

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2022-077

██████████ ██████████ ██████████

SK1

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on October 20, 2022, and assigned the case to a staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated February 2, 2024, 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 current Storekeeper, First Class (SK1/E-6), who was an SK2/E-5 at the time of filing, asked the Board to correct his record by restoring his rate to SK1/E-6. Because he has been advanced to SK1 in the interim, the Board interprets the application as a request to backdate his date of rank and award him back pay and allowances.

The applicant explained that on December 10, 2018, he went before a Captain’s Mast for violating Article 86 of the Uniform Code of Military Justice (UCMJ).¹ He received Non-Judicial Punishment (NJP) of restriction for 30 days and forfeiture of \$1,655 for two months, both of which were suspended for six months. In addition, he received a reduction in rate from E-6 to E-5, which

¹ Title 10 U.S.C.A. § 886 states, “Any member of the armed forces who, without authority –

- (1) fails to go to his appointed place of duty at the time prescribed;
- (2) goes from that place; or
- (3) absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed;

shall be punished as a court-martial may direct.

took effect immediately. The applicant alleged that after the mast, he was told that he would receive his previously reduced rate back after six months, so long as he worked hard and stayed out of trouble. The applicant claimed that after the six months were over, he approached the Personnel Officer, a Chief Warrant Officer (CWO), and requested information on how to have his previous rate restored. According to the applicant, the CWO told him not to waste his time because his request for restoration would be denied and led him to believe that, if he did submit the request, she would not have forwarded the request up his chain of command. The applicant explained that he felt the CWO had inside knowledge that he was not privy to, which resulted in him just giving up on pursuing the restoration of his rate. The applicant claimed that he later learned that the CWO believed that the applicant had gotten off easy and should have been discharged. The applicant stated that he did not understand the CWO's displeasure with his punishment because the charges of Operating a Vehicle While Intoxicated were dismissed.

The applicant stated that it has been three years since his reduction and his current Chief, the Supply Officer, questioned him about the situation and told him that the Personnel CWO's account did not make sense because she does not have the authority to make decisions over individual service members' careers. The applicant claimed that the Supply Officer contacted his previous Captain to inquire about the situation and whether or not the Captain would have had reason to oppose the applicant's rate reinstatement. According to the applicant, his previous Captain said no, that there was nothing that would have caused him to oppose the applicant's restoration of rate, and he was very disappointed to have learned that the applicant had not yet been restored to his previous rate.

To support his application, the applicant submitted character references from the Supply Officer, as well as his previous CO, who had convened the Captain's Mast. Both individuals spoke highly of the applicant and asked the Board to correct what they saw as an injustice against the applicant. The CO explained that at the time of handing down the applicant's NJP, which included the reduction in rate, it was his understanding that with excellent performance and good conduct, the applicant could earn back his rate within a year or two. The CO stated that clearly he misread the situation and had he known the applicant would have had to wait this long—nearly four years—to have his rate restored, he would not have chosen rate reduction as a punishment for the applicant at the time. Both officers stated that they had a high opinion of the applicant and fully endorsed the applicant's request to have his rate restored, with their respect growing deeper having watched him take responsibility for his actions without complaining. Other character references substantiated the applicant's claims that the Servicing Personnel Officer had been in disagreement with the punishment the applicant received and did not support his request for a restoration of his previous rate.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on August 21, 2001, where he trained as a Store Keeper and advanced to SK1/E-6.

On October 18, 2018, the applicant received an Alcohol Incident, when his abuse of alcohol was determined to be a significant and/or causative factor after he was pulled over by police on September 5, 2018, for expired registration, and was subsequently arrested for Operating a Vehicle

While Intoxicated (OWI). The applicant was issued a field sobriety test and a breathalyzer test. The breathalyzer test result showed that he had a 0.143 Blood Alcohol Content (BAC) shortly after his arrest. After the field sobriety and breathalyzer test, the applicant was transported to a local hospital for a blood test and urinalysis. This was the applicant's first documented alcohol incident. The applicant was warned that any further incidents might result in him being processed for separation in accordance with Article 2 of the Coast Guard's Drug and Alcohol Abuse Program, COMDTINST M1000.10.

On December 10, 2018, the applicant was found guilty at a Captain's Mast and received Non-Judicial Punishment. The Court memorandum recorded the following:

Code Offenses:

00860 Unauthorized Absence – from unit, etc.

Offense Narrative:

ART 86 UCMJ, Absence without leave: Absence from unit, organization not more than 3 days. In that Store Keeper First Class [Applicant], U.S. Coast Guard, U.S. Coast Guard Sector [redacted], [redacted], on active duty, did at or near [Applicant's Sector], on or about 6 September 2018, without authority, fail to go to at [sic] the time prescribed to his appointed place of duty, to wit: Coast Guard Sector [Applicant's Sector].

