

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No.1998-106

FINAL DECISION

Deputy Chairman:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14, United States Code. It was commenced on August 14, 1998, upon the Board's receipt of the applicant's application for correction.

This final decision, dated August 24, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a retired ensign, asked the Board to correct his record to show that he retired from the Coast Guard as a lieutenant junior grade (LTJG; pay grade O-2) rather than as an ensign (pay grade O-1). He further requested back pay and allowances from July 1, 1995.

On October 17, 1994, the applicant asked to be retired from the Coast Guard. On November 9, 1994 that retirement request was approved. Prior to his retirement, the applicant held the temporary grade of LTJG. He was taken to non-judicial punishment (NJP) on December 17, 1994, for sexual harassment that amounted to conduct unbecoming an officer and a gentleman (Article 133 of the Uniform Code of Military Justice). His punishment consisted of a letter of reprimand and forfeiture of pay. He was given a special OER, for the period from February 11, 1994 to December 23, 1994, to document his conduct and the NJP. On May 5, 1995 the Commandant convened a special board¹ to certify the highest grade satisfactorily held by the applicant for retirement purposes. On May 9, 1995, that special board determined that the highest grade satisfactorily held by the applicant was ensign (pay grade O-1E). The special board recommendation was approved by CGPC and the applicant retired on July 1, 1995, as an ensign.

SUMMARY OF SUBMISSIONS AND RECORD

The applicant stated that his rank was reduced from O2-E (LTJG with enlisted service) to O-1E (ensign with enlisted service) at the time of his retirement. He stated that "a great injustice was handed down to [him] as a result of USCG senior officers seeking retribution for [his] successful complaint of discrimination made in 1988." The applicant claimed that the NJP, letter of reprimand, and the special board were the

¹ The terms special board and highest grade held (HGH) board are used interchangeably in this decision.

retaliatory actions taken against him by public health service officers in G-K (Health and Safety Directorate of the Coast Guard).

On May 5, 1995, the Commander, Military Personnel Command, issued a precept convening a special board to certify the highest grade satisfactorily held by the applicant for retirement purposes. The precept stated that there would be no witnesses and that the board was limited to considering the documentary evidence presented to it, which included a statement submitted by the applicant and his performance record. The precept further advised the members that they must confine themselves to the facts of record and may not base their judgment on rumor or hearsay.

This special board convened on May 9, 1995. The special board found that the highest grade satisfactorily held by the applicant was his former grade of ensign. The special board stated as follows:

While serving as a [LTJG], USGC, [the applicant's] overall performance for the entire period served in that grade was not satisfactory . . . due to incidents of conduct unbecoming an officer. These incidents were documented in a special OER for the period 11 February 1994 to 23 December 1994 and the . . . punitive letter of Reprimand from Commander, Maintenance and Logistics Command, Atlantic, dated 23 December 1994. This Punitive Letter of Reprimand resulted from UCMJ proceedings held 12 December 1994. These proceedings found that [the applicant] engaged in conduct unbecoming an officer and a gentleman in that he behaved in a reprehensible manner while performing his duties as a Physician's Assistant This special OER documenting this behavior was "derogatory" and indicates [the applicant] "failed in the accomplishment of his duties" during that time frame.

Background for Applicant's Allegations of Retaliation

In 1985, the applicant then a student in a physician's assistance program at a civilian university was removed from that program based on a diagnosis by Captain F. that he suffered from a personality disorder.

In 1986, the applicant was the subject of an administrative discharge board (ADB) in which his command recommended his discharge due to the personality disorder. The recommendation for discharge was based on Captain F.'s diagnosis that the applicant had a personality disorder.

The ADB recommended, after a hearing, that the applicant be retained on active duty and determined that he had been misdiagnosed by Captain F. and that he did not suffer from a personality disorder. According to the applicant, his commanding officer (CO) made the following comment in recommending that the Commandant approve the recommendation of the ADB:

It is unfortunate when adverse action taken against a member is based upon information which appeared to be valid at the time but is later discovered that the information/considerations were questionable . . . for

the member is clearly the one who suffers. Such appears to be the case with [the applicant] who had some questionable minor judgment calls in one or two particular situations and who appears to be the victim of an unavoidable conflict in personality with his superior

The applicant stated that two years (1988) after the ADB adjourned, he found it necessary to file a discrimination complaint against the PHS officers in G-K and Captain F. in particular because of their refusal to approve his request to attend another physician's assistant program. The applicant alleged that the denial of his application to attend a subsequent physician's assistant program was the result of religious discrimination and retaliation against him for his having prevailed at the ADB. The applicant stated that after an investigation into the history of his effort to become a physician's assistant, a resolution of the complaint was reached, wherein he was granted full relief. He was allowed to enroll in a physician's assistance program.

