DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 2014-233

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 after receiving the applicant's completed application on December 2, 2014, and assigned it to staff member [redacted] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 24, 2016, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, an [redacted] pay grade E-7), asked the Board to correct her record to show that she was not selected for involuntary retirement by the Career Retention Screening Panel (CRSP) in November 2010 and was instead allowed to remain on active duty. Additionally, the applicant requested to receive all applicable back pay, leave and allowances.

The applicant explained that she was selected for involuntary retirement by the CRSP that convened in September 2010, and she was notified in November 2010 that she would be retired involuntarily. She appealed the decision, but her appeal was denied.

The applicant alleged that in the questions and answers provided on the Coast Guard Personnel Service Center webpage, it was specifically stated that the CRSP was not a reduction in force (RIF). The applicant alleged that the Coast Guard only called it a RIF board when requesting permission from the Secretary to skirt the due process protections provided for enlisted members in 14 U.S.C. 357 (a)-(g). The applicant alleged that the CRSP was designed to target members who fell below the Commandant's standards without giving them the statutory due process. The applicant alleged that the Coast Guard failed to provide the Secretary with any criteria and that the Coast Guard determined that providing due process—individual hearings—for approximately 1,600 members would be too burdensome.

The applicant alleged that the CRSP was mandated to conduct the panel in a manner that equaled a Selective Early Retirement Board (SERB), which it failed to do by not specifying the number of service members it was supposed to select for retirement. The Commandant should provide a maximum number of candidates to be selected to insure that no more candidates are forced into early retirement than are absolutely necessary to meet the Coast Guard's personnel needs. The applicant alleged that the CRSP was neither a RIF nor SERB, but an entirely new set of procedures that unfairly prejudiced the applicant by not providing her the safeguards required for a quality review.

The applicant alleged that on August 5, 2010, personnel subject to the CRSP were informed that the CRSP would make decisions about retention based on performance. The applicant alleged that on September 21, 2010, the applicant and others were informed of the selection criteria and given only three days to get their electronic imaged personnel data record updated.

The applicant alleged that the CRSP was allowed per its precept to only consider adverse information from the last five years. The applicant alleged that there was strong circumstantial evidence that the panel improperly considered negative information in her record that was outside of the designated time frame. The applicant alleged that the only adverse information in her file that occurred in the last five years was that she did not participate in the service wide exam (SWE). However, the applicant argued, since other similarly situated members who did not take the SWE were retained, the CRSP must have erroneously based its decision on an alcohol related incident in her record from 2002, which was outside the five-year guideline and a violation of the stated rules for the CRSP.

The applicant claimed that the Coast Guard failed to provide any reason for her selection and therefore she cannot know why she was selected. The applicant claimed that the CRSP did not properly apply the selection criteria to her. The applicant claimed that that her effectiveness as a leader and positive role model for junior shipmates is evident from the applicant's active efforts to take on leadership roles throughout her career. The applicant claimed that she remains viable for further professional advancement. Further, the applicant claimed that her record is otherwise so meritorious as to overcome any concerns raised by her failure to participate in the SWE. [redacted]

The applicant alleged that the one performance indicator that might have been applied to her was lack of professional upward mobility. The applicant alleged that prior to her position as an E-7 serving at an Electronic Systems Support Unit, she had not been given the opportunity to serve in a leadership role. The applicant alleged that because she applied for a position as Recruiter in Charge, she could not be an E-8 or be expected to make an E-8, so she could not take the SWE and compete for E-8.

The applicant alleged that she heard from a third party [redacted] CRSP stated that every applicant with an alcohol incident in their record was automatically selected for retirement.

The applicant concluded that she should be reinstated to active duty in the Coast Guard and granted the appropriate back pay, leave and allowances. In support of her allegations, the applicant submitted the following documents:

- On November 3, 2010, an email informing the applicant that she was not selected for retention by the CRSP and notifying her that the "official" paperwork would be released over the next couple weeks.
- The CRSP precept, dated September 22, 2010, directed a nine-member panel of officers and master chiefs to convene on September 27, 2010, to consider members who were eligible for involuntary retirement. The precept instructed the panel to review the candidates' records carefully to "afford each eligible candidate fair and equitable consideration." The panel was instructed to prepare a list of those selected for involuntary retirement and another list of those selected for continuation and was not given any quota. The panel was instructed to screen for continuation those who, *inter alia*, "show a propensity for upward mobility, advancement, and superior performance"; who "demonstrate a commitment to continual learning and self-improvement through the pursuit of advanced education"; who had "a record of creating and sustaining effective command climates and work environments characterized by respect for others and attention to the morale and welfare of subordinates"; who "possess an attitude of selflessness, humility, professionalism and enthusiasm"; who could "inspire, mentor, and encourage our people to greater levels of performance"; who would "hold subordinates accountable for lapses in performance and/or behavior"; who could provide "the leadership necessary to meet the current missions and operational tempo"; "who have demonstrated the potential to lead a diverse workforce and create circumstances for the success of all Coast Guard members"; and who reflect "the highest standards of conduct, integrity, capability, attitude, and military bearing."
- On November 23, 2010, the applicant appealed the decision of the CRSP on the following grounds: (a) she argued that her Direct Access record did not adequately reflect her career diversity, achievements, evaluations, recommendations or goals; (b) while acknowledging that she failed to demonstrate upward mobility by not qualifying or participating in a SWE since reaching E-7 rank, she argued that she did not compete in the SWE because while in the [redacted] she had been unable to fulfill her leadership role as a Chief Petty Officer and she sought to diversify her career path in Recruitment to be competitive when applying for Chief Warrant Officer; (c) she argued that if her selection for involuntary retirement was based on her entire service record, then the CRSP did not follow the selection standard of the Precept; and (d) she argued since the alcohol incident she had worked hard to overcome the negative marks.
- The CRSP candidate list; the May 2010 SWE advancement eligibility list for E-8; the May 2010 and 2011 Enlisted Advancement Announcements; the Chief Warrant Officer Eligibility cut off lists from 2009 and 2010; and the [redacted] Chiefs lists. From these, the applicant argued that there were 15 enlisted personnel that were retained by the CRSP, and that she determined to be similarly situated or her "equal" prior to the CRSP.

