilian defense counsel and CDR [J], USN, my defense counsel, in all respects and consider them to be qualified to represent me at this court-martial." Under section 1105 the applicant was afforded the opportunity to bring these matters, in written form, to the convening authority after he received a copy of the authenticated record of trial. There is no record that the applicant attempted to address his concerns regarding his character of discharge or his claim of ineffective assistance of counsel under section 1105 of the M.C.M. Therefore, the Board finds that the applicant has failed to prove by a preponderance of the evidence that relief on the grounds of ineffective assistance of counsel should be granted.

7. Even if the Board were to assume, without evidence, that both his military and civilian counsel failed to request a BCD, the applicant has not shown that the convening authority would have approved a discharge other than Dishonorable if requested at the time. According to R.C.M. 1107(d) of the Manual for Courts-Martial, the convening authority *may* disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature. Here, because the convening authority did not grant clemency, the convening authority presumably did not feel that clemency was appropriate in this case. His denial of clemency shows

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

that the convening authority considered the Dishonorable character of the applicant's discharge to be appropriate.

In addition, in subsection (e) of 120b the maximum punishment for sexual abuse of a child is, "Dishonorable Discharge, forfeiture of all pay and allowances, and confinement for 20 years." In all instances in the R.C.M. of sexual abuse or sexual assault of a child, the maximum punishment allowed is a Dishonorable discharge, not a BCD. Furthermore, section 1107(b)(1) of the M.C.M. then in effect, *Discretion of the Convening Authority,* states, "The action to be taken on the findings and sentence is within the sole discretion of the convening authority. Determining what action to take on the findings and sentence of a court-martial is a matter of command prerogative." Therefore, the convening authority for the applicant's court-martial was well within his prerogative and did not err by not upgrading the applicant's Dishonorable discharge.

8. Although the applicant did not argue for clemency on the basis of rehabilitation or post-service conduct in his initial application, it will nonetheless be addressed here because it was argued in his response to the views of the Coast Guard. In his response to the views of the Coast Guard, the applicant provided multiple letters of reference from himself, family members and his current partner. Each letter clearly states the writer's support of the applicant and their belief that he deserves the relief he seeks. However, the record shows and the applicant pled guilty to very serious crimes and the letters submitted as evidence of his rehabilitation are unpersuasive.

In addition, the applicant's crimes are not of a variety where social norms and public opinion have shifted in favor of the applicant. Sexual assault and violence against women, no matter their age, have seen heightened consequences being adjudged upon the accused, not lessened. The Coast Guard's guiding directive on upgrading discharges and clemency is the 1976 Memorandum on BCMR Clemency, which states the Board should *not* upgrade a discharge unless it is convinced, after all evidence has been considered, in light of today's standards the discharge was disproportionately severe vis-à-vis the conduct in response to which it was imposed. (Emphasis added.) The Board finds that the shifting norms of which this Memorandum speaks are not in the applicant's favor. On the contrary, taking today's shifting cultural norms into account and the increased demand for sexual offenders to be held accountable to the fullest extent, there was nothing egregious or extreme about the applicant's sentence. Furthermore, the applicant states that he has taken responsibility for his actions; however, within his response to the Coast Guard's views, the applicant acknowledges that sexual abuse within the military is a persistent problem, but contends that the applicant's case is not a "a sexual assault" case involving nonconsensual conduct, but one of consensual conduct with a girl who was fifteen and turned sixteen during their relationship. The Board could not find any such justification within the law or the M.C.M. that absolves the applicant of his crimes simply because a minor child allegedly "consented" to the acts that the applicant committed. It is also important to note here that the applicant was not just convicted of sexual abuse of a child, but also of assault consummated by battery against the victim. Again, taking shifting social norms into consideration, the Board finds nothing disproportionate or egregious about the applicant's sentence. For the reasons stated above, the applicant has failed to prove, by a preponderance of the evidence, that his case warrants clemency. Therefore, the applicant's request for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of former [redacted] for correction of his military record is denied.

March 25, 2022

[redacted]