

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 2000-035

DECISION OF THE DEPUTY GENERAL COUNSEL


I approve the recommended Order of the Board.

I disapprove the recommended Order of the Board.

I concur in the relief recommended by the Board.

DATE:

Dec. 18, 2000


Deputy General Counsel
Delegate of the Secretary
Department of Transportation

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FINAL DECISION

██████████ Deputy Chairman:

This is a proceeding under section 1552 of title 10 and section 425 of title 14, United States Code. It was docketed on December 2, 1999, upon the Board's receipt of the applicant's complete application for correction of his military record.

This final decision, dated November 9, 2000, is signed by three duly appointed members who were designated to serve as the Board in this case.

The applicant, a storekeeper first class (SK1; pay grade E-6), asked the Board to correct his record by advancing him to chief storekeeper (SKC; pay grade E-7) and by restoring the money that he was required to forfeit from his pay as a result of non-judicial punishment [NJP] on April 19, 1999. The applicant retired on November 1, 1999 and is not asking to be returned to active duty.

The commanding officer (CO), Coast Guard Headquarters set aside the NJP by letter dated October 28, 1999, although it was not initialed on behalf of the Commandant (G-WT) until November 1, 1999. The CO informed the applicant, without elaboration, "I have considered the facts and circumstances which resulted in the imposition of [NJP] . . . on 19 April 1999 by the [CO], Headquarters Support Command" and "I hereby set aside that punishment." The NJP appeal authority further informed the applicant that "[y]ou will be restored all rights, privileges and property which you held prior to the imposition of [NJP] . . . However, your supervisor may elect to withhold your recommendation for advancement."

SUMMARY OF RECORD AND SUBMISSIONS

On April 19, 1999, the applicant, a member of the Coast Guard Headquarters Support Command, was taken to non-judicial punishment for sending three e-mails "of an obscene and inappropriate nature, specifically pornographic material" in violation of COMDTINST M5370.8A, Standards of Conduct, COMDTINST 5270.1D, Management of Electronic E-mail, and Department of Transportation Instruction 1350.2, Information Resource Management Manual, Chapter 11.

As punishment, the applicant was given forfeiture of pay in the amount of \$1086.00 and a letter of reprimand. The applicant stated that in addition to the punishment, the NJP jeopardized his advancement to chief petty officer (he was

number 27 on the advancement list) and his special assignment to [REDACTED]

The letter of reprimand, dated April 19, 1999, was given to the applicant by the executive officer (XO), Coast Guard Headquarters Staff. The letter reprimanded the applicant about his conduct and told him that his actions indicated less than satisfactory judgment and responsibility.

The applicant submitted a rebuttal to the letter of reprimand, dated April 21, 1999. He also appealed the NJP on April 23, 1999 on the following grounds: "1) Unofficial use of e-mail is prevalent within the Coast Guard. The repercussions for Coast Guard military and civilian personnel are inconsistent. 2) The [NJP] awarded was disproportionate to [his] acts of bad judgment."

In asking that the NJP be vacated and that he be allowed to acknowledge his error through an administrative remarks [page 7] entry, the applicant stated the following:

(a) . . . These isolated incidents should not be labeled a pattern of abuse of Coast Guard property or lack of respect for regulations. The files that I sent contained neither nudity nor profanity. Nor have I ever created or imported any such images or text or visited any website promoting these activities. In comparison to the extreme volume . . . and content of unauthorized e-mails I received from within and beyond the Coast Guard, I have forwarded three. The messages I received have included politics, religion, animation, friendship, news, motivation, protest, holiday themes, sports, and humor (tasteless and otherwise). I have received some CG business e-mails with such attachments. I have been included in countless bang lists. I've noticed a range of military branches and ranks, government agencies, educational institutions, and personal addresses attached to these messages. . . . The repercussions for military and civilian personnel, Coast Guard-wide, have been, in most cases, verbal warnings and administrative entries. This shows inconsistency in the enforcement of policies. In addition, I have questions about how I was targeted for investigation. I also requested the opportunity to consult with a military lawyer, in writing, on 4 April during my interview with the [investigating officer] and was told that one would be provided at no cost. I have yet to see or hear from any lawyer.