- ALCOAST 408/10 issued on August 5, 2010, which advised members of an upcoming CRSP. ALCOAST 464/10 issued on September 21, 2010 announced further guidance with regard to the CRSP and noted that it would be held on September 27, 2010 and that it would be performance based. ALCGENL 140/10 issued on August 19, 2010 which announced which members would be considered by the CRSP and advised those members to update their personnel records.
- Memorandum from the Commandant of the Coast Guard to the Secretary of Homeland Security [redacted] dated August 13, 2010. The Commandant requested the authority to conduct the CRSP to address high retention and its adverse impact on workforce flow. The Secretary approved the request.
- A document titled Additional Q & A for 2010 CRSP Authorization.
- Correspondence between the applicant and Enlisted Personnel Management (EPM). The applicant inquired on January 4, 2011, if she should have been officially notified of her selection by the CRSP. A LTJG with Coast Guard Recruiting Command responded on January 20, 2011, sending the applicant via attachment a copy of the original notice.
- Statement of the applicant. The applicant stated that she had a conversation with the Chief Petty Officer (CPO) who replaced her as Recruiter in Charge in the Recruiting Office. The applicant stated that the CPO stated that he had spoken to a Master Chief Petty Officer (MCPO) regarding the CRSP. According to the statement, the CPO told the applicant that the MCPO stated that if a CRSP candidate had any alcohol related incidents in their record, they were selected for retirement. The applicant claimed that she did not discuss her alcohol incidents with the CPO prior and that the conversation was initiated by the CPO.

SUMMARY OF THE RECORD

Prior to enlisting in the Coast Guard in 1993, the applicant had served in the regular Air Force for approximately four years and six months as a sergeant (E-4). The applicant enlisted in the Coast Guard on June 22, 1993, as an E-3 with an enlistment contract for four years.

On October 29, 1997, the applicant received an adverse ("general-negative") Administrative Remarks form (CG-3307 or "Page 7s") documenting her first alcohol incident.[1] The Page 7 read: "On 10 Sep 96, you were stopped for DUI and were convicted in a civilian court. . . . Your performance since the incident has been outstanding and we have noticed no evidence that alcohol has affected your ability to perform your duties. . . ."

On October 30, 1997, the applicant received another Page 7. It read: "On the night of 10 Sep 96, you were stopped by the . . . Police Department and charged with a DUI. Your BAC was tested and found to be 0.16. You went to court in October and were convicted of a DUI. You

[1] An Administrative Remarks record entry, form CG-3307, better known as a "Page 7," is used to document a member's notification of important information, achievements, or counseling about positive or negative aspects of a member's performance in the member's military record.

received restricted driving privileges, mandatory attendance at a alcohol awareness training program and community service. . . .”

On June 21, 2001, the applicant signed an indefinite reenlistment contract.

On January 16, 2002, the applicant received a Page 7, which read: “Assigned mark of 2 in the Health and Well-being performance dimension of Enlisted Performance Evaluation Form . . . Member failed to meet the minimum standards expected for sobriety and was involved in a documented alcohol incident. . . The incident was a result of poor judgment directly attributable to not using alcohol in moderation.”

Also on January 16, 2002, the applicant received a Page 7, which read: “Member assigned mark of Not Recommended for the evaluation period ending 16 Jan 02. Member has been counseled on the steps necessary to earn a mark of recommended. . . .”

Also on January 16, 2002, the applicant received a Page 7, which read: “This is an adverse administrative remarks entry to document an ‘unsatisfactory’ conduct mark due to the award of non-judicial punishment for violating Articles 92 and 134 of the UCMJ.”

On April 8, 2002, the applicant was screened by the Substance Abuse Program and determined that she met the criteria for a diagnosis of Alcohol Abuser. The applicant was recommended for level I treatment beginning May 12, 2002.

Also on April 8, 2002, the applicant received a Page 7, which read: “[applicant] has been advised this date that despite having 2 Alcohol Incidents in her Coast Guard career, her request to remain in the Coast Guard has been approved by Commander, Atlantic Area. [Applicant] has also been advised that her future in the Coast Guard is directly associated with her adherence to the prescribed alcohol treatment and aftercare program which is to be established in her case.”