Sometime after the applicant completed the physician's assistant training course, he was assigned to the clinic at Cape May. Shortly after the applicant's assignment to the clinic at Cape May, Capt. F. was assigned to the clinic as the senior medical officer. Capt. F. was the officer who had previously diagnosed the applicant with a personality disorder and one of the officers whom the applicant had named as a party in the earlier discrimination complaint. The applicant stated that Capt. F., as senior medical officer, was his reporting officer and wrote the majority of his OERs.

While at Cape May, the applicant was punished at admiral's mast for conduct unbecoming an officer. The applicant claimed that he was not guilty of the conduct for which he was punished and he alleged certain improprieties occurred at the NJP hearing. Particularly, he stated that the only live witness against him at the NJP hearing admitted to lying and to being untruthful on the witness stand. He claimed that the NJP official rehabilitated the witness on two occasions. The applicant did not appeal the NJP.

In July 1995, the Professional Review Committee of the Coast Guard notified the applicant that it would take no adverse action with respect to the applicant's clinical privileges. The applicant claimed that the review of his professional clinical privileges was part of the overall retribution that he suffered from the leadership of the Coast Guard medical community. The applicant claimed that the determination that no adverse action would be taken with respect to his clinical privileges came only after his attorney informed the Commandant that the applicant had prevailed on a discrimination complaint against one of the members of that committee.

The applicant asserted that some officers who committed worse offenses than he had were not required to retire in a rank lower than that held the day before retirement. Moreover, the applicant argued that his overall performance as a LTJG was satisfactory and he should have been permitted to retire in that grade.

The Special OER

The special OER is for the period from February 11, 1994 to December 23, 1994. The marks consisted of 1s in human relations, judgment, responsibility, and military

behavior. He received a 1 in block 12. The special OER was submitted with the following pertinent commentary in block 9.f.:

[The applicant] exercised poor judgment and displayed a lack of responsibility by engaging in the following instances of Conduct Unbecoming of an Officer and a Gentleman: (1) making unwelcomed remarks/gestures of a sexual nature to a female E-3, while also implicitly recognizing that any such relationship would be inappropriate by stating that "they (the Coast Guard) don't have to know about it," or words to that effect; (2) making unwelcomed remarks of a sexual nature to a civilian physical therapy student intern; and (3) making unwelcomed remarks of a sexual nature to a dependent wife and stating "it is too bad you are married" and "don't tell your husband I think you look nice because I don't need to deal with a jealous husband," or words to that effect. This conduct is unacceptable when done by any Cost Guard officer. It is particularly repugnant and unprofessional when done by a Physician's Assistant during the course of treating a patient.

Attached to the special OER were the letter of reprimand that the applicant received as a result of non-judicial punishment and reviewer comments. The reviewer disagreed with the reporting officer's unsatisfactory mark in block 12 and gave the applicant a rating as a qualified officer. The reviewer stated "[b]ased on [the applicant's] performance in the Facilities Engineering Division, [the applicant] is qualified to serve until his retirement."

Applicant's Other OERs

The applicant has two ensign OERs and three LTJG OERs in which Capt. F. served as the reporting officer. On the first OER prepared on him by Capt. F. the applicant received marks of 4 and 5 with a 5 in block 12 (comparison scale and distribution). His second OER was similar to the first, with a mark of 4 in block 12. On the third OER, both the supervisor and reporting officer noted that the applicant's had been counseled regarding an inappropriate relationship with a subordinate. The supervisor also noted that "several formal complaints have been lodged against [the applicant] by patients under his care." The reporting officer gave the applicant a mark of 2 in block 12 for the third OER. On the fourth and fifth OERs prepared by this reporting officer, the applicant received marks of 4s and 5s and a mark of 3 in block 12 of each report. The applicant has four other OERs in his record, prepared by a different rating chain. Except for the derogatory special OER, the others contain grades of 4s and 5s, with a mark of 3 on the earlier OER and marks of 4 in block 12 on each of the remaining two OERs.

Views of the Coast Guard

On July 15, 1999, the Board received an advisory opinion from the Chief Counsel of the Coast Guard recommending that relief be denied.