(b) In my 21 year military career, this is the first time that I have faced NJP. My evaluations, past and present, exemplify my exceptional performance and high morals. I have consistently adhered to the highest standards of honesty, truthfulness, and integrity the Coast Guard demands. As a recruiter for 5 1/2 years, I illustrated those traits in [REDACTED] and mentoring quality applicants for both officer and enlisted programs. I have been selected as sailor of the Quarter and received many high praises and decorations. By virtue of the NJP, my orders for special assignment to recruiting [duty] and my position (#27) on the SKC advancement list were withdrawn. I am now ineligible to participate in

SWE beyond the time that I will become a candidate for HYT [high year tenure]. It is obvious that my professional growth in the Coast Guard has been halted. My current enlistment expires on 27 July 1999. This punishment will prompt an end to my stellar career.

On May 11, 1999, the applicant requested to retire because of the Coast Guard's high year tenure policy (he was near the maximum years allowed for service as an E-6 without advancement), because of the approaching end of his enlistment on July 27, 1999, his inability to reenlist without a waiver, and because of his inability to compete for advancement for 24 months after receipt of the NJP. The applicant's request for retirement was approved, with an effective date of November 1, 1999. Prior to his effective retirement date, the applicant began terminal leave.

On October 28, 1999, the NJP appeal authority set aside the NJP. On October 29, 1999, the applicant's supervisor recommended the applicant for promotion to chief petty officer. On November 1, 1999, the applicant's retirement became official.

In his statement to the Board, the applicant claimed that the appeal process was deliberately lengthy to prevent him from having any chance of remaining on active duty. He further stated as follows:

It appears evident that I have been kept in the dark on the matters of my NJP appeal. Headquarters Support Command has had Coast Guard lawyers involved (doing legal reviews). Apparently, they were not working on my behalf because I have yet to be questioned, counseled or advised by any lawyer although I requested one in writing. After several inquiries on the status of my appeal, I was told in mid-May that my case was to be dismissed. Many others [have] committed similar and worst offenses and received little or no punishment. It was also determined that the procedures of the NJP were administered improperly. [The captain who imposed the NJP] did not have the proper designation of authority to conduct NJP. I anxiously awaited a formal notification of dismissal. This would allow me to continue my career as a chief petty officer. I have made several inquiries regarding pertinent and relevant information on the status and procedures of this appeal. I have been denied information, put off, or re-directed at the highest level of the command. Often, [the CO, XO, a CDR B., and the enlisted advisor] were non-responsive to my e-mails and voice messages. As of the last day before beginning my terminal leave, I was still hearing assurances from the command but had seen no evidence. I repeatedly inquired on the status while on leave via e-mail. . . . On October 5 [the master chief] informed me that my NJP from April 19, 1999 had been dismissed and all rights, privileges, and fines were being restored and that a letter was being drafted to effect such action. It was November 6 before I received the letter. . . . I have yet to see the restoration of [the] fine.

. . . Becoming [a] Chief Petty Officer was a goal that I had set for myself early in my career. After studying long and working hard for that achievement, my drive brought me to place number 27 on the Chief

Storekeeper advancement list. That position would have made me eligible for promotion September 1.

The applicant submitted several e-mails ranging from June 24, 1999 through October 1999 inquiring about the appeal of the NJP.

Views of the Coast Guard

On July 13, 2000, the Board received an advisory opinion from the Chief Counsel of the Coast Guard. He recommended that the Board deny relief to the applicant. The Chief Counsel offered the following:

Applicant has already received appropriate relief when his NJP was set aside. He was not entitled to legal advice during his appeal. Contrary to his allegations, there is no indication his appeal was unfairly delayed. Rather, Applicant's appeal received careful consideration. Moreover, Applicant was notified by his superiors that his NJP would be set aside, and he was offered the opportunity to return to active duty. Specifically, Applicant's supervisor called him on 29 October 1999 (while applicant was on terminal leave) to inquire whether Applicant would return to active service as a Chief Petty Officer. Applicant declined. Although the offer to return to active duty remains, Applicant's request for retroactive advancement to Chief Petty Officer and retirement would be inappropriate and would violate Coast Guard regulations. Finally, Applicant's allegation that his pay was never refunded is moot, as his pay was refunded after he filed his application for correction of his military record. . . .

The Chief Counsel stated that the applicant's NJP was set aside because it was inconsistent with punishment imposed in other similar cases. The Chief Counsel further stated that, contrary to the applicant's allegation, there was no requirement to provide the applicant with legal advice during the appeal process.

The Chief Counsel asserted that the applicant's appeal was not improperly delayed. He stated that, absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith. According to the Chief Counsel, except for the allegation, there is no evidence that the Coast Guard acted without due diligence in resolving the applicant's appeal.