On June 6, 2002, the applicant successfully completed intensive outpatient care. She continued her career and advanced to chief petty officer (E-7).

On April 1, 2010, the Coast G[redacted]announcing the need for workforce shaping procedures due to historically high retention rates of senior members, which was blocking career development in the enlisted ranks, and the President’s budget for the Coast Guard, which projected losses that would require a reduction in the active duty workforce.

On August 5, 2010, the Coast Guard issued ALCOAST 408/10 referencing ALCOAST 165/10 and announcing the convening of a CRSP to select retirement-eligible members for mandatory retirement due to continued high retention rates slowing advancements.

On August 13, 2010, the Commandant submitted a [redacted] requesting approval of the CRSP “to address high retention and its adverse impact on workforce flow. The legal authority to conduct such a panel derives from Title 14, U.S. Code Section 357(j) and from Title 10 U.S. Code Section 1169. Per Title 14 U.S. Code Section 357 (j), the Secretary of Homeland Security must provide authorization for involuntary retirements without a

Board's action." The Commandant noted that it had reduced accessions and offered voluntary separations to reduce the workforce but that 91% of the members who had voluntarily separated were "from junior enlisted ranks," which had further unbalanced the workforce. He also noted that the panel would review about 1,600 personnel files of those who were retirement eligible." The Secretary approved the CRSP on September 21, 2010.

On August 19, 2010, the Coast Guard issued ALCGENL 140/10, referencing 10 USC 1169 and 14 USC 357(j) as the authority for the CRSP. It notes that "no percentage for selection for involuntary retirement has been identified at this time" and that each member should review his or her personnel data record to ensure that it is complete and could submit a communication to the panel.

On September 21, 2010, the Coast Guard issued ALCOAST 464/10 announcing that the CRSP for E-7s would convene on September 27, 2010, and would focus on "performance within the last five years or since the members' advancement to their current grade" but that the "panel may consider these factors with the entire official military personnel data record to select for continuation."

In the CRSP precept, dated September 22, 2010, the panel members were appointed and advised that their goal was "to produce a list of screened personnel who show a propensity for upward mobility, advancement, and superior performance within the enlisted ranks" for continuation on active duty. The precept notes that the proceedings of the CRSP were to be confidential. Three pages of "selection standards" include a recommendation that the panel focus on the prior five years of performance. A page of "Equal Opportunity Guidance" notes that candidates who have taken special assignments outside a usual career path should not be prejudiced in the selection.

In a memorandum with an unreadable date, the applicant was advised that she would be involuntarily retired as a result of the CRSP. On November 23, 2010, she appealed the CRSP. She noted that she had not demonstrated upward mobility since advancing to E-7 and stated that she would have competed for advancement if she had known that, by not doing so, she was putting her career at risk. She described her career and hard work and noted that she had taken an out-of-rate assignment as a recrui[redacted]eligible to compete for promotion in her rating. Had she known about the CRSP, she stated, she would not have sought to become a recruiter.

On January 19, 2011, Commander, PSC notified the applicant that her appeal had been carefully considered but denied. He advised her that she had to pick a retirement date between September 1 and December 1, 2011. She was involuntarily retired on December 1, 2011.

VIEWS OF THE COAST GUARD[redacted]

On May 8, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he adopted the findings of the Coast Guard Personnel Service Center (PSC) in a memorandum on the case and recommended that the Board deny relief.

The JAG argued that the Board should deny relief because the applicant has failed to substantiate any error or injustice in her selection for retirement by the CRSP based on a two-thirds vote of the panel. The JAG noted that the applicant bears the burden of proving the existence of an error or injustice by the preponderance of the evidence. Further, the JAG noted that all Coast Guard board proceedings are privileged, and the CRSP was properly convened and followed all applicable polies and regulations. The JAG also argued that this case presented a significant challenge of Coast Guard personnel policy and that any final decision contrary to this opinion must be reviewed by DHS General Counsel.

PSC argued that the application was not timely and therefore should not be considered by the Board beyond a cursory review. PSC argued that the applicant's retirement was in accordance with policy and authorized by the Secretary of Homeland Security. PSC refuted the applicant's claim that the CRSP may only review a preselect time of her record. PSC noted that, as discussed in ALCOAST 464/10 and the precept for the panel, the applicant's entire record was available for review and consideration. PSC stated that though the review was to focus towards the last five years of performance, it was not exclusively limited to this period of review or to adverse conduct alone.

PSC denied the applicant's claim that the CRSP was not a RIF board. PSC argued that the Commandant received sufficient authorization from the Secretary of Homeland Security to create the CRSP and involuntarily retire members. PSC also denied that she should have been retained on active duty because other member's equitable in performance were retained. PSC argued that the CRSP used the same criteria for all members screened by the panel, and that absent evidence to the contrary, the panel members are presumed to have discharged their duties correctly, lawfully, and in good faith.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 26, 2015, the Chair sent the applicant a copy of the views of the Coast Guard and invited her to submit a response within thirty days. The applicant requested and was granted several extensions and responded on March 1, 2016.

