DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-013

Xxxxxxxxxxxxxxxxxxxx
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FINAL DECISION

[redacted]

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 BCMR docketed the case on November 3, 2003, upon receipt of the applicant's completed application and military records.

This final decision, dated October 13, 2004, is 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—who received a general discharge under honorable conditions from the Coast Guard on February 9, 1989—asked the Board to correct his record by upgrading his discharge to honorable; by removing "Misconduct" as the narrative reason for separation shown on his discharge form, DD 214; and by granting him a retirement with pay and benefits as a [redacted] pay grade E-7).

The applicant stated that in December 1986, five other members of his division — some of whom were his subordinates—were caught stealing government property. The applicant alleged that he had previously told his supervisor, Mr. P, that he suspected some theft was occurring and that Mr. P advised him to try to determine "who, what, where and when" before contacting the Coast Guard Investigative Service. The applicant stated that one of the five members was caught stealing and turned the other four in "to get a better chance at a lighter sentence."

The applicant alleged that at some point, the prosecutor, Mr. B, decided that the applicant was "the ramrod of what he called 'an enormous amount of crime' and charged [the applicant] with the items that were stolen. He gave all five of these sailors testimonial immunity and they remained in the Coast Guard to testify against me … saying I had given these men a direct order to steal the property." The applicant pointed out that the property had been stolen over a two-year period and asked, if he had actually given such orders, why did the five sailors wait until they were caught to report the abuse.

The applicant alleged that in 1987 he was erroneously charged with and convicted of theft of government property. He alleged that no government property was found in his possession and that at first he did not take the charges seriously and did not hire a lawyer. He alleged that he was a "scapegoat" for someone else's crime. He alleged that he offered to let the Coast Guard search all of his personal property, but they did not. He alleged that all of the stolen property was found in the other five men's possession and that none of the paperwork used to acquire the stolen tools had his signature on it.

The applicant argued that the punishment he received "was too harsh for the crime. I paid the Coast Guard for the property someone else stole, spent one year in federal prison, and lost all my retirement." He alleged that he was required to pay $2,400 for the cost of the stolen property, as well as court costs. He alleged that people convicted of similar crimes had received much less punishment. He also alleged that it was unjust for the Coast Guard to punish him with the general discharge and no retirement because he was never court-martialed but was convicted in federal court. He stated that because he was honorably discharged and reenlisted on December 4, 1987, ten days before his court-martial, the Coast Guard lost the authority to court-martial him, and his case was "handed over to the federal court system."

The applicant also stated that upon reporting to the training center where he had worked on September 28, 1988—the day after his release from prison—he was advised to return home until discharged. He alleged that he should have been allowed to work until his discharge on February 9, 1989.

The applicant alleged that in 1999, the Coast Guard's Discharge Review Board (DRB) "was going to change my discharge to 'honorable' until they found the letter I signed saying I 'could' be deprived of my rights as a veteran." The applicant alleged that he signed this letter only because the prosecuting attorney was harassing his family and he "was fearful they might find some other way to lock me up again."

In support of his allegations, the applicant submitted copies of some of his military records and letters from retired military members. A retired Coast Guard commander who met the applicant in 1993 described him as a hard-working businessman

and great asset to the community. A retired rear admiral of the Navy described the applicant as a very conscientious worker whose "conduct has always been above reproach" and "by far the most active person in community affairs" in their county. A retired major in the county police department stated that the applicant and his wife "are very much involved in civic and service projects" and "are to be commended for their good volunteer work." In 1988, a car dealership owner wrote on the applicant's behalf that the applicant was "of good moral character," reliable, trustworthy, and committed to the improvement of the community.

SUMMARY OF THE RECORD

On February 28, 1972, the applicant enlisted in the Coast Guard, having previously served about eighteen months in the Army. He attended [redacted] "A" School to become a third class [redacted] petty officer and in 1974 was transferred into the [redacted] rating and advanced to [redacted] 2. He advanced to [redacted] 1 in 1976 and to [redacted] C in 1979. Over the course of his career, he accumulated more than five years of sea duty.

In October 1983, the applicant was assigned to work as chief of the [redacted] at a Reserve Training Center.

On December 3, 1987, the applicant's then current enlistment ended. He received an honorable discharge. On December 4, 1987, he reenlisted for three years.