Sentence Narrative:

Member is restricted to unit for 30 days, suspended for six months. Member is to forfeit \$1655 per month for 2 months, suspended for six months. Member is reduced to E-5.

On March 27, 2019, the applicant submitted a memorandum wherein he requested that he be granted a waiver of the reenlistment eligibility requirements set forth in Article 1.E.2. of the Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2B.²

On May 8, 2019, Commander, Personnel Service Center issued a memorandum, "Reenlistment Waiver Request" wherein she informed the applicant that his request for a reenlistment waiver had been granted under the condition that the applicant acknowledge an Administrative Remarks Page ("Page 7") within 15 working days from the date of the memorandum containing the following verbiage:

² Article 1.E.2. of COMDTINT M1000.2B discusses the eligibility requirements a service member must meet in order to reenlist or extend their current enlistment, one of which is having "no documented offense for which the maximum penalty for the offense, or closely related offense under the UCMJ and Manual for Courts-Martial, includes a punitive discharge during the current period of enlistment." The criteria used to determine if a service member has committed a serious offense is identified in Article 1.B.17.b.3. of the Military Separations Manual, COMDTINST M1000.4, states, "Commission of a serious offense does not require adjudication by non-judicial or judicial proceedings. An acquittal or finding of not guilty at a judicial proceeding or not holding non-judicial punishment proceeding does not prohibit proceedings under this provision. However, the offense must be established by a preponderance of the evidence. Police reports, CGIS reports of investigation, etc. may be used to make the determination that a member committed a serious offense." This article specifically states that a member who engages in drunken or impaired operation of a vehicles is to be considered the "Commission of a Serious Offense" that warrants mandatory discharge, unless a recommendation by the service member's Commanding Officer is submitted wherein he/she recommends the service member be retained.

To reenlist in the Coast Guard you waive your rights to any future Administrative Separation Board for unsuitability and/or misconduct, where alcohol or drugs is the causative factor. You are reminded that you must adhere to your treatment plan. Any future violation involving alcohol or drugs will result in you being processed for separation from the Coast Guard with no entitlement to an Administrative Separation Board.

The Commander further stated that if the applicant chose to acknowledge the above-referenced Page 7, he would be authorized to reenlist in the Coast Guard, but if he declined to acknowledge the Page 7, she would deny his reenlistment request.

On May 10, 2019, the applicant signed and acknowledged a Page 7 with the above-referenced verbiage.

On August 9, 2019, the applicant entered into a new enlistment period.

For the November 2019 SK1 Service Wide Examination (SWE), the applicant placed 153 out of 245 SK1 candidates. The revised cutoff for the November 2019 SK1 SWE was 33.

For the November 2020 SK1 SWE, the applicant placed 133 out of 266 SK1 candidates. The revised cutoff for the 2020 SK1 SWE was 47.

For the May 2021 SK1 SWE, the applicant placed 160 out of 245 SK1 candidates. The revised cutoff for the May 2021 SK1 SWE was 66.

The applicant did not take the November 2021 SK1 SWE.

For the May 2022 SK1 SWE, the applicant placed 12 out of 235 SK1 candidates. The revised cutoff for the May 2022 SK1 SWE was 50.

The applicant was promoted to SK1 during the 2023 promotion cycle.

VIEWS OF THE COAST GUARD

On April 12, 2023, a judge advocate (JAG) of the Coast Guard submitted a memorandum in which he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC) and recommended that the Board deny relief in this case.

The JAG argued that the applicant's case is untimely, however, the JAG's position is incorrect. In *Detweiler v. Pena*,³ the Court held that the Board's statute of limitation is tolled under the Soldiers' and Sailors' Civil Relief Act for active duty military members. Accordingly, since the applicant in this case was and still is on active duty, the statute of limitations has not begun to run and the applicant's application is timely. Therefore, the JAG's arguments on untimeliness will not be summarized here.

³ *Detweiler v. Pena*, 38 F.3d 591 (D.C. Cir. 1994).