The applicant disputed the clai[redacted]nely because her receipt shows that the Government received it on November 13, 2014, even though it was not delivered to the BCMR office until December 1, 2014.

The applicant argued that there was no authority for the CRSP because the Coast Guard did not expressly request authority to conduct a RIF and did not use that term in the memorandum to the Secretary. The applicant argued that because the CRSP considered documented misconduct and marginal performance, the members were entitled to individual hearings pursuant to other paragraphs of 14 USC 357. She argued that the selection standards' references to poor performance, dereliction, and misconduct show that she should have received an individual Enlisted Personnel Board. The applicant argued that 10 USC 1169 is a more general statute and that the more specific provisions requiring individual hearings under 14 USC 357 applied.

The applicant also argued that the Coast Guard's use of the term RIF does not comport with how other military services have used the term, even though the BCMR has previously found that a RIF can include a review of conduct and performance in BCMR 2011-130. The applicant argued that as used by other uniformed services, a RIF involves determining that a particular number of people must be separated and then scoring the members and discharging the set number.

The applicant argued that the fact that the Coast Guard had 1,600 eligible members to consider did not relieve them of the statutory requirement to conduct Enlisted Personnel Boards, as described in 14 USC 357(b). She argued that the Coast Guard has disemboweled the statutory rights of its enlisted members by requesting ongoing authority to hold yearly CRSP panels to eliminate members based on their performance and conduct.

APPLICABLE LAW AND POLICY

Federal Statutes

Title 14 U.S.C. § 357 includes the following provisions: "(a) Enlisted Personnel Boards shall be convened as the Commandant may prescribe to review the records of enlisted members who have twenty or more years of active military service. (b) Enlisted members who have twenty or more years of active military service may be considered by the Commandant for involuntary retirement and may be retired on recommendation of a Board—(1) because the member's performance is below the standards the Commandant prescribes; or (2) because of professional dereliction. (c) An enlisted member under review by the Board shall be—(1) notified in writing of the reasons the member is being considered for involuntary retirement; (2) allowed sixty days from the date on which counsel is provided ... to submit any matter in rebuttal; (3) provided counsel ... to help prepare the rebuttal ... and to represent the member before the Board ...; (4) allowed full access to and be furnished with copies of records relevant to the consideration for involuntary retirement prior to submission of the rebuttal ...; and (5) allowed to appear before the Board and present witnesses or other documentation related to the review." However, subsection (j) of § 357 states, "When the Secretary orders a reduction in force, enlisted personnel may be involuntarily separated from the service without the Board's action."

Title 10 U.S.C. § 1169 states that "no regular enlisted member of an armed force may be discharged before his term of service expires, except—(1) as prescribed by the Secretary concerned; (2) by sentence of a general or special court-martial; or (3) as otherwise provided by law."

Background for the CRSP

ALCOAST 165/10[2]

On April 1, 2010, the Coast Guard issued ALCOAST 165/10 entitled "ACTIVE DUTY MILITARY MANAGEMENT." It stated the following in pertinent part:

[2] An ALCOAST is a directive from the Commandant, the Vice Commandant, or the Chief of Staff of the Coast Guard.

Within our active duty workforce, we continue to experience historically high retention levels in both our officer and enlisted ranks. Currently we have more active duty enlisted members and officers than funded billets. Looking ahead to fiscal year (FY) 2011, the president's budget for the Coast Guard projects billet losses that will exacerbate this overage in our active duty workforce. A military workforce requires flows at all levels to ensure career progression for our people. Absent normal separation rates at all levels, opportunities for advancement and promotion become significantly reduced, thus increasing time-in-grade at every level.

Over the past six months, the Coast Guard has implemented several initiatives to reduce the impacts of high retention, including eliminating all selective re-enlistment bonuses (SRB), waiving up to 12 months time-in-grade requirements for retirements, and reducing accessions to TRACEN Cape May to their lowest level on record. Officer accessions have also been reduced. *Even with this careful management, the active duty workforce still remains above our funded level. This situation, coupled with the planned military billet reductions proposed in the President's FY 2011 budget necessitates the use of additional workforce management tools.* (Emphasis added.)

# # #

To manage the enlisted workforce: CG–PSC-EPM will consider waiving obligated service requirements based on needs of the service.

The President's FY 2011 budget proposal has not yet been approved by Congress . . . we must prepare now to match the number of people in our active duty workforce to the number of funded billets. To help mitigate the impact of these overages, we will: [Insource] work presently conducted by contractors [and] Market transition . . . to the Reserve.

[redacted]

If the above measures are unable to align body to billet levels . . . We will use a performance-based retention panel to align the enlisted work force.

[redacted]

ALCOAST 333/10

June 25, 2010, the Coast Guard issued ALCOAST 333/10 that suspended the voluntary separation programs due mainly to Deep Water Horizon. The ALCOAST also noted the following:

> [Through voluntary separation programs for both enlisted and officers], to date we have processed over 700 officer and enlisted member requests from all levels of the service.
>
> [The voluntary separation] initiative has met our desired goals and provided some relief to our personnel strength. There is still some concern due to our continued high retention that other workforce shaping initiatives may be needed to ensure we have the vibrant and healthy workforce for the long term, including normal accessions and advancement opportunities.

