

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-136

████████████████████
██████████ DC2/E-5

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on April 25, 2018, and assigned it to staff attorney ██████████ to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated December 7, 2018, 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, a former Damage Controlman Second Class (DC2/E-5) who was discharged on April 11, 2018, asked the Board to correct his record by reinstating him to a Damage Controlman First Class (DC1/E-6) and awarding him retroactive pay and allowances from October 26, 2017.

The applicant asserted that the “entire process of discovery, investigation, and handling of the issues” of the allegations against him was handled unjustly and erroneously. He claimed that he was not provided with assistance and was denied counsel throughout the disciplinary process. He stated that his command was unaware of the repercussions that resulted from the non-judicial punishment (NJP) and was also unaware that the NJP would lead to his discharge. He stated that his command was unaware until March 7, 2018, that he would be unable to reenlist so his “command requested a waiver and appeal but was denied.” The applicant complained that he was not given any documentation or reason for the decision to deny his reenlistment waiver request. He asserted that he had been an “exemplary member of the Coast Guard for nearly 15 years.” He stated that he was not afforded the opportunity to regain his rank. The applicant stated that he was proud to wear his uniform and was “gravely disappointed” that his career was cut short by accusations that he was unable to dispute.

In support of his allegations, the applicant provided many documents, some of which are discussed below in the Summary of the Record. He also submitted his many qualifications, medals, commendations, and administrative entries noting his positive work throughout his career in the Coast Guard.

SUMMARY OF THE RECORD

The applicant enlisted on October 6, 2003. He has no negative entries in his record other than those at issue in this case.

The Coast Guard provided a copy of an undated Administrative NJP Checklist bearing the applicant's name. All of the action items to be completed before Mast had been initialed as completed. These items included "appoint Mast Representative."

A Report of Offense and Disposition shows that on October 12, 2017, while assigned to a cutter, the applicant was charged with committing the following violations and specifications of the Uniform Code of Military Justice (UCMJ) on September 29, 2017:

- Article 92 (3), Dereliction of Duty: That the applicant fostered and condoned an unprofessional work environment.
- Article 92 (3), Dereliction of Duty: That the applicant did haze and/or bully complainant.
- Article 128: Assault Consummated by Battery: That the applicant did, on separate occasions, unlawfully hit complainant with a stick, shove him into a chair, and slam him on the buttocks.
- Article 134, Indecent Conduct: That the applicant did text an explicit picture to complainant.
- Article 107, False Official Statement: That the applicant did lie in his official statement made to Coast Guard Investigative Services (CGIS) in that he denied hitting anyone with a stick.

On October 24, 2017, the applicant acknowledged being notified of the charges against him, being provided with the report of an administrative investigation, and being informed of his rights regarding the charges and upcoming Mast. His rights at Mast did not include being represented by an attorney, but he could be accompanied by a Mast representative or spokesperson. He also had a right not to incriminate himself, to be informed of the evidence against him, to present evidence and call witnesses, to cross-examine witnesses, to present matters in defense, extenuation, or mitigation orally or in writing, and to appeal the punishment awarded as overly harsh or disproportionate. The applicant acknowledged his rights by signature in front of a witness. The Report of Offense and Disposition also shows that the applicant chose an ensign to be his Mast representative.

The applicant was punished at Mast on October 26, 2017, for violating Article 92, by sustaining an unprofessional work environment leading to hazing, and Article 128, by committing

assault consummated by battery. He was awarded restriction to the cutter for forty-five days, extra duties for forty-five days, and reduction to pay grade E-5.

On December 27, 2017, a reenlistment interview was conducted and the applicant was informed that he did not meet the reenlistment eligibility requirements due to the NJP on October 26, 2017. He was also informed that he had his CO's positive recommendation for reenlistment because he had taken his "punishment with humility and resolve and with notable introspection on [his] leadership and creating positive change." The applicant was told that he could request a reenlistment waiver from the Personnel Service Center (PSC) within fifteen days of this notification.

On January 3, 2018, the applicant prepared a reenlistment appeal for PSC asking that he be allowed to reenlist again. He stated that it had been his personal goal to complete at least twenty years with the Coast Guard. He stated that he had accepted and "learned from the mistakes [he] made" but asserted that they were not indicative of his career as a whole. He stated that he took full responsibility for his actions. He informed PSC that he had completed the 45 days of restriction and he was continuing to complete the extra duty obligation. The applicant detailed how he had taken advantage of the extra time to speak to senior crew members to learn from his mistakes, to retake training and take extra leadership training, and to seek guidance on areas in which he was lacking. He noted that he had had a "rank meant right" attitude which was toxic, and he claimed he had fully learned from his mistake and was working on bettering himself to become a better leader and team member. The applicant stated that he strongly desired to have the opportunity to continue serving in the Coast Guard and requested that he be able to reenlist.