The JAG argued that the applicant failed to carry his burden of persuasion. According to the JAG, the only basis for the applicant's claims of error and/or injustice is a conversation the applicant had with his CWO, who allegedly dissuaded the applicant from submitting an official request to have his previous rate restored. However, the JAG argued that regardless of the CWO's comments, the applicant failed to prove that he was otherwise prevented from submitting his request through the CWO or submitting his request through someone other than his CWO. According to the JAG, the applicant admitted that he based his decision to give up on trying to have his rate restored on a subjective belief that his request would not be approved. Accordingly, the JAG argued that the applicant's decision to give up and not formerly request a restoration of his previously held rate was a significant and causative factor in the error/injustice he now claims.

The JAG argued that although the applicant's Commanding Officer (CO) now states that he would not have selected a reduction in rate as punishment if he had known how long the applicant's reduction would have lasted, that is insufficient to prove error or injustice. Similarly, the JAG argued that the CO's statement is insufficient to prove that the applicant's previous rate should be retroactively advanced to E-6. The JAG explained that the CO stated that it was his understanding at the time of handing down the applicant's punishment that the applicant could earn his rate back in one or two years. The JAG contended that the CO's statement indicates that it was the CO's intent that the applicant earn his rate back, not have it automatically restored after six months. Regardless, the JAG argued that once the applicant commenced his new reenlistment contract on August 9, 2019, the applicant was no longer eligible to have his rate restored via a formal request, with the only remaining option available to the applicant was to earn his rate back through competing in the SK1 SWEs. For the reasons outlined, the JAG argued that the applicant's request for relief should be denied.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 1, 2023, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. The Chair received the applicant's response on July 20, 2023.

In response to the Coast Guard's recommendation to deny relief in his case, the applicant explained that he was given improper guidance from a superior officer, who did not have the authority to deny his right to submit a formal request to have his rate restored. The applicant contended that the authority to deny his request rested solely with his CO, the CAPT, not the CWO. The applicant explained that he requested assistance from the CWO for the proper method to prepare documentation in order to submit a formal request to his rate restored, but was told by the CWO that it would be a waste of his time because he would not have his rate restored. The applicant stated that at the time, he did not have a Supply Chief to request guidance from, so his only option for advice was the CWO, which created a dead-stop line of communication thru the chain of command.

The applicant stated that though he did sign a new reenlistment contract on August 19, 2019, he was informed by the CWO that if he did not reenlist, he might not be able to complete his twenty years of active duty service and might not receive a retirement. The applicant alleged that he was not informed or counseled that his reenlistment would make the restoration of his E-6 rate impossible. According to the applicant, had he known that his new reenlistment contract would

have prevented his rate from being restored, he definitely would have made a different decision. The applicant stated that after the CO retired in July 2020, he believed all hope was lost, since the presiding official of his Captain's Mast had departed, because his new CAPT did not know his work ethic. Because of his lack of personal knowledge, the applicant explained, he assumed the new CO would simply default to the CWO's opinion of him. Instead of submitting a formal request for rate restoration, the applicant stated, he instead began preparing for future SK1 SWEs because he did not know of any other way to have his rank restored. The applicant alleged that he had never heard of the BCMR and did not know it was an option, until a new CWO arrived at his unit and educated him on the process. According to the applicant, that was the date that the three-year statute of limitations began to run, not before.

The applicant stated that he wanted this Board to understand that he was improperly advised and influenced by a superior officer. He argued that he should have been afforded the opportunity to submit a request for restoration, which would have allowed the CO to hear his side of things and decide on whether or not to restore the applicant's rate. Instead, the CO was never presented with the opportunity to restore the applicant's rate. The applicant explained that his major complaint is that his professional growth has been stunted and although he has finally successfully advanced to SK1, he cannot compete for Chief Petty Officer until May 2025.

APPLICABLE LAW AND POLICY

Article 1.A. of the Coast Guard's Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2B, provides the following guidance on reduction in rate of an enlisted member:

1.A.28. Advancement After Reduction.

...

b. After Reduction as Punishment.

1. Advancement After Reduction. Members who have been reduced in rate, except those who fall within the provisions of Articles 15(d) and 15(e) of the Uniform Code of Military Justice, are subject to the normal advancement system, unless they are considered by their commanding officers to be deserving of special advancement.

2. Recommendation for Restoration/Advancement. Commanding officers who consider enlisted members to be deserving of restoration to a formerly held rate, or deserving of advancement, but to a rate lower than formerly held, may recommend such restoration or advancement by letter to Commander (CG PSC-EPM) or (CG PSC-RPM). In making such a recommendation, the present commanding officer will set forth in detail a full justification of the action recommended based on at least five, but not more than 36, months observation of performance of duty by the member concerned since reduction in rate. The observation time need not be totally at the present unit, but must take place within the same period of enlistment. Enlisted members E-7 and above, who have been reduced to E-5 or below, may be recommended for restoration of rate up to and including E-6. However, in order for enlisted members to be advanced to E-7 or above, they must re compete in a SWE only after meeting the eligibility requirements of Articles 3.A.5. and 3.A.6. of this Manual.