ALCOAST 408/10

The Coast Guard issued ALCOAST 408/10 on August 5, 2010. It stated the following in pertinent part:

> Over the course of the last two years the entire military workforce has experienced record high retention that has decreased accessions, reduced A-school quotas, and significantly slowed down advancements/promotions. To ensure viability and growth potential, we must take steps to ensure that we maintain workforce flow and advancement opportunities.
>
> Similar workforce shaping tools similar to those of officers do not exist for the enlisted workforce. Given our high retention rates, this inconsistency compromises our ability to maintain a healthy advancement flow. . . . It is necessary to implement an additional workforce tool. Our goal is to ensure that the Coast Guard has vibrant and healthy enlisted workforce for the long term, one with consistent accession levels [redacted]nities.
>
> To meet this goal, we are planning to hold a career retention screening panel (CRSP) for enlisted personnel who [who are retirement eligible].

Commandant's Request for Coast Guard Active Duty Enlisted Career Retention Screening Panel (CRSP)

In an August 13, 2010 memorandum, the Commandant requested approval from the Secretary to conduct an active duty enlisted CRSP in the fall [redacted] retention and its adverse impact on the workforce flow. The Coast Guard stated that 14 U.S.C. §

357 (j) and 10 U.S.C. § 1169[3] gave the Secretary the authority to order the CRSP and that "[p]er Title 14 U.S. Code, Section 3357(j), the Secretary of Homeland Security *must provide authorization for involuntary retirements without board action*. " (Emphasis added.) The memorandum further stated the following:

> The Coast Guard has taken steps to resolve the retention problem. We have reduced our accessions to the lowest level in our records. We temporarily waived obligated service requirements to allow voluntary separations. However, the majority ([redacted] of over 700 recent voluntary separations were from junior enlisted ranks, and not our more senior workforce. If allowed to continue, this trend, along with our reduced accessions, will result in an imbalance in the enlisted workforce's experience level for many years to come.
>
> The panel will review approximately 1600 records, including the records of all first class petty officers and below with twenty or more years of service and all chief petty officers and above with twenty or more years of service and three years or more time in grade. Because the panel will only review those with twenty or more years of service, every one reviewed will be retirement eligible. Members asked to involuntary retire will still be entitled to full retirement benefits.
>
> Your endorsement of this memo will provide the Coast Guard with the legal authority required to conduct this panel.

The Secretary approved the Commandant's request to hold a CRSP to select members for retention.

ALCGENL 140/10

On August 19, 2010, ALCGENL 140/10 announced to enlisted personnel the implementation of the CRSP and that it was scheduled to convene in the fall at PSC to assess the continued service of retirement eligible personnel who meet the following criteria:

A. All retirement eligible E6 and below with 20 or more years of active military service as of 1 September 2010.
B. All retirement eligible E-7 and above with 20 or more years of active military service who have three or more years time in grade as of 1 September 2010.

Section 8 stated that personnel who meet the criteria to be considered by the CRSP should promptly review and update their direct access information and have their SPO or admin update their electronic personnel data record.

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[3] Section 1169 of title 10 of the United States Code states that "no regular enlisted member of an armed force may be discharged before his term of service expires, except—(1) as prescribed by the Secretary concerned; (2) by sentence of a general or special court-martial; or (3) as otherwise provided by law."

Section 10 stated that the personnel subject to the CRSP may communicate with the CRSP panel by a standard memo endorsed by their CO.

Section 12.B. stated that personnel selected for involuntary retirement can appeal the decision based only on material error, newly discovered evidence, or the presence of improper documents in the member's personnel file.

Section 12.F. stated that personnel may request a waiver extending beyond 1 December 2011, waivers were to be considered based on service need and approval by PSC-EPM.

ALCOAST 464/10

ALCOAST 464/10 issued on September 21, 2010 announced further guidance with regard to the CRSP and noted that it would be held on September 27, 2010 and that it would be performance based. In this regard, the ALCOAST provided the following guidance, in pertinent part:

> 4. Documented misconduct and substandard or marginal performance are the primary reasons CRSP eligible candidates will be considered for involuntarily retirement . . . The focus will be performance within the last five years, or since the members advancement to their current grade . . . whichever timeframe is longer . . . The factors listed below will indicate to the panel that an individual may not meet the performance requirements for continuation . . . .
>
> A. Substandard performance of duty to include receipt of a not recommended for advancement based on an unsatisfactory conduct mark or declining performance with the same approving official in the rating chain.
> B. Receipt of an enlisted evaluation report with a minimum average characteristic marks of 3.5 or below.
> C. Moral or professional dereliction, such as relief for cause.
> D. Failure to meet service norms or regulations concerning alcohol use and body fat standards.
> E. Documented misconduct [redacted]CMJ, e.g., non-judicial punishment, or conviction by military court-martial/conviction by a civilian court.
> F. Other documented adverse information clearly indicating the CRSP candidates' continuation may be inconsistent with national security interests or may otherwise not be in the best interest of the Coast Guard, such as losing one's security clearance.
> G. Financial irresponsibility, such as failure to pay just debts or a pattern of government credit card delinquency, including revocation of the [redacted] government credit card due to misuse or failure to pay outstanding balance.
> H. Performance probation
> I. Failure to demonstrate upward mobility by not qualifying or participating in the service wide examination.