On January 17, 2018, the applicant's Commanding Officer (CO) recommended that the applicant be allowed to reenlist but also noted that he was not eligible for reenlistment. He stated that on October 26, 2017, the applicant was found to be in violation of Article 92, sustaining an unprofessional work environment that led to hazing, and Article 128, assault consummated by battery. The CO stated that "on the surface, the aggregation of these charges seems intolerable, but the incident as a whole was neither egregious nor malicious, and the member can be rehabilitated." He stated that he spent several hours adjudicating the applicant's NJP and after "much deliberation and counsel from [his] servicing legal office," the CO gave the applicant a punishment that he felt was strong but fair. He did not feel the applicant's actions were worthy of a discharge. However, he stated, the applicant's actions were not commensurate with the Coast Guard's standards and he was therefore demoted and given 45 days of restriction and extra duty. The CO stated that there was substantial mitigating evidence in the case as a whole, including the fact that the applicant "was harassed and provoked by his subordinates." The CO found that the applicant's subordinates "were not innocent bystanders" and were also punished accordingly at Mast. The CO stated that without prompt, the applicant took full responsibility for both his and his subordinates' actions throughout the entire process. He stated that the applicant had "shown progressive growth of character by humbly owning his mistakes publicly to the crew, ... going above and beyond in the execution of his extra duty, and demonstrating an earnest desire to earn back the crew's respect as a valued shipmate." The CO asserted that this failure should not be the end of the applicant's career.

On March 8, 2018, PSC issued separation orders directing the honorable discharge of the applicant when his enlistment ended on April 11, 2018.

The applicant was discharged on April 11, 2018, with an honorable discharge when his enlistment ended. He had fourteen years, six months, and six days of active duty service. He received a separation code of JBK and a corresponding narrative reason for separation was Completion of Required Active Service. His reentry code is RE-3.

VIEWS OF THE COAST GUARD

On October 3, 2018, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. The JAG stated that the Enlistments, Evaluations and Advancements manual, Article 1.E., states that a member wishing to reenlist may not have a documented offense for which “the maximum penalty for the offense ... includes a punitive discharge during the current period of enlistment.” The JAG stated that as a result of the Mast the applicant was found to have committed two such offenses under the UCMJ, so he was ineligible to reenlist. While the applicant submitted a waiver request with his CO’s endorsement, the JAG argued that PSC acted fairly and correctly when it denied the waiver request and processed the applicant for discharge.

In response to the applicant’s argument that his command was unaware of the ramifications of its actions, the JAG claimed that this was “an erroneous assertion.” The JAG stated that the CO stated in his waiver endorsement that he had “spent several hours in review and adjudication” of the applicant’s NJP and had deliberated with counsel in doing so. Therefore, the JAG argued that the “only possible conclusion” was that the command was aware of the ramifications. In response to the allegation that the “process of discovery, investigation, and handling” of his case was unjust, the JAG stated that the applicant provided no evidence to support this assertion. The JAG stated that the only evidence the applicant did provide was documentation of “a laudable career in the Coast Guard” prior to the NJP. The JAG also argued that the applicant provided no evidence that he was denied a right to counsel. On October 24, 2017, the applicant acknowledged his rights including his right to a Mast representative. The JAG also noted that a member attached to a vessel does not have the right to reject punishment at Mast and demand trial by court martial, but the applicant had acknowledged the rights that he did have, which included a right to a Mast representative but not to representation at Mast by an attorney. The JAG noted that the applicant had admitted to committing the underlying acts for which he received NJP and therefore recommended denying relief.

In recommending denial, the JAG also adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC). PSC stated that the application was timely and should be considered on the merits. PSC recommended that the Board deny relief because the applicant did not provide evidence to show that an “error or injustice occurred in processing him for discharge.” PSC argued that the CO was within his authority when awarding the NJP and the applicant thereby became ineligible to reenlist.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 26, 2018, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. The applicant responded on November 25, 2018, and stated that he disagreed with the Coast Guard's advisory opinion.

The applicant stated that he does not have any additional evidence of his allegations other than what he had already submitted. He stated that since his discharge he has enlisted in his state's National Guard and has begun basic training in the Army. He asserted that due to his demotion to an E-5 he would have to "compete for quite some time to regain [his] previous rank." The applicant claimed that he had been "told for months that [he] had nothing to worry about so [he] shouldn't consider talking with legal counsel [and] that [he] was guaranteed reinstatement at the 5 month anniversary of the mast." He acknowledged that he had no evidence of these assertions other than his word. He stated that the entire investigation was based on "hearsay and a preponderance of evidence" which he was unable to prove or disprove at this time. He thanked the Board for its time and stated that he was looking for closure to a great career that he felt had been prematurely ended.