The Chief Counsel stated that this application should be dismissed because the applicant failed to exhaust his administrative remedies by not filing a discrimination and

retaliation complaint against his command through the civil rights process. The Chief Counsel also stated that the applicant failed to take advantage of the opportunity to appeal the NJP or to file an article 138 complaint against his commanding officer.

The Chief Counsel asserted that the applicant had failed to produce substantial evidence to rebut the presumption that the HGH (highest grade held) board acted properly and without prejudice. The Chief Counsel also argued that the applicant failed to show any procedural error in the HGH proceedings. He further stated that the applicant failed to demonstrate an error or injustice with respect to the special OER, on which the HGH based its recommendation that the applicant should be retired in the lower grade of ensign.

The Chief Counsel stated that the sexual harassment charges against the applicant for which he was punished at NJP and which were documented in the special OER, had nothing to do with his prior administrative discharge proceedings or his prior discrimination complaint. The Chief Counsel argued that the applicant has not shown that the NJP and the Special OER were unjust or a continuation of alleged past harassment. He noted that the applicant did not exercise his right to appeal the imposition of the NJP and only recently asserted that the NJP was procedurally defective and infected with bias. The Chief Counsel further stated, in pertinent part, as follows:

Applicant has not provided evidence showing that the decision to impose non judicial punishment was factually erroneous or an abuse of discretion. In fact, the Flag Officer conducting the NJP reviewed the records and heard witnesses and resolved this matter against the applicant. In contrast, the applicant has failed to overcome the strong presumption that the military officials involved in his December 1994 NJP performed their duties correctly, lawfully, and in good faith.

The Chief Counsel stated that pursuant to section 421(a) of title 14 Unites States Code and Article 12.C.15. of the Personnel Manual, the Commandant had the authority to retire the applicant at a grade other than the highest grade held. The Chief Counsel stated that the HGH is limited to a review of documentary evidence and does not call live witnesses. The applicant was afforded the opportunity to submit a statement to the HGH Board.

Attached to the advisory opinion was a memorandum from the Commander, Coast Guard Personnel Command, (CGPC). He explained which officers are subject to HGH determinations. He stated as follows:

Not all officers are subject to a HGH process and [are] allowed to retire in their current grade. Not all officers are subject to HGH determinations and even fewer who are subject to them are referred to special boards convened to assist the Commandant in making those determinations. Title 14, Section 421 does not authorize permanent Regular officers (even those convicted of more serious offenses) to be subject to HGH determinations and requires that they be retired with the permanent grade held at the time of retirement. The provisions of Title 14 which

establish the authority of the Coast Guard to appoint temporary officers afford them protections as well as responsibilities; a protection being a right to revert to a permanent enlisted grade; a responsibility being subject to HGH determinations. It was his status as a temporary officer requesting retirement which led to the review of his record containing his inappropriate behavior and thus led to a HGH determination.

Applicant's Response to the Views of the Coast Guard

Subsequent to receiving the advisory opinion, the applicant obtained an attorney who submitted a brief setting out the applicant's original contentions as well as new ones.

The applicant asserted that the Coast Guard violated Article 10-A-2g.(2)(b) of the Personnel Manual by permitting Capt. F. to serve in the applicant's rating chain because of the past interactions between Capt. F. and the applicant. Capt. F.'s transfer to the clinic where the applicant was assigned "[r]aise[d] a substantial question whether the Reported-on Officer will receive a fair and accurate evaluation." The applicant asserted that although the OERs written by Capt. F. were never adverse, they were consistently uncomplimentary in some respect and they were instrumental in his failure of selection for promotion to lieutenant (LT). The applicant stated that there is no way to be confident that Capt. F. was objective about the applicant's performance given "(1) his prior psychiatric evaluation of [the applicant] and (2) the Coast Guard's rejection of that evaluation in the administrative discharge board process." The applicant pointed out that of the eight OERs he received as an officer, five were written by Capt. F. The applicant asserted that he was a marked man within the medical department and the Coast Guard permitted Capt. F. whose objectivity was open to grave doubt to exert a major influence on his performance at the one and only medical unit at which he served as an officer. The applicant stated that the OERs written by Capt. F. should not have been in his record, and it was prejudicial for them to have been considered by the Special Board and the Acting Commandant.