The Chief Counsel stated that the applicant has already been offered the only relief to which he is entitled, which is to be returned to active duty and then be advanced to pay grade E-7. According to the Chief Counsel the applicant has refused this offer. He stated that every effort was made to return the applicant to active duty before he retired. The Chief Counsel asserted that the applicant was not inclined to return to active duty because he did not want to leave his civilian job.

The Chief Counsel asserted that retroactively advancing the applicant to chief petty officer with subsequent retirement would confer a disproportionate and undeserved benefit to the applicant. The Chief Counsel further stated that "when

Applicant submitted his request to retire on 11 May 1999, while his NJP appeal was ongoing, he acknowledged he was declining any opportunity for advancement should his appeal end favorably." The Chief Counsel noted that in the applicant's request to retire, he stated "Whatever the outcome of my appeal, I have decided to retire from the Coast Guard."

The Chief Counsel stated that should the Board decide to correct the applicant's record by advancing him to Chief Petty Officer, Coast Guard regulations require him to serve on active duty for two years. Article 5.C.25.e.1., Coast Guard Personnel Manual.

A memorandum from the Commander, Coast Guard Personnel Command (CGPC) was attached to the advisory opinion. The CGPC offered the following relevant opinions:

1. The applicant's name was removed from the May 98 SKC SWE Advancement Eligibility List . . . on 25 May 1999 due to applicant's submission of his letter dated 11 May 1999 requesting retirement.
2. Applicant expressed in his retirement request letter dated 11 May 1999 that he had intended to extend in the United States Coast Guard for three (03) years and execute his PCS orders to [REDACTED] in May 1999; however, the NJP resulted in his PCS orders being cancelled and his name being removed from the May 98 SKC SWE Advancement Eligibility List.
3. [Even if] the applicant had not submitted a retirement letter, the applicant's name would have been removed due to NJP. . . . On 13 July 1999, the applicant's NJP paperwork eventually was entered into the HRSIC database whereby the applicant's appeared on HRSIC's NJP report.
4. If the applicant had not submitted his request to retire and had no NJP, the applicant would have been advanced to SKC/E-7, assuming the applicant remained fully qualified and eligible for advancement prior to 19 April 1999 and up to 01 September 1999.

Applicant's Response to the Views of the Coast Guard

On July 26, 2000, the Board received the applicant's response to the views of the Coast Guard.

The applicant stated that he requested, in writing, on April 4, 1999, to consult with a lawyer during the investigation, not during his appeal process. No lawyer was made available to him during the investigation. The applicant stated that he was denied the opportunity to consult with a lawyer about the NJP. The applicant stated that the acknowledgement of rights and acceptance of NJP document that he signed on April 19, 1999, waiving his right to a lawyer was presented to him approximately 10 minutes before imposition of punishment.

The applicant stated that the Coast Guard deliberately delayed acting on his appeal to prevent him from saving his career. He stated that contrary to the instruction in the Uniform Code of Military Justice that 4 months is a reasonable time to set aside an NJP in the absence of unusual circumstances, it took approximately 6 months for the Coast Guard to act on his appeal. Moreover, he stated that the NJP authority, himself, could have set the NJP aside irrespective of the appeal process. With respect to the Coast Guard deliberately delaying his appeal, he stated the following:

[T]here is evidence that [the Coast Guard] had ample time and reasoning to dismiss my punishment and allow me to continue my CG career. I am positive that the delay to over turn the punishment was intended to combat any chance for me to recall my retirement request, be advanced and return[ed] to active duty. My case was extended from April 23 to October 29, the last working day of my stellar career, to prevent embarrassment to the Coast Guard for poor management and recourse from prior mishandled cases.

The applicant offered the following as his reason for requesting retirement, notwithstanding his appeal of the NJP.

Had I not requested retirement May 11, I likely would have been discharged July 27, 1999 the end of the current enlistment, without retirement. In fact, I was required to extend 4 months in order to retire Nov. 1.

Due to my time in service and the Coast Guard's High Year Tenure policy, I was approaching the maximum years allowed to serve as an E-6 . . . Reenlistment would not have been an option without a waiver. In addition, by virtue of receiving NJP, I would be ineligible to compete for promotion for 24 months. These issues prompted me to request to retire at the rank of E-6 effective 1 November 99. . . .

The urgency to seek civilian employment was imperative, as I am a single parent.