APPLICABLE REGULATIONS

Article 1.A.5.b.(5) of the Enlisted Accessions, Evaluations, and Advancements manual, COMDTINST M1000.2A, states that one of the requirements for reenlistment is that a member may have "no documented offense for which the maximum penalty for the offense, or closely related offense under the UCMJ ..., includes a punitive discharge during the current period of enlistment." Article 1.A.5.b.(5)(a) states that this section is "aimed at serious offenses, analogous to those warranting the 'Commission of a Serious Offense' basis for discharge identified in [the Military Separations manual]."

Article 1.A.5.d. states that members who are not eligible for reenlistment "but are recommended for reenlistment/extension by their commanding officer, may submit an appeal via memorandum" to PSC.

Article 3.A.5.g. states, "For 12 months prior to the terminal eligibility date and for the entire period from recommendation to advancement, members in pay grades E-4 and E-5 must have no unsatisfactory conduct mark, courts-martial (CM) or civil convictions, or NJP punishments."

The Military Separations manual, COMDTINST M1000.4, Article 1.B.17.b.(3), states that commission of a serious offense "does not require adjudication by a non-judicial or judicial proceedings. ... However, the offense must be established by a preponderance of the evidence."

FINDINGS AND CONCLUSIONS

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

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

2. The applicant alleged that his demotion to E-5 and discharge were erroneous and unjust. When 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.¹ 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."²

3. The applicant claimed that he was denied counsel during the NJP proceeding. Under Article 15 of the UCMJ, members are entitled to a Mast representative or spokesperson, but they are not entitled to representation by an attorney.³ Therefore, the applicant was not denied a right to representation by an attorney at Mast because he had no such right. The record shows that the applicant acknowledged notification of his rights on October 24, 2017, which included the fact that he was not entitled to representation at Mast by an attorney but had a right to be accompanied by a Mast representative. The applicant signed this acknowledgement in front of a witness, and the record shows that he exercised this right. The Board is therefore not persuaded that the applicant was denied counsel during the NJP proceedings.

4. The Board is likewise unconvinced that the applicant's command was unaware of the repercussions of the NJP. The CO stated in his January 17, 2018, endorsement of the applicant's waiver request that he had spent several hours adjudicating the applicant's NJP and that he made his decision after "much deliberation and counsel from [his] servicing legal office." After consulting counsel, the CO was very likely to have known both the maximum punishments for the charged offenses and the fact that an enlisted member may not reenlist if they have received NJP for an offense for which the maximum possible punishment is a punitive discharge.⁴ Even if the CO was unaware that the NJP would lead to the applicant's discharge, the ultimate discharge authority lay with PSC and not the CO. The Board therefore sees no reason to correct the record on this basis.

5. The applicant also alleged that he was advised for months after the NJP that he had "nothing to worry about" and did not need an attorney. He did not submit evidence to support these allegations, and the record shows that he exercised his right to request a waiver of the reenlistment criteria, so he knew he was not eligible to reenlist. The applicant did not have a legal right to an attorney pursuant to the NJP or his lack of eligibility for reenlistment, and being advised that you do not need an attorney is not equivalent to being denied a right to an attorney.

6. The applicant argued that it was an injustice that he was not afforded the opportunity to regain his rank after his reduction in rate at Mast. He noted that his reduction in rate

¹ 33 C.F.R. § 52.24(b).

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

³ Manual for Courts-Martial United States (2016), p. V, para. 4.c.(1)(B).

⁴ The Enlisted Accessions, Evaluations, and Advancements manual, COMDTINST M1000.2A, Article 1.A.5.b.(5).

occurred just a few months before the end of his enlistment and he pointed out how laudable the rest of his Coast Guard career had been. However, the applicant was solely responsible for the timing of his misconduct, and under Article 3.A.5.g. of the Enlisted Accessions, Evaluations, and Advancements manual, COMDTINST M1000.2A, an E-5 is not eligible to compete for advancement to E-6 if the E-5 has received NJP during the one-year period before the terminal eligibility date for the Servicewide Examination for advancement.⁵ In addition, according to Article 1.A.5.b.(5) of the manual, had the applicant been punished for these offenses at any time during his enlistment, he would have been ineligible for reenlistment, even if he had been able to regain his E-6 paygrade.

7. The Coast Guard is presumed to have acted correctly, lawfully, and in good faith,⁶ as it appears to have done here. The applicant has not overcome that presumption or proven by a preponderance of the evidence that his NJP, his ineligibility to reenlist, PSC's decision not to waive the reenlistment criteria, or his failure to be re-advanced to E-6 before his discharge constituted an error or injustice. Accordingly, the applicant's request for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁵ COMDTINST M1000.2A, Article 3.A.5.g.

⁶ *Arens* at 1037.

ORDER

The application of former DC2 [REDACTED] USCG, for correction of his military record is denied.

December 7, 2018