The ALCOAST stated that the panel may consider the above factors along with the entire official military personal data record to select candidates for the continuation. While the list of factors is not all inclusive, it provides the performance indicators the panel will consider to select those CRSP candidates for involuntary retirement.

CRSP Precept

In the precept for the CRSP, dated September 22, 2010, the purpose and guidance for the CRSP was laid out. It read in pertinent part, "The goal of this screening panel is to produce a list of screened personnel who show a propensity for upward mobility, advancement, and superior performance within the enlisted ranks, by applying the performance criteria provided and considering the member's whole record." Additionally, it read, "You may discount minor errors, based on how recently they occurred, as long as subsequent performance reflects lessons learned." The precept included five enclosures: (1) General Guidance; (2) Selection Standard; (3) Equal Opportunity Guidance; (4) Panel Reports; and (5) Oaths.

In the General Guidance enclosure the panel procedures are laid out. It reads in pertinent part:

> 5. Adverse Information. Just as you must consider positive performance, you must consider incidents of misconduct and substandard performance documented in a CRSP candidate's official Military Personnel Data Record (PDR) when determining those CRSP candidates to be recommended for continuation. For those CRSP candidates who are recommended for continuation and who have received disciplinary action, or whose privileged information record contains matters relating to conduct or performance of duty that occurred within the past five years or since advancement to their current pay grade (E5, E6, E7, E8, E9) whichever is longer, all such incidents must be fully disclosed when the slates are briefed for recommendation for continuation and prior to the final panel decision.

In the Selection Standard enclosure the "gold standard" of senior enlisted performance is described in detail. It also read, "the following adverse performance indicators occurring within the last 5 years, or since advancement to current grade (E5, E6, E7, E8, E9) whichever is longer (e.g., if a member was advanced to their current rank seven years ago, the last seven years of performance will be used), shall be specifically addressed when considering whether a CRSP candidate's continuation is in the best interest of the Coast Guard. . . . (4) Failure to meet service norms or regulations concerning alcohol use and body fat standards; (5) Documented misconduct involving violation of the UCMJ, e.g., Non-Judicial Punishment or conviction by military Court-Martial; or conviction by civilian court; . . . (9) Failure to demonstrate upward mobility by not qualifying or participating in a Service Wide Exam; . . ."

Additional Q & A for 2010 CRSP Authorization

The Coast Guard released an additional document providing information regarding the CRSP to enlisted members. It read in pertinent part:

> Question #2: Why didn't the Commandant's memo use the term "reduction in force"?
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> Answer #2: The CRSP was not intended to reduce the overall size of the force. The CRSP was convened to efficiently and fairly, based on uniform performance and conduct criteria, identify retirement eligible enlisted personnel for involuntary retirement; accelerate advancement of junior enlisted members; and reinvigorate accession of recruits into the Coast Guard. . . .
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> Question #4: Why didn't the Coast Guard conduct Enlisted Personnel Boards in accordance with Article 12.C.10 of the Coast Guard Personnel Manual for the members identified for involuntary retirement?
>
> Answer #4: Article 12.C.10 of the Coast Guard Personnel Manual is based on the Commandant's authority to convene involuntary retirement boards in accordance with 14 U.S.C. §§ 357 (a) – (i). Convening individual boards of different composition would not have guaranteed consistent application of the same set of performance and conduct standards to all eligible members as the CRSP, convened under Secretarial authority, was specifically designed to do.

PRIOR BCMR CASES

In BCMR Docket No. 2011-130, the Board addressed the legality of the 2010 CRSP, determined that the CRSP was held pursuant to a "reduction in force," and denied the applicant's request for relief in that case. The Board noted that 10 U.S.C. § 1169 authorizes the Secretary to prescribe how an enlisted member may be discharged before his term of service expires and that 14 U.S.C. § 357(j) permits Coast Guard enlisted personnel to be involuntarily retired from the service without receiving an individual hearing before an enlisted personnel board when the Secretary orders a "reduction in force." The Board based its holding that the 2010 CRSP process was a "reduction in force" on a series of ALCOAST messages in that time frame stating that the Coast Guard had more personnel than funded billets.