The applicant stated that the question before the Special Board and the Acting Commandant was whether the applicant's performance of duty as a LTJG was satisfactory. To answer this question, the applicant stated that his entire record should have been reviewed, not simply the flag mast and special OER. The applicant stated that except for the special OER, none of his other OERs were unsatisfactory. In fact, the other OERs while containing some criticisms, contained some very complimentary remarks. The applicant did receive some marks of 3, but most of his marks were 4s and 5s. The applicant stated that "[I] do not contend that [my] record was spotless. But [I] do contend that [my] overall record of service as a [LT]JG was satisfactory.

The applicant stated that one of the OERs considered by the Special Board and the Acting Commandant was defective, pursuant to the Personnel Manual. Articles 10-A-4d.(4)(b), -(6), (7)(b), (8)(a), -4g.(3)(g), Personnel Manual. According to the applicant, this defective OER undermined the HGH determination made by the Special Board. He claimed that the OER for the period from April 8, 1993 to June 30, 1993 contained prohibited comparisons from one reporting period to another. Contrary to the pertinent provisions of the Personnel Manual, this OER repeatedly refers to matter

from a prior reporting period. He provided the following examples of comments from this OER that referred to another reporting period:

[Section] 6c observes that "[t]here have been no complaints regarding perceived inappropriate remarks since December 1993." . . . Section 8 states "His problems in the past have been primarily making inappropriate remarks. This has not happened during this marking period." . . . [Section] 9f states: "His judgement has improved in his dealing with subordinates and others." Section 11 states: "[The applicant] has demonstrated a willingness to address areas that were shortcomings, noted above and on previous OER." [Emphasis provided by the applicant].

The applicant asked that all references quoted above be removed from this OER. He claimed that the alleged prohibited references "made his record appear worse before the Special Board and the Acting Commandant than it would have had they not been included because they drew further attention to previous adverse matter."

The applicant argued that since these alleged improper comments made his record appear worse, the action of the Acting Commandant must be set aside unless the Coast Guard can demonstrate that the applicant would have been found not to have served satisfactorily in the grade of LTJG and retired in the grade of ensign in any event.

The applicant contended that the Coast Guard's decision to retire him in the grade of ensign was an injustice in light of its actions in the case of other officers who were permitted to retire in the highest grade held despite misconduct far graver than the applicant's. He cited ten examples of other officers permitted to retire in the highest grade held, despite their proven misconduct. These officers ranged in rank from a CWO2 to a rear admiral. The applicant stated that these officers committed misconduct such as dereliction of duty, fraud, and conduct unbecoming an officer.

The applicant stated that he was punished at NJP for a minor offense. He argued that his misconduct was indeed minor in comparison to that of the officers he listed as having been permitted to retire in the higher grade. He stated that "several of the officers . . . committed offenses that were sufficiently grave to warrant their referral to the Department of Justice for criminal prosecution . . . or to warrant their prosecution by military authorities under the UCMJ. . . . In two cases, the officers in question caused the total loss of Coast Guard cutters under their command. In one of those two cases, there was major loss of life. It is . . . preposterous to contend that [the applicant's] shortcomings, whatever they were, rose to anything evenly vaguely approaching the gravity of cases such as these."

The applicant argued that an agency has a duty to be consistent in its decision making, or to explain what seems to be departures from earlier actions. *Lozowski v. Slater*, ___ F. Supp. 2d ___, ___ (D.D.C. 1999). He stated that the Coast Guard made no effort to reconcile the action it took against him with that it took against the other officers discussed above.

The applicant stated that the Coast Guard attempted to use the fact that he was a temporary officer to distinguish his treatment from that of the other officers, who were permanent officers. The applicant stated that the Coast Guard's suggestion that 14 U.S.C. § 421(a) (1994) does not authorize permanent Regular officers to be subject to HGH determination is a red herring because this provision of the law does not address HGH determinations at all. This Provision states:

Every commissioned officer, warrant officer, or enlisted member who is retired under any provision of this title shall be retired with the permanent grade or rate held at the time of retirement, unless entitled to retire with a higher grade or rate under any provision of this title or any other law.

The applicant stated that contrary to the Coast Guard's claim that "[n]ot all officers are subject to HGH determinations," section 334(a) of title 14 covers all commissioned officers; it does not distinguish between temporary and permanent officers. This provision provides the following:

Any commissioned officer, other than a commissioned warrant officer, who is retired under any provision of this title, shall be retired from active service with the highest grade held by him for not less than six months while on active duty in which, as determined by the Secretary, his performance of duty was satisfactory.