...

1.A.31. Reduction in Rate.

a. General Provisions. Reasons for Reduction in Permanent Rate. Reduction in a permanent rate may result from any one of five reasons:

1. Punishment in accordance with Uniform Code of Military Justice,

...

b. Reduction in Rate as a Punishment.

...

(2) Reduction by Reason of NJP. Under the authority of Article 15 of the Uniform Code of Military Justice, a commanding officer may reduce an enlisted member in pay grades E-2 through E-6 to the next inferior pay grade as a result of NJP if the member concerned was previously advanced or promoted to the pay grade from which demoted by the commanding officer concerned or by an equivalent or lower command. Commanding officers of all commands in the Coast Guard have equivalent authority to effect the authorized advancement of enlisted members and will exercise promotion authority within the meaning of Article 15(b)(2)(D), Uniform Code of Military Justice. Accordingly, commanding officers who have authority to impose NJP under the provision of Article 15 may reduce an enlisted member, except a chief petty officer under their command, to the next inferior pay grade for disciplinary purposes.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

2. The application was timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

3. 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.⁴

4. The applicant alleged that after his Captain's Mast and his reduction in rate, it was explained to him that he would receive his previously reduced rate back after six months, so long as he worked hard and stayed out of trouble. However, according to the applicant, when he approached his CWO about restoring his rate, he was told not to bother because it would not be

⁴ *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).

approved. As a result of the CWO's statement, the applicant claimed that he decided against submitting a formal request. 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 the military record, and the applicant bears the burden of proving, by a preponderance of the evidence, that the disputed information is erroneous or unjust.⁵ 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."⁶

5. The applicant has alleged that he is entitled to have his rate of E-6 backdated because he relied upon erroneous and biased information he received from his CWO at the time. Article 1.A.28.b.1. of the Coast Guard's Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2B, states, "Members who have been reduced in rate, except those who fall within the provisions of Articles 15(d) and 15(e) of the Uniform Code of Military Justice, are subject to the normal advancement system, unless they are considered by their commanding officers to be deserving of special advancement." Here, Coast Guard policy makes it clear that members who are reduced in rate are subject to the normal advancement system, wherein members must earn advancement by taking the annual Service-Wide Examination (SWE), unless they are considered by their COs to be deserving of special treatment. The Board's review of the record indicates that the applicant's CO did not believe the applicant's case warranted special consideration and instead believed the applicant should "earn" his re-advancement. Although the applicant has alleged that he was deterred from submitting his request for restoration and as a result, his CO was never presented with the opportunity to review the applicant's case, he has not submitted evidence showing that the CWO actually refused to process a request for him, only that the CWO advised him that his request would not be approved. And the CO's statement about expecting the applicant to earn re-advancement within a year or two shows that the CWO was correct in advising the applicant that a special request for restoration of rate would not have been approved as the CO expected him to earn it through the advancement system. Moreover, the CO is not the deciding authority. Article 1.A.28.b.2. of COMDINTST M1000.2B, states, "Commanding officers who consider enlisted members to be deserving of restoration to a formerly held rate, or deserving of advancement, but to a rate lower than formerly held, may recommend such restoration or advancement by letter to Commander (CG PSC-EPM) or (CG PSC-RPM)." Therefore, Commander, PSC-EPM is the deciding authority, and when advancing members, PSC is required to advance the best qualified.⁷ In this case, the record shows that there were dozens of eligible SK2s who had not received NJP and who were scoring higher on the SWE than the applicant.

6. For the reasons outlined above, the applicant has not met his burden, as required by 33 C.F.R. § 52.24(b), to overcome the presumption of regularity afforded the Coast Guard that its administrators acted correctly, lawfully, and in good faith.⁸ He has not proven, by a preponderance of the evidence, that the Coast Guard failure to restore his rate after six months of his reduction was erroneous or unjust. Accordingly, the applicant's request for relief should be denied.

⁵ 33 C.F.R. § 52.24(b).

⁶ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁷ Article 3.A.1.a., COMDTINST M1000.2A.

⁸ *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

ORDER

The application of SK1 [REDACTED] [REDACTED] USCG, for the correction of his military record is denied.

February 2, 2024

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