In BCMR Docket No. 2013-153, the Board addressed the legality of the 2012 CRSP. The Board noted in the opinion that there is evidence that the Coast Guard continued to undergo reductions in effective strength during the period of the 2012 CRSP. According to Coast Guard data, in fiscal year (FY) 2010 the Coast Guard had 32,802 enacted enlisted positions. The FY 2011 President's Budget proposed a reduction of 978 positions from the enlisted workforce. The FY 2012 President's Budget proposed a reduction of 116 positions from the enlisted workforce. The FY 2013 President's Budget proposed a reduction of 738 positions from the enlisted workforce. The FY 2014 President's Budget proposed a reduction of 979 positions from the enlisted workforce. The numbers reflect a downward trend in the number of enlisted positions in the Coast Guard. Although the actual enacted numbers varied from the President's Budget requests, the Coast Guard needed to take appropriate steps to meet those proposed budgeted numbers. The enacted numbers also show a downward trend for enlisted positions. In FY 2010 the Coast Guard had 32,802 enlisted positions, but in FY 2014 the Coast Guard has 31,944 enlisted positions, which is a reduction of 858 enlisted positions since FY 2010.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a). The Coast Guard claimed that the application was not timely because the applicant's last day of active duty was November 30, 2011, and the BCMR staff stamped the application as received on December 1, 2014. While the office of the BCMR did not receive the application until December 1, 2014, the screening process required for mail before reaching its ultimate destination at the Department of Homeland Security sometimes delays delivery of the mail, which is beyond an applicant's control. The preponderance of the evidence shows that the application, with the applicant's signature dated November 5, 2014, was mailed within three years of the applicant's retirement and presumably it should have arrived within three days of that date.[4] Therefore, the Board finds that the application was timely.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.[5]

3. The applicant alleged that her involuntary retirement pursuant to the CRSP convened in 2010 was erroneous and unjust because nothing in her record warrants selection for separation, because the only information in her record that might merit her selection was outside the five-year window the CRSP was allegedly authorized to consider, and because the Coast Guard ignored statutory requirements and protections by labeling the CRSP as a reduction in force when it was not a reduction in force (RIF). In considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[6] Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."[7]

4. The applicant alleged that the 2010 CRSP was not a RIF, but instead a construct contrived to circumvent protections provided for enlisted members by Congress under 14 U.S.C. § 357(a)-(i). The record shows, however, that the Secretary relied on her authority under both 10 U.S.C. § 1169 and 14 U.S.C. § 357(j) (the RIF statute) in authorizing the involuntary retirements through the CRSP in 2010. In Docket No. 2011-130, the Board determined that the 2010

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[4] *See Liu v. United States*, 93 Fed. Cl. 184, (2010), citing *Charlson Realty Co. V. United States*, 384 F.2d 434,442 (1967), and *Ross v. United States*, 16 Cl. Ct. 378, 382 (1989), and finding that filing was timely because plaintiff could reasonably expect that priority mail would arrive at federal court within three days based on public claims of United States Postal Service.

[5] *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

[6] 33 C.F.R. § 52.24(b).

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

CRSP was held pursuant to a RIF. The Board based its holding that the 2010 CRSP process was a RIF on a series of ALCOAST messages in that time frame stating that the Coast Guard had more personnel than funded billets, that the number of funded billets was being further reduced, and that various mechanisms to reduce the force were being implemented. The Board has also addressed the legality of a subsequent CRSP in BCMR Docket No. 2013-153. In that case, the Coast Guard submitted numbers of authorized force strengths in the President's budgets and statutes showing that the Coast Guard had in fact been downsizing and had used the CRSPs to reduce its force as well as to re-balance the seniority of the workforce left imbalanced by prior downsizing mechanisms. In Docket No. 2013-153, the Board noted its concern over the language used by the Coast Guard in the ALCOASTs but found that the language in the memorandum signed by the Secretary and continued reductions in effective strength and the decommissioning of multiple cutters since the convening of the 2010 CRSP established by a preponderance of the evidence that the CRSPs were intended to be and quite literally being used as reduction-in-force mechanisms. The applicant in this case has not provided any evidence to prove the contrary. Given the lack of contrary evidence and in light of the broad authority generally granted to the Secretary under 10 U.S.C. § 1169 to determine the separations of enlisted personnel and her express reliance on 14 U.S.C. § 357(j) in authorizing the CRSPs, the Board is not persuaded that the applicant's evidence and arguments have overcome the presumption of regularity with respect to the authorization and implementation of the 2010 CRSP.

5. On June 13, 2016, the U.S. Court of Federal Claims issued a decision on a challenge to the Coast Guard's CRSPs in the case *Lippmann v. United States*, in which the court held that the term "discharge" in 10 U.S.C. § 1169 included all types of separations, including mandatory retirements. Although the court has not yet decided the issue of whether the plaintiff in that case is entitled to a hearing before an Enlisted Personnel Board under 14 U.S.C. § 357, the Board notes that if, under 10 U.S.C. § 1169, the Secretary may prescribe the procedures for separating members, which includes retiring them pursuant to a RIF, then when the Secretary approved the Commandant's memorandum regarding the CRSPs on September 22, 2010, pursuant to 14 U.S.C. § 357(j), she thereby legally prescribed the procedures for reducing the force—a RIF—conducted by involuntarily retiring members through CRSPs.

