DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-107

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FINAL DECISION

This is a proceeding under the provisions of section 1552 of Title 10 and section 425 of Title 14 of the United States Code. The Chair docketed the case on April 28, 2006, upon receipt of the completed application for the correction of his military record.

This final decision, dated January 31, 2007, 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 asked the Board to correct his military records by removing an April 19, 1982, non-judicial punishment (NJP)[1] and the associated performance marks, by awarding him his second good conduct medal, and by advancing him to chief fire control technician (FTC; pay grade E-7).

The applicant asserted that the NJP should be removed from his record because he was mentally incompetent at the time he committed the offenses and at the time he went to mast. In this regard, he stated, "It was determined I was not aware I was breaking the law or the UCMJ and that I was not medically responsible for my actions." He argued that he should be advanced to pay grade E-7, with back pay and allowances, because at the time he committed the NJP offenses he was number two on the advancement list from which the top four candidates advanced to FTC. He stated that as a result of the mast he lost his security clearance and his name was removed from the E-7 advancement list. He stated that his security clearance was subsequently reinstated, but the performance evaluation noting the NJP was never cleared from his record and he was never advanced.

[1] NJP is also referred to as captain's mast.

The applicant contended that he did not discover the alleged error until January 15, 2006. He stated that his current requests should have been made at the time he petitioned to have his special court-martial overturned under Article 69 of the UCMJ. In this regard, he stated that because of his mental illness he did not realize that the petition did not include his current requests. He stated that although he is still suffering from the mental problems, his symptoms are better controlled, and that "It has come to my attention that I am still suffering from lack of the honor I should have received by being advanced to the rank of E-7." He also stated that he is being penalized because he is not eligible to join service-related organizations, such as the chief petty officers association that would possibly entitle him to less expensive insurance premiums. He further stated that he did not received the entire amount of pay and allowances to which he was entitled while on active duty and the temporary disability retired list (TDRL).[2]

BACKGROUND

The applicant enlisted in the Coast Guard on March 21, 1975. He was promoted regularly and eventually reached pay grade FT1 (fireman technician first class/pay grade E-6).

On April 19, 1982, the applicant was taken to NJP under Article 15 of the Uniform Code of Military Justice (also known as captain's mast) for theft. He was reduced in rate to FT2 (pay grade E-5) that was suspended for a period of three months. At the time of the captain's mast, the applicant was on the advancement list for promotion to FTC. However on April 21, 1982, the applicant's commanding officer (CO) requested that the applicant's name be removed from the advancement list, which was done.

On August 26, 1982, the applicant was convicted at special court-martial of two specifications of larceny that occurred on or about October 23, 1981, and November 27, 1981. He was sentenced to confinement for thirty days and to a reduction in rate to FTSN (pay grade E-3). The convening and supervisory authorities approved the findings and sentence.

On December 11, 1982, the applicant was hospitalized for exhibiting abnormal behavior. He was discharged from the hospital on March 2, 1983, with a diagnosis of "atypical dissociative disorder." A medical board (MB) agreed with the diagnosis and referred the matter to the Central Physical Evaluation Board (CPEB).[3]

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[2] The TDRL consist of those members whose disabilities are not yet stable and therefore cannot be permanently retired. See Article 2.A.48 of the PDES Manual.

[3] The CPEB is a permanently established administrative body convened to evaluate, on a record basis, whether active duty, reservists, or temporarily disabled retired members are fit for duty, and if they are

On March 31, 1983, the CPEB met and found the applicant to be unfit for continued duty and recommended that he be temporarily retired due to physical disability.

On May 12, 1983, the Commandant issued a decision stating that a review of the applicant's record had determined that the highest rate in which he served satisfactorily was FT1 (E-6). The Commandant further directed that the applicant be temporarily retired in that grade.

The applicant was placed on the TDRL on May 24, 1983, with a 30% disability rating for depersonalized neurosis. The CPEB also noted their opinion that "the medical evidence suggests the [applicant's] condition may have influenced the actions which resulted in his punishment under the UCMJ."

In July 1984, the applicant submitted alternative petitions for relief under Article 69 and Article 73 of the UCMJ. Article 69 provides that within two years of approval of the sentence, an accused may petition to have court-martial findings and/or sentence set aside on the ground of, among other things, newly discovered evidence. Article 73 provides for the petitioning of a new trial based on newly discovered evidence within two years of sentence approval. Both of the applicant's requests were based on his contention that he was not mentally responsible for his actions at the time he committed the offenses.