The applicant stated that not only are temporary officers who request retirement subject to review, but all officers who request retirement are subject to "initial administrative review" to determine whether their cases should be referred to a special board. See *Covill v. United States*, 959 F.2d 58, 60 n.6. The applicant stated that the Personnel Manual in no way distinguishes between temporary and permanent commissioned officers for purposes of that review. Article 12-C-15g.(1) of the Personnel Manual states the following:

The record of each individual scheduled for retirement will be administratively reviewed at the time of retirement to determine the highest grade or rate in which his/her service in the Coast Guard is satisfactory.

The applicant stated that in view of the disparate agency actions, the action taken against him is arbitrary and capricious and should be set aside. In addition to showing that he retired as a LTJG with back pay and allowances, the applicant in his response to the advisory opinion, requested the following additional relief. 1. That the proceedings of the Special Board and the Acting Commandant's action be set aside. 2. That Sections 8, 9f and 11 of the OER for the period ending June 30, 1993 be corrected by deleting references to the prior reporting period. 3. That all of the OERs in which Capt. F. was a member of the rating chain should be expunged and continuity reports substituted therefor.

Supplemental Views of the Coast Guard

On March 9, 2000, the Board received the supplemental views of the Coast Guard.

The Coast Guard stated that the applicant held a dual status; he was a permanent enlisted member and a temporary commissioned officer. The Chief Counsel stated that a permanent enlisted member retires under the authority of 14 U.S.C. § 421 and § 355. However, even though a permanent enlisted member, the applicant had served in a higher grade. Therefore, the Chief Counsel stated that pursuant to 14 U.S.C. § 362, the applicant was entitled to have his record reviewed for possible retirement in a higher grade. This provision states that

[a]ny enlisted member who is retired under any provision of section 353, 354, 355, or 357 of this title shall be retired from active service in the highest grade or rating held by him while on active duty in which, as determined by the Secretary, his performance of duty was satisfactory, but not lower than his permanent grade or rating.

The Chief Counsel stated that the HGH board and the Acting Commandant, reasonably concluded that the applicant had not served satisfactorily at the grade of LTJG. He stated in reaching its findings and recommendation, the HGH board relied primarily on the special OER and the December 23, 1994, punitive letter of reprimand. The Chief Counsel pointed out that Capt F. was not a member of the applicant's rating chain for either of the two OERs on which the special board relied, nor was Capt F. directly involved in the matters discussed in those reports or the CGIS investigation. The Chief Counsel stated that Captain F. retired from the Coast Guard in April 1994.

The Chief Counsel stated that the applicant's allegation that Capt. F. could not be an objective member of the applicant's rating chain because he had diagnosed the applicant as having a personality disorder some 9 years earlier is unfounded. In this regard, the Chief Counsel further stated:

Article 10.A.2.g.(2)(b), [Personnel Manual] does not state that a medical officer, upon reaching a medical diagnosis on a patient member, is forever barred from serving in the patient member's OER Rating Chain. What Article 10.A.2.g.(2)(b) . . . *does state* is that a presumption of disqualification will arise in any situation in which a personal interest or conflict on the part of the OER rating Chain raises a substantial question whether the Reported-on Officer will receive a fair and accurate evaluation. Applicant has failed to prove how [Capt. F.], acting in his professional capacity as staff psychiatrist, had a *personal* conflict with Applicant. (Emphasis added). There is no evidence that [Capt. F.] acted anything but professional in that evaluation or that in retrospect, his evaluation was presumptively wrong. If adopted, Applicant's interpretation of [this provision] would require any member of an OER rating chain to disqualify themselves after having taken action unfavorable to a Reported-on Officer's personal interests That interpretation is clearly specious and should be rejected.

Moreover, the evidence in the record reveals that [Capt. F.] acted objectively and without bias toward Applicant. First, the evidence shows that Capt. F., who had had no previous interaction with Applicant, acted professionally in his capacity as staff psychiatrist in reaching his medical diagnosis of adjustment disorder. Second, contrary to Applicant's allegation that [Capt. F.] transferred in disgrace after the fact, Capt. F. voluntarily chose to return to a Public Health Service position . . . for personal reasons. . . . Lastly, Capt. F. took affirmative steps when he arrived for duty at Cape May . . . to discuss the matter openly with Applicant. . . . Applicant did not object to Capt. F.'s role in his OER rating Chain and the evidence indicates Capt. F. acted objectively and fairly in his performance assessment of Applicant. . . . Applicant has failed to allege a misstatement of hard facts in any of the five [Capt. F.] OERs nor did he exercise his due process right to object to any of those OERs by submitting a Reply.