6. The applicant alleged that the CRSP was required to be conducted in the same manner as a SERB and that it failed i[redacted]dant did not specify the number of members to retire. The language in the CRSP precept, from which the applicant derives this claim, reads in pertinent part: "Consistent with longstanding Coast Guard Personnel Policy, the procedures for the CRSP will, to the maximum extent practicable, parallel those for boards convened for officers [SERBs]." The Board does not find the applicant's argument persuasive. The precept does not bind the CRSP to the exact procedures of a SERB but states that the CRSP should follow SERB procedures to the maximum extent practicable extent while it also does not provide the CRSP with a specific number or percentage target for involuntary retirement. However, by signing the memorandum citing 14 U.S.C. § 357(j), the Secretary of [redacted] Homeland Security authorized the Commandant to reduce the force—conduct a RIF—through a CRSP, and there is no legal requirement that a RIF mechanism be bound by a specific number or percentage goal. The CRSP precept shows that the Commandant, being familiar with SERB procedures, intentionally chose not to limit the number of retirees by stating, "There is no quota for the number of personnel selected for involuntary retirement. . ." The record shows that the

CRSP was just one of various mechanisms the Coast Guard was implementing to reduce the force by reducing enlistments and separating members both voluntarily and involuntarily over the course of several years. The fact that the CRSP was not given a specific number or percentage target does not persuade the Board that the CRSP was not in fact a reduction-in-force mechanism authorized by the Secretary when she signed the memorandum and used legally by the Commandant to reduce the force. The Board finds that the applicant has failed to establish by a preponderance of the evidence that the CRSP was not a proper RIF mechanism or that it violated applicable law or policy because no specific number or percentage of members to retire was specified.

7. The applicant alleged that she and others subject to the CRSP were given only three days to have their electronic imaged personnel data record updated. The specific criteria of the CRSP were not released until September 21, six days before the CRSP met, in ALCOAST 464/10. However, in ALCGENL 140/10, distributed on August 19, 2010, enlisted members were informed of the planned upcoming CRSP. In addition to stating which members would qualify for consideration by the panel, the notice read: "Personnel who meet the criteria listed in paragraph 2 should promptly review and update their direct access information and have their SPO or admin update their electronic personnel data record." This bulletin gave enlisted members who would be considered for retirement over one month to check and ensure their records were up to date. In addition, ALGENL 140/10 provided a method for members to directly address the CRSP to explain any disparities in their records.[8] Therefore, the applicant has not established by a preponderance of the evidence that she was prejudiced before the CRSP because of the time allotted to check and update her personnel record.

8. The applicant alleged that the CRSP was authorized in its precept to consider adverse information from only the last five years and she had no adverse information in her record less than five years old. She cited paragraph 5 of enclosure 1 of the precept to support her claim. It reads: "For those CRSP candidates who are recommended for continuation and who have receive disciplinary action . . . that occurred within the past five years . . . all such incidents must be fully disclosed when the slates are briefed for recommendation for continuation and prior to the final panel decision." The precept thus required an explanation of why members were to be retained if they had adverse information entered in their records within the previous five years; it did not prohibit the CRSP from considering adverse information in a member's record that was more than five years old. The applicant also cited paragraph 2(b) of enclosure 2 of the precept, which reads: "the following adverse performance indicators occurring within the last 5 years . . . shall be specifically addressed when considering whether a CRSP candidate's continuation is in the best interest of the Coast Guard." But this language likewise did not prohibit the CRSP from considering adverse information from more than 5 years earlier; rather, it required the CRSP to specifically address the more recent adverse information.

In addition, the Board notes that contrary to the applicant's argument, the CRSP precept states in paragraph 5 that the goal of the panel was "to produce a list of screened personnel who show a propensity for upward mobility, advancement, and superior performance within the enlisted ranks, by applying the performance criteria provided and *considering the member's whole record*." (Emphasis added.) Therefore, the Board finds that the applicant has not submitted

[8] The record does not reflect whether the applicant chose to utilize this option.

evidence or information sufficient to establish that the CRSP improperly considered older, adverse information in her record even assuming *arguendo* that it did so.

9. The applicant noted that the Coast Guard failed to provide any reason for her selection and alleged that the CRSP did not properly apply the selection criteria to her. She noted that the one performance indicator identified in the CRSP precept that might have worked against her was her lack of recent professional upward mobility. The applicant attributed her lack of recent advancement to her pursuit of a recruiting assignment and argued that her record is so meritorious that it should have overcome any concerns raised by her failure to participate in the SWE. Because the proceedings of the CRSPs are confidential, however, no one but the CRSP members know how the panel weighed such matters. Absent evidence to the contrary, the Board presumes that the CRSP members carried out their duties "correctly, lawfully, and in good faith,"[9] and the applicant has not persuaded the Board that they did not.

10. The applicant alleged that she heard from a third party that one of the members of the CRSP stated that everyone with an alcohol incident in their record was automatically selected for retirement. The applicant did not submit any corroborating evidence, however, and absent evidence to the contrary, the Board must presume that the CRSP members carried out their duties under the precept "correctly, lawfully, and in good faith."[10] In addition, as noted above, the CRSPs were not limited to consideration of members' conduct and performance during the prior five years by the terms of the precept, so even if the CRSP did consider the applicant's prior alcohol incident in a negative light, it would not justify voiding the results of the CRSP.

11. Because the applicant has not proven by a preponderance of the evidence that her involuntary retirement on December 1, 2011, pursuant to the reduction in force through the CRSP was erroneous or unjust, her request for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

[9] *Arens v. United States*, 969 F.2d 1034, 1037 (1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979); 33 C.F.R. § 52.24(b).
[10] *Id.*

ORDER

The application of [redacted] USCG (Retired), for correction of her military record is denied.

June 27, 2016

[redacted]