At the request of the Chief Counsel of the Coast Guard, a sanity board was convened pursuant to R.C.M. 706, MCM (1984). In granting the applicant's request under Article 69 of the UCMJ, the Chief Counsel reported the findings of the sanity board as follows:

> (1) At the time of the alleged criminal conduct [the applicant] did have a mental defect.
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> (2) Clinical psychiatric diagnoses at the time of the alleged criminal conduct:
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> 3001 - (Axis I) - 300.15 - Atypical dissociative disorder, manifested by an episode of a trance like state involving theft of U.S. Coast Guard equipment.

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not, to determine and rate their disabilities. Article 4.A.1. of the Physical Disability Evaluation System (PDES) Manual.

3019 - (Axis II) - 300.183 - Borderline personality disorder.

(3) [The applicant] did at the time of the alleged criminal conduct and as a result of such mental defect, lack substantial capacity to appreciate the criminality of his conduct.

(4) [The applicant] did at the time of the alleged criminal conduct and as a result of such mental defect, lack substantial capacity to conform his conduct to the requirements of the law.

(5) [The applicant] did not have sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently in his defense.

The Chief Counsel stated that the sanity board findings constituted a complete defense to the offenses and fully supported the relief requested by the applicant under Article 69 of the UCMJ. Therefore, the findings and sentence of the special court-martial were set aside and the charges dismissed. "All rights, privileges and property of which the [applicant] has been deprived by virtue of the findings of guilty and sentence set aside by this action shall be restored."

On December 11, 1985, the Convening Authority issued a supplemental special court-martial order dismissing the set aside court-martial charges and restoring the applicant's rights, privileges, and property lost as a result of the findings of guilty and sentence.

On December 31, 1985, the Chief of the Enlisted Career Branch directed that the applicant's record be corrected by removing the court memoranda pertaining to his special court-martial, by removing all personnel action forms pertaining to his confinement, by correcting his pay and active duty base dates, and by correcting his expiration of enlistment date. The Chief of the Enlisted Career Branch further directed the correction of the applicant's record by removing all references to a reduction in rate from FT1 to SNFT and by deleting his performance evaluation marks dated December 31, 1982.

The applicant had been on the TDRL for approximately four years when the CPEB met on December 9, 1987, and found that although he remained unfit for duty, his condition had stabilized and become permanent such that a disability rating could be determined. The CPEB recommended that the applicant be removed from the TDRL and discharged by reason of physical disability with a 10% disability rating and severance pay. (A 30% disability rating is required for retirement by reason of physical disability.)

On January 19, 1988, the Commandant approved the CPEB's findings and directed the applicant to be removed from the TDRL and discharged by reason of physical disability with severance pay.

VIEWS OF THE COAST GUARD

On September 12, 2006, the Board received the advisory opinion from the Judge Advocate General (JAG) of the Coast Guard, recommending that the Board grant partial relief to the applicant by removing the April 19, 1982, non-judicial punishment, by removing the associated enlisted evaluation, and by authorizing the issuance of a second good conduct award. The JAG did not recommend that the applicant be advanced to E-7. In recommending partial relief, the JAG adopted the comments of the Commander, Coast Guard Personnel Command (CGPC) as part of the advisory opinion.

CGPC noted that the application was untimely. On the merits of the application, CGPC stated that the NJP and associated enlisted evaluation should be expunged from the applicant's record because the dates of the NJP (April 19, 1982) and dates for the commission of the offenses (February 1982) occurred within the span of time that the applicant was declared to be mentally incompetent. CGPC stated that it is reasonable to presume that the applicant was not competent at the time of his February 1982 offense or his April 19, 1982, NJP. CGPC stated that with the NJP and associated enlisted evaluation marks removed there is nothing in the regulation that prohibits the applicant from receiving his good conduct award.