The Chief Counsel stated that whether or not HGH boards could or should have been held in other cases is irrelevant in the instant case. The Chief Counsel stated that while 14 U.S.C. § 334 appears to provide for a highest grade determination for all commissioned officers, that provision only applies to temporary commissioned officers under title 14 of the United States Code. In a footnote, the Chief Counsel stated "Article 12.C.15., [Personnel Manual] is overly broad and seemingly ambiguous regarding the statutory requirement for a HGH board. The Coast Guard intends to amend that regulation in the next change to the [Personnel Manual] to comport with the statute."

The Chief Counsel attached a statement from Capt. F. to his supplemental comments. Capt. F. stated that he recommended against the applicant's potential enrollment in the physician's program at Wake Forest University. He stated that his recommendation against the applicant was at the behest of the Office Chief, with the full concurrence of all Division Chiefs in the Office of Health Services. Capt. F. stated that he had no ill will against the applicant. Capt. F. further stated as follows:

When I arrived for duty at Cape May I discovered that [the applicant] worked for me. I immediately met with him to ensure that he had an opportunity to discuss any matter related to our previous interactions. I told him that the past was the past and that I harbored no ill will or prejudice against him. I wanted to put everything out in the open and give him any benefit of the doubt he might desire if he felt uncomfortable working for me. Our administrative officer was aware of the situation and would have forwarded an early transfer request with a favorable endorsement if [the applicant] so requested. At no time did I state or infer that I was unable to work with him.

During the period of my service at Cape May, I was compelled to counsel [the applicant] several times regarding inappropriate relations with female patients and co-workers. . . .

I subsequently retired in April 1994 and have no knowledge concerning the events leading up to [the applicant's] Admiral's Mast. I do recall

receiving a telephone call from my relief asking about a complaint he had received from a civilian student dental technician complaining about [the applicant].

In summary, I believe that events at Cape May during the time period 1992 through 1995 have proved that my psychological evaluation of [the applicant] in 1985 was accurate and correct. . . .

Applicant's Reply to the Supplemental Coast Guard Views

On April 24, 2000, the Board received the applicant's reply to the supplemental views of the Coast Guard. The applicant stated that Capt. F's statement was not credible and does not respond to the applicant's claim that he should not have been permitted to be a member of his rating chain.

The applicant stated that Capt. F.'s description of their interaction at Cape May is misleading. The applicant described their meeting at Cape May in the following manner: "When [we] saw one another, [Capt. F.] asked [me] if [I] wanted to stay at Cape May. [I] was buying a house and naturally wanted to stay. [I] said to [Capt. F.] that if either one of [us] had to leave, it should be [Capt. F]."

The applicant stated that Capt. F.'s "body language and other conduct at Cape May was entirely consistent with the fact that [Capt. F.] and others with whom he worked at Headquarters had been thwarted in the effort to scrub the applicant from training as a physician's assistant." He stated that Capt. F. avoided making eye contact with him, was offended by the fact that the applicant wore an officer's uniform, and unceremoniously handed the applicant his LTJG promotion certificate in a hallway.

The applicant expressed disagreement with the Coast Guard's argument that the OERs which contain comments that refer to other reporting periods are irrelevant to the dispositive issues in this case and should be summarily dismissed because the applicant failed to establish a nexus between them and the HGH determination, is not well taken. The applicant stated that he has established a nexus between the error and the special board by showing that the applicant's record would have looked better without the erroneous out of period OER entries. He stated that the burden has now shifted to the Coast Guard.

With respect to the Coast Guard's contention that the applicant did not reply to the OERs he now objects to, the applicant stated that his objections to the OERs are such that they would have been prohibited by the content and length constraints imposed by the Personnel Manual. He stated that the time for submitting a reply to an OER is far shorter than the time allowed for requesting a review by the BCMR.

The applicant stated that the Coast Guard has chosen not to respond on the merits to his contention that its HGH determination in the applicant's case was arbitrary and capricious when compared with the treatment of these other officers, other than to claim these other cases are irrelevant to the applicant's situation. The applicant stated that an agency cannot play favorites or draw arbitrary distinctions in cases. The applicant attached several statements from the officers who allegedly had been

permitted to retire in the highest grade, giving the Coast Guard permission to discuss their situations in this case.