The applicant stated that once it appeared that the NJP might be set aside, he never received a formal offer of advancement or of remaining on active duty. He submitted an e-mail dated October 21, 1999, to the assignment officer asking about the possibility of being assigned to the [REDACTED]. He informed the assignment officer that a lieutenant commander was working on canceling his retirement orders contingent on his advancement and duty assignment. He stated that his assignment to the [REDACTED] would be convenient for him and the Coast Guard since he had already moved to the area with his daughter at no cost to the government and he was an experienced recruiter. On October 22, 1999, the assignment officer replied, "I can't really talk 'assignment' with you at this time. However, I believe if you return to active duty, your future would be as a SK [storekeeper]." In addition, the applicant offered the following:

As a single parent with a 17 year old daughter in her last year of high school, [I] did not find it advantageous to relocate my family again after 4 months.

A billet was open at [REDACTED] [A] BMC [Chief boatswain's mate] of [REDACTED] received order in Sept 99 to [REDACTED] the position that I accepted before my orders were canceled in April 99. That left a billet open at [REDACTED] that is still not filled. I could have filled that billet at no cost to the government, having already relocated in the area.

The applicant also stated that he is reluctant to return to active duty because of a fear of working in a hostile environment that he believes has resulted from his persistence in appealing the NJP. He stated that there have been attempts to intimidate him because of his persistence. He believes that he will not receive fair treatment in assignments, evaluations, or professional growth opportunities if he returns to active duty. He stated that with his current job he has a secure future and does not wish to return to active duty. He believes he should be advanced to SKC (E-7).

The applicant said that the amount of the fine (\$1,086.00) was returned to him in December 1999.

Additional Information

The Board obtained additional information from the Coast Guard that shows that a question existed as to whether the NJP authority in this case had been properly delegated. The Chief Counsel stated that the Commander, Coast Guard Headquarters, by letter dated March 1, 1996, appointed the Commanding Officer, Headquarters Support Command, as the Commanding Officer, Headquarters Staff, Coast Guard Headquarters, with authority over all military personnel assigned with certain exceptions. This letter also designated the Commanding Officer, Headquarter staff as a special court-martial convening authority. The March 1996 letter indicated that the Commanding Officer, Headquarters Support Command, was also the executive officer, Coast Guard Headquarters.

On November 23, 1999, in an effort to clarify the dual position held by the Commanding Officer, Headquarter Support Command and Executive Officer, Coast Guard Headquarters, the Commanding Officer, Coast Guard Headquarters issued a letter to the Executive officer, Coast Guard Headquarters designating the position as Commanding Officer, Headquarters Staff, with authority over all military personnel, with certain exceptions.

On December 30, 1999, Headquarter Instruction 5810.1 was issued explaining that the Commanding Officer, Headquarter Support Command is designated as the Executive Officer, Coast Guard Headquarters and the Commanding Officer, Headquarters Staff.

The Board also obtained information that after NJP was imposed on the applicant, the Chief of Staff decided to refer the results of a similar investigation to the

member's supervisor for disposition. The document containing this information further stated that "[I]n the interest of fair and equitable treatment of all HQ staff, previous NJP decisions in similar matters were set aside and referred to the individual supervisor for action."

The Board also obtained an e-mail from a LCDR, dated October 27, 1999, to the applicant, with respect to efforts to return him to active duty. She informed the applicant as follows: "In regard to our conversation on 21OCT99 about your move to [REDACTED] (executed against your TONO under your current retirement orders for a retirement date effective 01Nov99) and your desire not to move again (if able to continue on active duty), I spoke with the Special Assignment Officer about the personnel status at [REDACTED] you mentioned this as a possible assignment consideration). [REDACTED] is at full personnel complement; no billet vacancies exist there now and will not within the SPEAR 2000 transfer season."

The Board also obtained a copy of the alleged improper e-mails that the applicant was accused of distributing.

APPLICABLE REGULATIONS

Personnel Manual

Article 5.C.25.e.1.&2 of the Personnel Manual provide for the following:

"1. Personnel advancing to pay grade E-7, E-8, or E-9 will be required to remain on active duty for two years from the effective date of their advancement to the new grade. Personnel who accept advancement to pay grade E-7, E-8, or E-9 will be required either to extend their enlistment or reenlist prior to advancement, if necessary, to ensure meeting the two year obligated service requirement. If personnel cannot reenlist or extend for the full two years due to High Year Tenure, then they must obligate to their Professional Growth Point [PGA] for the new pay grade.