With respect to the applicant's request for advancement to E-7, CGPC offered the following:

> The applicant contends that he is entitled to advancement to E-7 along with back pay and allowances since he was removed from the E-7 advancement list as a result of the [CO's] NJP on April 19, 1982 . . . The [CO's] recommendation for advancement is based upon a member's potential to perform in the next higher grade. While the decision to withdraw the [CO's] advancement recommendation was made in conjunction with the NJP, removal of the NJP due to the applicant's incompetence does not necessarily change the [CO's] decision that the applicant is not recommended for advancement. Additionally, based upon the applicant's complete mental incapacity and his inability to distinguish right from wrong, a recommendation [for advancement] from the [CO] is not appropriate. Furthermore, based upon mental incapacity the applicant was not eligible to be enlisted in the Coast Guard, pursuant

to [10 U.S.C. § 504]. [Article 5.C.13.e.1. of the Personnel Manual][4] allows for members who are awaiting final action of the PDES to be advanced, however the provision of the [CO's] recommendation is not met in this case, even with the removal of the NJP and associated marks. Any action to restore the applicant to the original eligibility list and change the [CO's] advancement recommendation would be inconsistent with Coast Guard policy and would clearly be unfair given the applicant's situation.

APPLICANT'S REPLY TO THE VIEWS OF THE COAST GUARD

On September 13, 2006, a copy of the Coast Guard views was sent to the applicant for his response. The Board did not receive a reply from the applicant.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.

2. The application was not timely. To be timely, an application for correction of a military record must be submitted within three years after the applicant discovered or should have discovered the alleged error or injustice. See 33 CFR 52.22. This application was submitted approximately eighteen years beyond the statute of limitations.

3. However, the Board may still consider the application on the merits, if it finds it is in the interest of justice to do so. In Allen v. Card, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that in assessing whether the interest of justice supports a waiver of the statute of limitations, the Board "should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review." The court further stated that "the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review." Id. at 164, 165. See also Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir. 1995).

4. The applicant claimed that he did not discover the alleged error until January 15, 2006, but admitted that he should have included a request for the current corrections in his 1984 Article 69 petition to have the special court-martial findings and sentence

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[4] This provision provides authority for the CO to cancel an advancement prior to its being effected when it is determined that the member no longer meets the eligibility requirements and it appears that eligibility will not be attained prior to expiration of the current advancement eligibility list.

overturned. Nevertheless, the applicant stated that at the time of the Article 69 petition, he was suffering from mental problems and did not realize that the petition did not include a request for removal of the NJP and associated performance evaluation marks and or a request for advancement to E-7. The Board is persuaded by the applicant's argument and notes that the sanity board found that he applicant was not able to understand the nature of the court-martial proceedings or to participate intelligently in his defense in July 1982. Therefore, it is just as probable that the applicant was not able to assist counsel with the preparation of his Article 69 petition in 1984 which failed to include the current request for removal of the NJP and the associated enlisted performance evaluation and the request for advancement to E-7.

5. Additionally, the Board is persuaded to waive the statute of limitations because the applicant's claim has some merit. The Board agrees with the Coast Guard that the applicant's NJP of April 19, 1982, should be removed from his record as the applicant probably suffered from a mental defect at that time that caused him to lack the substantial capacity to appreciate the criminality of his conduct, to conform his conduct to the requirements of the law, and to cooperate intelligently in his defense. As the then-Chief Counsel stated, the sanity board findings constituted a complete defense to the court-martial charges. The Board finds that the sanity board findings also excuse the applicant's misconduct that led to his NJP. As the JAG stated, the date in which the applicant committed the February NJP offenses and the date of NJP were within the period that the applicant was determined to be incompetent. Therefore, the NJP of April 19, 1982, the associated performance evaluation, and the administrative remarks entry dated February 1, 1982, noting the NJP and the commencement of a new period towards a good conduct award[5] should be removed from the applicant's record. The Board further agrees with the JAG that with the removal of the aforementioned documents, there is no basis to refuse granting the applicant's request to be awarded his second good conduct award.

6. With the removal of the NJP, the applicant's record will contain no disciplinary actions. In this regard, the applicant asserted with the removal of the NJP and the fact that a sanity board determined that he was mentally incompetent at the time he committed the NJP offenses, he should have been advanced to pay grade E-7. The convening authority has already set aside the special court-martial conviction and sentence that included the reduction in rate to SNFT. The Commandant placed the applicant on the TDRL in pay grade E-6, the highest grade in which the applicant satisfactorily served.