On December 14, 1987, a federal grand jury indicted the applicant on seven criminal charges alleging that:

1. between February 1985 and August 1985, he stole and converted to his use "assorted hand tools which had been received from [a U.S. Naval Weapons Station] of a total value of approximately five hundred dollars ($500.00), the military property of the United States";

2. at the motor pool on or about June 24, 1986, he stole and converted to his use "a variable speed orbital action jig saw and a professional high torque three-eighths inch (3/8") power drill" valued at about $365.00;

3. on January 29, 1987, he stole and converted to his use "power shears and blade heads" valued at about $417.00;

4. on or about March 1986, he stole and converted to his use "a vacuum cleaner" valued at more than $100.00;

5. on or about December 24, 1986, he stole and converted to his use "one battery charger" valued at about $235.00;

6. on or about March 1, 1986, he "knowingly and unlawfully conveyed or disposed of without authority by giving [to someone else] a tool kit containing assorted hand tools" valued at about $220.00; and

7. on or about March 1986, he stole and converted to his use "a Vano Blower, a tripod mount, and two hose attachments" valued at about $1,388.00."

On [redacted], the applicant was convicted in federal court on five of the counts (2, 3, 5, 6, and 7). Count 1 was dismissed. The jury acquitted the applicant on count 4. He was sentenced to one year's incarceration for each of the other five counts, to be served simultaneously, and restitution of $2,405 and court fees. The court also ordered the Coast Guard to delay separating the applicant until the appeal was complete.

On March 21, 1988, the applicant was incarcerated. On March 23, 1988, his Executive Officer (XO) made an administrative entry in his record stating that on February 12, 1988, he had been convicted in federal court for theft of government property worth $2,405, and sentenced to one year in jail, restitution of $2,405, and a $250 court assessment. The XO prepared a special evaluation assigning the applicant the lowest possible mark (one) for conduct, using resources, setting an example, professionalism, judgment, responsibility, and integrity and terminated his eligibility for a good conduct award.

On April 8, 1988, after being advised that the Coast Guard intended to discharge him administratively, the applicant requested a hearing before an Administrative Discharge Board (ADB). The hearing was delayed due to the applicant's incarceration and to the court order to stay any separation action against the applicant.

On September 27, 1988, the applicant was released from prison. He reported for duty the next day but was apparently told to stay at home.

On [redacted], the applicant's appeal of his conviction was denied. The United States Court of Appeals for the [redacted] Circuit stated that the applicant

> was in charge of the motor pool, and in connection therewith, he was authorized to purchase parts, tools and supplies from various commercial sources. Appellant in his free time, operated a business, known as "xxxxxx", through which he engaged in selling, installing and repairing heating and air-conditioning equipment. The testimony of the various government witnesses, many of whom served with the appellant in the Coast Guard, was sufficient to prove beyond a reasonable doubt the various charges upon which he was convicted. … The appellant's real complaint is that the government never executed a search warrant of his home or business in an effort to find the articles of property allegedly stolen from the United States. He argues that the failure of the government to search his premises weakens the government's case. This may be true, but this is a matter for jury argument … We find no abuse of discretion in the trial judge's handling of the case … .

On December 29, 1988, the applicant and his counsel signed the following letter:

> 1. I have been advised by my Commanding Officer that he is recommending me for a discharge from the Coast Guard be reason of misconduct and the reasons therefor. He has also advised me that as an enlisted person who has completed more than eight years of service, I have the following rights, unless waived in writing:

a. My case will be heard by an administrative discharge board of not less than three officers.
b. I may appear in person before such administrative discharge board.
c. I may be represented by counsel.

2. I hereby waive my right to a hearing before an administrative discharge board provided Commandant determines that I should be awarded a discharge under honorable conditions. I know that I have been convicted of theft from the government, and that is not taken lightly by the Coast Guard. I also know that I have more than 17 years of Coast Guard service with no other blemishes of any kind in my record. Therefore, I feel that an honorable or general discharge would better characterize my overall service to the Coast Guard than a discharge Under Other Than Honorable Conditions. I feel that it would be in the Coast Guard's as well as my own best interests to discharge me expeditiously. …

3. I further understand that if a general discharge is issued to me that I could be deprived of many of the rights as a veteran under state and federal legislation; and that I may expect to encounter substantial prejudice in civilian life in situations where the type of service rendered and the characterization of discharge may have a bearing. …

On January 9, 1989, the applicant's CO forwarded this letter and other correspondence to the Commandant and recommended that the applicant receive a general discharge under honorable conditions. On January 19, 1989, the CO sent copies of the indictment and judgment of conviction to the Commandant.

On January 28, 1989, the Commandant ordered that the applicant receive a general discharge by reason of misconduct within thirty days due to his trial and conviction by civil authorities, pursuant to Article 12-B-18 of the Personnel Manual.

On February 9, 1989, the applicant was discharged. His DD 214 shows that he received a general discharge for misconduct with an RE-4 reenlistment code (ineligible), pursuant to Article 12-B-18 of the Personnel Manual. He had completed a total of 18 years, 5 months, and 19 days of active service.