"2. Personnel advanced to pay grade E-7, E-8, or E-9 understand that a request for voluntary retirement or early release will not be effected prior to completion of the two year obligated service requirement."

Article 12-G-7. of the Personnel Manual states that "1. Commander, (CGPC . . .) will discharge a member who fails to advance before his or her PGP date. However, a retirement-eligible member may request retirement." Subsection 3 of this provision states that "[r]etirement-eligible members may request to retire on an effective date before the end of the month in which they exceed their PGP and may stipulate voiding the request if their PGP increases before the requested retirement date. As such Commander . . . will not remove these members from the advancement eligibility list until they retire. However, if they do not desire to void their request, they will be removed when their retirement is approved."

Manual for Courts-Martial

Section 6.d., Part V, Manual for Courts-martial contains the following with respect to setting aside an NJP.

"Setting aside is an action whereby the punishment or any part or amount thereof, whether executed or unexecuted, is set aside and any property, privileges, or rights affected by the portion of the punishment set aside are restored. The nonjudicial punishment authority who imposed punishment, the commander who imposes nonjudicial punishment, or a successor in command may set aside punishment. The power to set aside punishments and restore rights, privileges, and property affected by the executed portion of a punishment should ordinarily be exercised when the authority considering the case, believes that, under all circumstances of the case, the punishment has resulted in clear injustice. Also, the power to set aside an executed punishment should ordinarily be exercised only within a reasonable time after the punishment has been executed. In this connection, 4 months is a reasonable time in the absence of unusual circumstances."

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submission, and applicable law:

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10 United States Code. The application was timely.
2. The Chairman has recommended disposition of the case without a hearing. 33 CFR § 52.31. The Board concurs in that determination.
3. Any alleged error with respect to the legality of the punishment, either because of a procedural violation or the lack of proper delegated authority by the officer imposing NJP has been rendered moot by the setting aside of the NJP on October 28, 1999. The Board notes, however, that the applicant acknowledged sending the e-mails, the Coast Guard determined that there was unequal treatment in the manner in which it handled these cases, particularly the applicant's, and that confusion existed about the NJP authority's delegation to impose NJP on the applicant.
4. The NJP appeal authority, in setting aside the NJP, did not state on what ground it was set aside, but the Board presumes it was set aside because it was found to have been a clear injustice. Section 6.d., Part V, of the Manual for Courts-martial states that "[t]he power to set aside punishments and restore rights, privileges, and property affected by the executed portion of a punishment should ordinarily be exercised when the authority considering the case, believes that, under all circumstances of the case, the punishment has resulted in clear injustice." This finding is consistent with that of the Chief Counsel who states that it was set aside because it was inconsistent with punishment imposed in other cases.
5. The setting aside of the NJP should restore the applicant's rights, privileges, and property that were affected by the punishment that was set aside. Section 6.d., Part V, Manual for Courts-Martial. The Military Justice Manual states that it wipes the slate clean. Article 1-E-9.e., Military Justice Manual.

6. Even though the applicant promptly appealed the NJP, he was still faced with the issue of high year tenure. In addition, there was no guarantee that he would prevail on the appeal or how long the process would take, so he took terminal leave, found other employment, and relocated with his family to [REDACTED]. The applicant asserts, and the high year tenure regulation appears to support him, that if he had not requested retirement and he reached his maximum professional growth point, he could have been discharged. The applicant believes that a discharge would have resulted in the loss of retired pay. The applicant, without being advanced, could only remain in the Coast Guard as an E-6 for a total of 22 years. Therefore, his professional growth point would have occurred on December 9, 1999. Complicating the issue even more was the fact that the applicant's enlistment expired July 27, 1999, although it was extended for 4 months. Pursuant to Article 12-G-5 of the Personnel Manual, reenlistments are not permitted beyond an applicant's professional growth point, except with a waiver from the Commandant. Facing high year tenure and with an NJP in his record it was unlikely that the applicant would have received a waiver to reenlist. An NJP appeal does not stay the punishment imposed. Section 7.d., Part V, Manual for Courts-Martial. The Coast Guard did not disagree with the applicant's understanding on the impact the HYT policy would have on his retirement eligibility, if he had remained on active duty and his appeal had been denied.

7. The applicant argues, contrary to the Chief Counsel, that all rights, privileges, and property were not restored to him after the NJP was set aside; however, he agrees that the forfeiture has been returned to him. He does not want to return to active duty, but he does want to be advanced to SKC retroactive to September 1, 1999. The Chief Counsel asserts that the applicant has received all the relief to which he is entitled by virtue of the setting aside of the NJP and by virtue of the Coast Guard's offer to restore him to active duty and advance him to E-7 on condition that he obligate himself for an additional two years of service, and accept a duty assignment based on the needs of the Service.