The applicant stated that the Coast Guard's contention that highest grade held determinations apply to temporary officers but not to permanent officers, is without merit. He quoted the following from a Court of Claims decision:

It was satisfactory service in the grade that entitled the officer to advancement, whether that grade was permanent or temporary. Congress could not have intended to prefer service in a temporary grade over service in a permanent grade. The spirit of the Act [of June 29, 1948] was that an officer was entitled to retired pay in the highest grade held by him, temporary or permanent. *Grayson v. United States*, 137 Ct. Cl. 779, 782 (1957).

The applicant stated that neither Titles 14 nor 10 U.S. Code, Coast Guard Regulations, nor the Personnel Manual purport to set different standards of performance for temporary and permanent officers. He stated that it appears that the Coast Guard agrees that Article 12.C.15 of the Personnel Manual supports this conclusion.

The applicant concluded his reply to the advisory opinion with the following paragraph:

[I] paid [my] debt to society in the Flag Mast. In addition, [I have] had to incur substantial expense not only in preparing for the mast . . . but also in defending [my]self against other actions the Coast Guard has proposed against me as well as in pursuing and ultimately settling my civil rights complaint. It is fundamentally unfair to also saddle [me] with the six figure loss of the difference between the retired pay of a Lieutenant (j.g.) and that of an ensign over the remainder of [my] life.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter 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 (1993). The Board concurs in that recommendation.

3. The Board finds that pursuant to section 334(a) of title 14 United States Code, the Coast Guard could review the applicant's record to determine the HGH by the applicant. This provision of the law states that "[a]ny commissioned officer, other than a commissioned warrant officer, who is retired under any provision of this title, shall be retired from active service with the highest grade held by him for not less than six

months while on active duty in which, as determined by the Secretary, his performance of duty was satisfactory."

4. The applicant was a temporary officer, who maintained his permanent enlisted status. Therefore, at the time of his retirement he held the dual status of a temporary commissioned officer as well as that of an enlisted member. The Board is not persuaded by the Coast Guard's argument that 14 U.S.C. § 334(a) only applies to temporary officers, since no such distinction is made in the statute. There may be situations where other than temporary officers will be subject to this statute.

5. There is no argument, however, that the applicant held a permanent enlisted status. Therefore, based on 14 U.S.C § 362, he was entitled to be retired in the highest grade held, but not lower than his permanent enlisted grade, in which the Secretary determined that his service was satisfactory. See 14 U.S.C §421 which states that "every commissioned officer, . . . or enlisted person who is retired under any provision of Title 14, U.S. Code, shall be retired with the permanent grade or rate held at the time of retirement, unless entitled to retire with a higher grade or rate under any provision of this title or any other law." Moreover, the applicant could be retired only on twenty years of enlisted service, because he did not meet the requirement for retirement as a commissioned officer based on twenty years of service. In this regard 14 USC § 291 states that in order to retire as a regular commissioned officer with twenty years of service, ten of those twenty years must have been as a commissioned officer. From this, the Board concludes that the applicant's retirement eligibility was based on at least twenty years of enlisted service. Having served in a higher grade than his permanent enlisted rate of chief health service technician, the applicant was entitled to a record review to determine if he could be retired in the highest grade held.

6. The Commandant acted in accordance with law and regulation by convening a board to recommend whether the applicant should be retired in the higher grade. The HGH board determined that the applicant's overall service as a LTJG was not satisfactory and recommended that he be retired in the lower grade of ensign. The Commandant approved the applicant's retirement in the grade of ensign.

7. The applicant has not demonstrated that the NJP, letter of reprimand, special OER, or the special board, were retaliatory actions taken against him by public health service officers in the Health and Safety Directorate of the Coast Guard. The record shows that the applicant was taken to NJP for conduct unbecoming an officer and a gentleman by making inappropriate comments to his patients. The special OER documented this unbecoming conduct, the NJP and the letter of reprimand. The applicant has not shown that any of the officers in his rating chains, except for Capt. F., any of the officers on the HGH board, or the NJP official had any previous involvement with him. While Capt. F. had some previous involvement with the applicant prior to their Cape May assignments, Capt. F. was not involved with the NJP, special OER or HGH board.

8. Although the applicant did not appeal the NJP, he now claims that there were improprieties in the NJP proceedings. In addition he claims that the only witness against him lied on the witness stand. He failed to prove this allegation or any other impropriety in the NJP proceedings.