On June 15, 2000, the DRB reviewed the applicant's discharge. The DRB recommended that relief be denied, noting that it "initially recommended that [the applicant] receive an Honorable Discharge based on the fact that the member did not receive an Admin Discharge Board. However, further examination of the member's record found that he had waived his right to an ADB. Therefore, the Board felt, [his] DD-214 should stand as issued." The DRB stated that under Article 12-B-18 of the Personnel Manual, the Commandant could direct the discharge of a member for misconduct due to "[c]onviction by foreign or domestic civil authorities or action taken tantamount to a finding of guilty for an offense for which the maximum penalty under the Uniform Code of Military Justice is death or confinement longer than one year involving moral turpitude." In addition, the DRB found that the applicant's history of community serv-

ice did not justify upgrading his discharge. On April 9, 2001, the DRB's recommendation was approved.

VIEWS OF THE COAST GUARD

On March 30, 2004, the Judge Advocate General (TJAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case.

TJAG alleged that the applicant's request was untimely and that he had not submitted any evidence to show that it is in the interest of justice for the Board to waive the three-year statute of limitations.

Regarding the merits of the case, TJAG argued that the applicant has "failed to present any evidence that he was improperly convicted or that the Coast Guard improperly discharged him from the service." TJAG argued that "[a]bsent 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); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). TJAG alleged that the record indicates that the applicant "was properly convicted in federal court and subsequently knowingly and voluntarily waived his right to an [ADB] in exchange for a discharge 'under honorable conditions.'"

TJAG attached to his advisory opinion a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC). CGPC alleged that there is no merit to the applicant's allegation that his administrative discharge was disproportionately harsh. CGPC alleged that the Coast Guard "routinely discharges members convicted by civil authorities for this and other types of serious offenses." CGPC also argued that the applicant "was afforded all his due process rights" and that he waived his right to an ADB.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 31, 2004, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. The applicant requested a 90-day extension, and his response was received on July 27, 2004.

The applicant again asserted his innocence and alleged that throughout the proceedings against him, he acted out of fear that the Coast Guard "would try to pursue some other trumped up charge." He also indicated that he had only waived his right to an ADB because he wanted to do as he was told so that his life could begin again. His Senior Chief had told him that if he did not sign the letter waiving his right to an ADB he would "have to go through a lot more trouble to get this over with."

The applicant asked—if he was guilty of theft—then why did he receive an honorable discharge on December 4, 1987; why did no one search his property for the missing property; why was his signature not on the invoices presented in court; why were the witnesses against him granted immunity; why did the witnesses not come forward with their accusations earlier; and why was the stolen property found in the hands of the witnesses. The applicant argued that he should not have been convicted based on the slim evidence, most of which strongly implicated the witnesses rather than himself. He alleged that it was unfair that the jury heard the evidence for count 1 because the count was dismissed. He alleged that this confused and biased the jury.

APPLICABLE LAW

Rule 201(d) of the Rules for Courts-Martial in effect in 1988 provided that, unless an alleged offense is purely military in nature, such as failure to obey an order, a member can be tried by a "proper civilian tribunal," rather than by court-martial.

Under Article 12-B-18.b.(1) of the Personnel Manual, the Commandant could separate a member for misconduct with a discharge under other than honorable conditions (OTH); a general discharge under honorable conditions; or an honorable discharge due to "[c]onviction by civil authorities … of an offense for which the maximum penalty under the Uniform Code of Military Justice [UCMJ] is death or confinement in excess of one year." Under Article 121 of the UCMJ, the maximum penalty for larceny of property valued in excess of $100.00 was "[d]ishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years," and the maximum penalty for wrongful appropriation of such property was "[d]ishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years."

Article 12-B-18.d. of the Personnel Manual provided that the provisions of Article 12-B-32 applied to all members with eight or more years of active service who were being recommended for discharge due to misconduct. Article 12-B-32 provided the procedures for ADBs. Article 12-B-32.a.(1) provided that a member could be discharged without an ADB if the member waived his right to an ADB in writing.

On July 7, 1976, the delegate of the Secretary informed the BCMR of the following determination, which has never been countermanded:

> [T]he Board should not upgrade discharges solely on the basis of post-service conduct. The situation in which a man is granted a less than honorable discharge under circumstances all agree were just, and then goes on to become Albert Schweitzer, is one that—if it ever occurs—is properly handled by an exemplary rehabilitation certificate or a Presidential pardon.
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> This emphatically does not mean that the justness of a discharge must be judged by the criteria prevalent at the time it was rendered. The Board is entirely free to take into account changes in community mores, civilian as well as military, since the time of dis-

> charge was rendered, and upgrade a discharge if it is judged to be unduly severe in light of contemporary standards. …. [T]he Board should not upgrade [a] discharge unless it is convinced, after having considered all the evidence [in the 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.