8. The applicant complained that prior to the NJP he was on the advancement list and would have advanced on September 1, 1999 to SKC and that he would have begun a special assignment to the [REDACTED] in May 1999. After receiving NJP, his orders to recruiting duty were canceled and his name, although removed from the advancement list as a result of his May 1999 retirement request, would have been removed as a result of the NJP had no retirement request been submitted. The offer of the Coast Guard to return him to active duty with no commitment to a particular duty assignment, according to the applicant, is not restoring him to the rights, privileges, and property he had prior to the NJP. Moreover, he had just recently relocated to the [REDACTED] area and began civilian employment there.

9. The Board must determine whether the applicant suffers from an injustice created by and resulting from the imposition of the unfair NJP or whether, as the Chief Counsel asserted, he has received the relief to which he is entitled. The Chief Counsel blames the applicant, in part, for this situation: first, because the applicant submitted a retirement request; and second, because the applicant did not accept their terms for a return to active duty.

10. The Board is persuaded that the applicant acted reasonably in requesting retirement in light of the Coast Guard's policy with respect to HYT. Weighing the equities in this case, the Board finds that the applicant was punished unfairly, which placed him in a position of having to deal with the issue of high year tenure and possible loss of retirement. The applicant should not be punished further by not being advanced to SKC. The Board is not persuaded that the applicant's refusal to accept the Coast Guard's offer to return to active duty and then be advanced to E-7, but accept an assignment based on the needs of the Service, should not defeat his request to be advanced. The Board notes that this offer is not consistent with the applicant's position prior to the NJP, in which he had orders to [REDACTED]. The applicant stated that he would have accepted orders to the [REDACTED] in [REDACTED] but the Coast Guard claimed that there were no open billets there, although the applicant claims there was a billet available in [REDACTED] at the time. Even if there were no billets in the [REDACTED] there is nothing in the record that indicates that the Coast Guard attempted to work out any other assignment with the applicant, but left him only with the option of returning to active duty in an SKC billet anywhere in the world. The Board is not persuaded, under the circumstances, that the Coast Guard made a good faith effort to work out an acceptable arrangement with the applicant for a return to active duty.

11. The applicant appealed the NJP on April 23, 1999, and did not get a final resolution until October 28, 1999. (A service member is given only 5 days to appeal an NJP.) However, the letter did not reach the applicant until November 6, 1999. During this period, the applicant made continual inquiries as to the status of the appeal and why it was taking so long to render a final decision on the appeal, especially after he had been told in May 1999 that the appeal would be set aside. The Board finds that the applicant's actions were reasonable, particularly in light of the fact that he had a family to support and there was no guarantee he would prevail on the appeal. The Coast Guard did not wait for the outcome of the appeal before canceling the applicant's recruiting assignment and designating other personnel to fill it.

12. The applicant's acts to protect his retirement and take care of his family, under the particular circumstances of this case, coupled with the dilemma caused by the length of the Coast Guard review of the NJP appeal, are not unreasonable. Neither does the Board find the applicant's refusal of the Coast Guard's half-hearted offer to return to active duty unreasonable. The Board is persuaded that the applicant has suffered an injustice and finds that justice demands that he be granted the relief requested. More of an effort should have been made by the Coast Guard to find a reasonable assignment for the applicant.

13. The Coast Guard has stated that to advance the applicant without returning him to active duty for a minimum period of two years is contrary to regulation. However, this regulation does not divest the Commandant of the ability to separate (or retire) a member for good and sufficient reasons or if such a separation is in the Coast Guard's best interest. Article 12-B-12.a.16 & 17, Personnel Manual.

14. Accordingly, the Board finds that the applicant's record can be corrected to show that he obligated himself for two years of duty on September 1, 1999 and that he was also advanced to pay grade E-7 that same day. The record can be further corrected

to show that at the direction of the Commandant, with the consent of the applicant, he was retired on October 31, 1999 at pay grade E-7.

ORDER

The application of SK1 _____), USCG (Ret.) for the correction of his military record is granted. His record shall be corrected to show that he was advanced to pay grade E-7 on September 1, 1999, and that he retired on October 31, 1999, as an E-7. The applicant's advancement to E-7 shall be effective for all purposes, including pay and allowances.