9. The applicant argues that his record was in error and unjust when it was considered by HGH board to determine the highest grade satisfactorily held by him on active duty. He contends that the OERs, in which Capt. F. served as reporting officer, were prepared in violation of Article 10-A-2.g.(2)(b) of the Personnel Manual. The applicant claims Capt. F. should have been disqualified under this provision because his previous interaction with the applicant "[r]aised a substantial question whether the Reported-on Officer will receive a fair and accurate evaluation." In 1895, Capt. F. diagnosed the applicant as having a personality disorder. This diagnosis led in part to the applicant's ADB proceedings. After the discharge proceedings, Capt. F. wrote a letter recommending against the applicant's participation in another physician's assistant program. The applicant's 1988 discrimination complaint did involve allegations against Capt. F.

10. Based on their history, the Board could conclude that Capt. F. should not have been in the applicant's rating chain. However, the Board finds that upon Capt. F.'s arrival at Cape May, the applicant was given an opportunity to request another assignment. The applicant suggested in his brief that he wanted to stay at Cape May because he had just bought a house. The applicant has presented no evidence that he asked to have another rating chain established for himself at Cape May or for another assignment at Cape May. He was aware that Capt. F. would be his reporting officer and he accepted that fact. The Board finds it is a little late in the day for the applicant to object to Capt. F. as the reporting officer; he should have objected when given the opportunity.

11. Moreover Capt. F.'s OERs do not demonstrate that he harbored a bias against the applicant. The applicant's marks from Capt. F. were in the average to just below average range. In fact, his block 12 marks for the first two OERs in which Capt. F. served as reporting officer were 5 and 4. Capt. F. gave the applicant a 2. in block 12 for the OER for the period October 1, 1992 to April 7, 1993. However, this OER commented on the applicant's inappropriate relationship with a subordinate and inappropriate comments to his patients. The applicant has not demonstrated that Capt. F.'s assessment of his performance in these OERs is inaccurate or that they were infected with bias.

12. The applicant's allegation that the OER for the period April 8, 1993 to June 30, 1993 contained comments that refer to a previous reporting period has merit. Comments in that OER such as "His problems in the past have been primarily making inappropriate remarks" and "There have been no complaints regarding perceived inappropriate remarks since December 1993" refer to a previous reporting period. The Board finds that even if these comments were deleted from the OER it is not likely that the applicant would have been permitted to retire in the higher grade. The special board made it clear that the applicant's overall performance was not satisfactory essentially because of his conduct which led to an NJP, letter of reprimand, and special OER. The removal of the comments about which the applicant complains would leave his record essentially the same in appearance.

13. While the applicant argues that he should have relief on this point because the Coast Guard failed to address or rebut his claim that his record would look better

without the erroneous comments in the OER for the period April 8, 1993 to June 30, 1993, the Board finds sufficient evidence to dispose of this issue without any further comment from the Coast Guard. Based on the evidence in this case, the Board finds, as discussed No. 11 above, it is unlikely that the applicant would have been retired as a LTJG, even without the erroneous comments. Since the applicant has retired, and the Board finds it unlikely that he would have been retired as a LTJG with the erroneous comments removed, the Board has determined under the circumstances of this case, corrective action with respect to these comments is not necessary.

14. The Board notes that Capt. F. and the other reporting officers on each OER, except for one, through the period covered by the special OER were Public Health Service officers. Therefore it was necessary, pursuant to the Personnel Manual, to have a Coast Guard officer review the OER and attach certain comments. This was done, and each time the reviewer agreed with the rating chain's assessment of the applicant's performance.

15. The applicant claims that he was treated differently than the approximately 10 other officers he claims were permitted to retire in the highest grade held, even though, according to the applicant, their misconduct was equal to or greater than his. However, the applicant has failed to show that the retired grades of these other officers were not their permanent grades. Section 421 of title 14, United States Code gives commissioned officers and warrant officers the right to retire in the permanent grade held at the time of retirement. The evidence offered by the applicant does not show that these officers were permitted to retire in a higher grade than their permanent grade. The Board is not aware of any evidence that permits the Secretary to retire a servicemember in a grade below that member's permanent grade. The Board finds insufficient evidence to establish that the applicant was deliberately treated differently than these other officers. He was in a different status and the law and regulation permitted a review of his record to determine if he should be retired in a grade higher than chief hospital services technician.

16. Accordingly, the Board finds that the applicant's request for relief should be denied.

ORDER

The application of
correction of his military record is denied.

USCG(Ret.), for