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. The Coast Guard argued that the application was untimely.[1] However, the applicant filed his application within three years of the date the Coast Guard Discharge Review Board declined to upgrade his discharge.[2] Therefore, the Board finds that his application was timely.[3]

3. The applicant alleged that because he received an honorable discharge and was reenlisted on December 4, 1987—after the Coast Guard had completed its investigation of the alleged offenses—he should not have received a general discharge from the Coast Guard on February 9, 1989. However, an honorable discharge from military service does not mean that a member has been found innocent of an alleged offense.[4] In the applicant's case, the new contract was necessary only because the applicant's prior contract was terminating, and an honorable discharge was proper at the time because he had not yet been convicted of any offense.

4. The applicant complained that he was supposed to have been tried by court-martial on December 14, 1987, but was not. There is no evidence in the record to support the applicant's allegation. However, under Rule 201(d) of the Rules for Courts-Martial in effect at the time, a member charged with theft could be tried by a "proper civilian tribunal," rather than by court-martial. The applicant has not proved that the

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[1] An application to the Board must be filed within three years after the applicant discovers the alleged error in his record. 10 U.S.C. § 1552.

[2] Under 10 U.S.C. § 1551, the statute of limitations of the Discharge Review Board is fifteen years.

[3] *Ortiz v. Sec'y of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994) (holding that "because the Army's regulation requires exhaustion of [Discharge] Review Board remedies before the Correction Board will consider an application, the Correction Board's three-year statute of limitations does not begin to run at the time of discharge where, as here, servicemembers timely pursue remedies before the Review Board").

[4] *See United States ex rel. Hirshberg v Malanaphy*, 168 F.2d 503, 507 (N.Y. 1948), *rev'd on other grounds,* 336 U.S. 210 (1949).

Coast Guard committed any error in handing his case over to federal civilian authorities for prosecution.

5. The applicant alleged that his conviction in a civilian court should not have affected the character of his military discharge. However, Article 12-B-18.b.(1) of the Personnel Manual expressly authorized the separation of a member for misconduct due to "[c]onviction by civil authorities … of an offense for which the maximum penalty under the Uniform Code of Military Justice is death or confinement in excess of one year." Moreover, the Article allowed the Commandant to award such a member an OTH, general, or honorable discharge. The five offenses of which the applicant was convicted each carried a maximum penalty of confinement in excess of one year under the UCMJ, and the Board is not persuaded that the Commandant committed any error or injustice in awarding the applicant a general discharge under honorable conditions in light of his misconduct. The Board does not find that the applicant's general discharge "was disproportionately severe vis-à-vis the conduct in response to which it was imposed."[5]

6. The applicant alleged that he waived his right to an ADB because the prosecuting attorney was harassing his family; because he was afraid he might get locked up again on a "trumped up charge"; and because he did not want to "have to go through a lot more trouble to get this over with." The record indicates that on December 29, 1988, and with the advice of counsel, the applicant signed a statement in which he voluntarily waived his right to an ADB because he had decided that it would be in his own best interest to do so. The record indicates that the applicant received all due process with respect to his discharge. He has not submitted any proof that he was coerced to sign the waiver. The Board finds that he has not proved by a preponderance of the evidence that the Coast Guard erred in accepting his waiver and discharging him without convening an ADB. Nor has he proved that the DRB erred in denying his request for an upgraded discharge because of his waiver.

7. The applicant alleged that he was innocent and should have been acquitted on all counts. In essence, he asks the Board to find that the judge, jury, and the Court of Appeals all erred in performing their assigned duties. The applicant did not submit any evidence concerning the charges against him that was not considered by the judge, jury, and Court of Appeals. The letters he has submitted regarding his character and community activism do not disprove the charges of which he was convicted. The jury found that he was guilty of those charges "beyond a reasonable doubt," and the Board finds that he has not proved by a preponderance of the evidence that his general

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[5] Memorandum from John Hart Ely, the General Counsel of the Department of Transportation, to the Board for Correction of Military Records dated July 7, 1976. On March 1, 2003, the Coast Guard and the Board for Correction of Military Records transferred from the Department of Transportation to the Department of Homeland Security pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002).

discharge as a result of the conviction constituted treatment by military authorities that "shocks the sense of justice."[6]

8. The applicant submitted several letters of reference attesting to his good character and good work for his community. However, the delegate of the Secretary has held that "the Board should not upgrade discharges solely on the basis of post-service conduct."[7] Therefore, although the letters indicate that the applicant and his wife are very active in their community and have worked hard to improve it, they do not justify upgrading his discharge.

9. The Board concludes that the applicant has not proved by a preponderance of the evidence that his general discharge and lack of retirement pay are erroneous or unjust. Accordingly, his request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

[6] *See Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577 (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976)).
[7] Memorandum from John Hart Ely, note 5 above.

ORDER

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