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[5] It is clear from the military record that while this entry is dated February 1, 1982, the date the applicant committed the NJP offenses, it refers to the NJP to be imposed on April 19, 1982 and it is the entry that established the new commencement date for the applicant's good conduct award eligibility period.

7. However, the Board agrees with the Coast Guard that the applicant has failed to prove that he would have likely been advanced to pay grade E-7 in the absence of the NJP. To be eligible for advancement the applicant required the CO's recommendation. See Article 5-C-16a. of the Personnel Manual then in effect. As the Coast Guard argued, removal of the NJP does not mean that the CO's decision not to recommend the applicant for advancement was likely to change. In this regard, the Board notes that the applicant exhibited abnormal behavior in December 1982 for which he was hospitalized. He was diagnosed with a mental disability that led to his being found unfit for continued duty and processed through the PDES. In addition, a sanity board determined that the applicant suffered from a mental defect as early as 1981. Under the circumstances, the applicant could not meet the criteria of Article 5-C-12a.(1) of the Personnel Manual for advancement of disabled personnel. This provision states in pertinent part, that personnel who are recommended for advancement but awaiting a physical evaluation board or are in a not fit for duty status can be advanced if they satisfy certain criteria, which includes retaining the CO's recommendation for advancement and "In the judgment of the [CO], there is a reasonable expectation that the individual will be able to return to a fit for duty status." From the applicant's hospitalization on December 11, 1982, until his discharge from the Coast Guard on January 19, 1988, he was never fit for duty. The Board finds that based on the evidence of record there was never a reasonable expectation prior to, during, or after his disability processing that the applicant would have been able to return to a fit for duty status. Nor did the applicant ever receive the CO's recommendation for advancement after his name was removed from the advancement list. The applicant has failed to prove that the CO committed an error or injustice by not recommending him advancement to E-7.[6]

8. After the applicant was declared unfit by CGPC as a result of the PDES processing, he was not eligible for advancement. Article 5-C-12a.(2) of the Personnel Manual in effect at the time stated that a member who had been declared unfit was not eligible for participation in and advancement under the servicewide competition.[7] However, under Article 12-C-15f.(3) of the Personnel Manual, a member may be retired

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[6] Although the Board normally attempts to place an applicant in the position he would have been in had the error not occurred as discussed in Denton v. United States, 204 Ct. Cl. 188, the fact is that the applicant was not eligible for advancement without the CO's recommendation, a mandatory requirement. There is no evidence in the record that the CO reinstated his recommendation for the applicant's advancement, even after the applicant's disabilities were uncovered.

[7] Article 5.C.25.b. of the current Personnel manual however permits a member who is declared unfit by CGPC to be advanced prior to retirement if they are above the cut on the current eligibility list. However, the member would still need the CO's recommendation for advancement, which the applicant did not have. The applicant did not submit evidence showing that he was above the cut on the advancement eligibility list and that information is not in the military record. The cutoff consists of those on the list who are guaranteed advancement and who do not have to compete further for promotion.

in the highest grade or rate to which he or she would have been promoted had it not been for the physical disability for which the member is retired, if that disability was found to exist as a result of the member's physical examination for promotion. The applicant's mental disability was not discovered as a result of a medical examination to determine his fitness for promotion but rather as the result of the applicant's abnormal behavior after a courts-martial conviction. Therefore, under the regulation the applicant could not be retired as a FTC. He was properly retired as a FT1 upon a highest-grade determination by the Commandant. The Board finds no error or injustice in the treatment of the applicant by Coast Guard authorities.

9. The applicant suggested that he might not have received all the pay that he was entitled to as a result of the CA's action restoring all the property and benefits that were taken from him as a result of the court-martial. However, the applicant presented no evidence on this point and the request should be denied.

10. Based upon the above, the Board finds that it is in the interest of justice to waive the statute to limitations and to grant the applicant the partial relief recommended by the Coast Guard.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application former xxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG for the correction of his military record is granted in part as follows:

The April 19, 1982 NJP and the associated performance marks shall be removed from the applicant's record.

The February 1, 1982, administrative remarks entry documenting the imposition of CO's NJP and noting the beginning of a new good conduct award eligibility period shall be removed from the applicant's record. (See footnote 5 of this decision.)

His record shall be further corrected by awarding him a second good conduct award.

All other requests are denied.

Bruce D. Burkley

Harold C. Davis, M.D.

George A. Weller