

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-050

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

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, [REDACTED], docketed the application on December 19, 2006, upon receipt of the completed application, and subsequently prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated August 30, 2007, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his record to show that he retired with 25 years of service rather than with 22 years and that he retired on October 31, 2002, rather than on October 31, 1999. He requested back pay and allowances. The applicant relies on the Board's decision in Docket No. 2000-035 to support his request for three years of additional active duty credit.

BACKGROUND

BCMR Docket No. 2000-035 (Prior Case)

On December 2, 1999, the applicant, then a [REDACTED] pay grade E-6), filed an application with the Board, which was docketed as Docket No. 2000-035. In that application, he asked the Board to correct his record "by advancing him to [REDACTED]; pay grade E-7) and by restoring the money that he was required to forfeit from his pay as a result of non-judicial punishment [NJP] on April 19, 1999."¹ The applicant voluntarily retired on November 1, 1999 and did not seek a return to active duty.

¹ The Coast Guard had returned money forfeited by the applicant as a result of setting aside the non-judicial punishment prior to the issuance of the Board's decision in Docket No. 2000-035.

As stated above, on April 19, 1999, the applicant, then a member of the Coast Guard Headquarters Support Command, was punished at captain's mast for sending three e-mails "of an obscene and inappropriate nature, specifically pornographic material" in violation of Coast Guard regulations.

The applicant's punishment included a forfeiture of pay in the amount of \$1086.00 and a letter of reprimand that was given to the applicant by the executive officer (XO), Coast Guard Headquarters Staff. The applicant submitted a rebuttal to the letter of reprimand, dated April 21, 1999. Also, on April 23, 1999, he appealed the NJP on the following grounds: "1) Unofficial use of e-mail is prevalent within the Coast Guard. The repercussions for Coast Guard military and civilian personnel are inconsistent. 2) The [NJP] awarded was disproportionate to [his] acts of bad judgment."

On May 11, 1999, the applicant requested to retire because of the Coast Guard's high year tenure policy (HYT)² (he was near the maximum years allowed for service as an E-6 without advancement), because of the approaching end of his enlistment on July 27, 1999, and his inability to reenlist without a waiver, and because of his inability to compete for advancement for 24 months after receipt of the NJP. The applicant's retirement request was approved, with an effective date of November 1, 1999. The applicant took terminal leave prior to the effective date for his retirement.

On October 28, 1999, the NJP appeal authority set aside the NJP and restored all rights, privileges and property which the applicant held prior to the imposition of NJP. On October 29, 1999, the applicant's supervisor recommended the applicant for promotion to chief petty officer. On November 1, 1999, the applicant's retirement became official.

The applicant argued in Docket No. 2000-035 that in addition to the unfairness of the punishment, the NJP jeopardized his advancement to chief petty officer (he was number 27 on the advancement list) and his special assignment to [REDACTED]

The Coast Guard recommended that the Board deny relief to the applicant in Docket No. 2000-035. The Chief Counsel argued that the applicant had already received appropriate relief when his NJP was set aside. The Chief Counsel stated that contrary to the applicant's allegations, there was no indication his appeal was unfairly delayed. The Coast Guard offered the applicant the opportunity to return to active duty, which he declined. The Chief Counsel stated that the applicant's request for retroactive advancement to chief petty officer and retirement would be inappropriate and would violate Coast Guard regulations that required the applicant to serve two additional years on active duty if advanced to chief petty officer. The Chief Counsel noted the applicant's comment in his retirement letter that "whatever the outcome of my appeal, I have decided to retire from the Coast Guard."

² The Coast Guard's then high year tenure policy established the maximum time in service for each enlisted pay grade called professional growth points. For an E-6, 22 years was the maximum time allowed. However, the regulation permitted members to request waivers of this policy. See Chapter 12.G.1. of the Personnel Manual.

The Commander, Coast Guard Personnel Command (CGPC) issued a memorandum that was a part of the advisory opinion. He stated that the applicant's name was removed from the advancement list on May 25, 1999 as a result of the applicant's request for retirement. CGPC further stated that even if the applicant had not submitted a retirement letter, his name would have been removed due to the NJP. CGPC also stated that if the applicant had not submitted his request to retire and had no NJP, he would have been advanced to [REDACTED] E-7, assuming he remained fully qualified and eligible for advancement, prior to April 19, 1999, through September 1, 1999.

The applicant responded to the advisory opinion and stated that he believed that he should be advanced to E-7. The applicant also stated that he did wish to return to active duty and he did not ask to be credited with any additional active duty.

On November 9, 2000, the Board issued the final decision in Docket No. 2000-035. It was approved by the Secretary's Delegate on November 18, 2000. A copy of the final decision was mailed to the applicant on December 21, 2000. The Board made the following pertinent findings in Docket No. 2000-035:

3. Any alleged error with respect to the legality of the punishment, either because of a procedural violation or the lack of proper delegated authority by the officer imposing NJP has been rendered moot by the setting aside of the NJP on October 28, 1999. The Board notes, however, that the applicant acknowledged sending the e-mails, the Coast Guard determined that there was unequal treatment in the manner in which it handled these cases, particularly the applicant's, and that confusion existed about the NJP authority's delegation to impose NJP on the applicant.
4. The NJP appeal authority, in setting aside the NJP, did not state on what ground it was set aside, but the Board presumes it was set aside because it was found to have been a clear injustice. Section 6.d., Part V, of the Manual for Courts-martial states that "[t]he power to set aside punishments and restore rights, privileges, and property affected by the executed portion of a punishment should ordinarily be exercised when the authority considering the case, believes that, under all circumstances of the case, the punishment has resulted in clear injustice." This finding is consistent with that of the Chief Counsel who states that it was set aside because it was inconsistent with punishment imposed in other cases.
5. The setting aside of the NJP should restore the applicant's rights, privileges, and property that were affected by the punishment that was set aside. Section 6.d., Part V, Manual for Courts-Martial. The Military Justice Manual states that it wipes the slate clean. Article 1-E-9.e., Military Justice Manual.
6. Even though the applicant promptly appealed the NJP, he was still faced with the issue of high year tenure. In addition, there was no guarantee that he would prevail on the appeal or how long the process would take, so he took terminal

leave, found other employment, and relocated with his family to [REDACTED]. The applicant asserts, and the high year tenure regulation appears to support him, that if he had not requested retirement and he reached his maximum professional growth point, he could have been discharged. The applicant believes that a discharge would have resulted in the loss of retired pay. The applicant, without being advanced, could only remain in the Coast Guard as an E-6 for a total of 22 years. Therefore, his professional growth point would have occurred on December 9, 1999. Complicating the issue even more was the fact that the applicant's enlistment expired July 27, 1999, although it was extended for 4 months. Pursuant to Article 12-G-5 of the Personnel Manual, reenlistments are not permitted beyond an applicant's professional growth point, except with a waiver from the Commandant. Facing high year tenure and with an NJP in his record it was unlikely that the applicant would have received a waiver to reenlist. An NJP appeal does not stay the punishment imposed. Section 7.d., Part V, Manual for Courts-Martial. The Coast Guard did not disagree with the applicant's understanding on the impact the HYT policy would have on his retirement eligibility, if he had remained on active duty and his appeal had been denied.

7. The applicant argues, contrary to the Chief Counsel, that all rights, privileges, and property were not restored to him after the NJP was set aside; however, he agrees that the forfeiture has been returned to him. He does not want to return to active duty, but he does want to be advanced to [REDACTED] retroactive to September 1, 1999. The Chief Counsel asserts that the applicant has received all the relief to which he is entitled by virtue of the setting aside of the NJP and by virtue of the Coast Guard's offer to restore him to active duty and advance him to E-7 on condition that he obligate himself for an additional two years of service, and accept a duty assignment based on the needs of the Service.

8. The applicant complained that prior to the NJP he was on the advancement list and would have advanced on September 1, 1999 to [REDACTED] and that he would have begun a special assignment to the [REDACTED] in May 1999. After receiving NJP, his orders to [REDACTED] were canceled and his name, although removed from the advancement list as a result of his May 1999 retirement request, would have been removed as a result of the NJP had no retirement request been submitted. The offer of the Coast Guard to return him to active duty with no commitment to a particular duty assignment, according to the applicant, is not restoring him to the rights, privileges, and property he had prior to the NJP. Moreover, he had just recently relocated to the Atlanta area and began civilian employment there.

9. The Board must determine whether the applicant suffers from an injustice created by and resulting from the imposition of the unfair NJP or whether, as the Chief Counsel asserted, he has received the relief to which he is entitled. The Chief Counsel blames the applicant, in part, for this situation: first, because the applicant submitted a retirement request; and second, because the applicant did not accept their terms for a return to active duty.

10. The Board is persuaded that the applicant acted reasonably in requesting retirement in light of the Coast Guard's policy with respect to HYT. Weighing the equities in this case, the Board finds that the applicant was punished unfairly, which placed him in a position of having to deal with the issue of high year tenure and possible loss of retirement. The applicant should not be punished further by not being advanced to [REDACTED]. The Board is not persuaded that the applicant's refusal to accept the Coast Guard's offer to return to active duty and then be advanced to E-7, but accept an assignment based on the needs of the Service, should . . . defeat his request to be advanced. The Board notes that this offer is not consistent with the applicant's position prior to the NJP, in which he had orders to [REDACTED]. The applicant stated that he would have accepted orders to the [REDACTED], but the Coast Guard claimed that there were no open billets there, although the applicant claims there was a billet available in [REDACTED] at the time. Even if there were no billets in the [REDACTED] Office, there is nothing in the record that indicates that the Coast Guard attempted to work out any other assignment with the applicant, but left him only with the option of returning to active duty in an [REDACTED] billet anywhere in the world. The Board is not persuaded, under the circumstances, that the Coast Guard made a good faith effort to work out an acceptable arrangement with the applicant for a return to active duty.

11. The applicant appealed the NJP on April 23, 1999, and did not get a final resolution until October 28, 1999. (A service member is given only 5 days to appeal an NJP.) However, the letter did not reach the applicant until November 6, 1999. During this period, the applicant made continual inquiries as to the status of the appeal and why it was taking so long to render a final decision on the appeal, especially after he had been told in May 1999 that the appeal would be set aside. The Board finds that the applicant's actions were reasonable, particularly in light of the fact that he had a family to support and there was no guarantee he would prevail on the appeal. The Coast Guard did not wait for the outcome of the appeal before canceling the applicant's [REDACTED] assignment and designating other personnel to fill it.

12. The applicant's acts to protect his retirement and take care of his family, under the particular circumstances of this case, coupled with the dilemma caused by the length of the Coast Guard review of the NJP appeal, are not unreasonable. Neither does the Board find the applicant's refusal of the Coast Guard's half-hearted offer to return to active duty unreasonable. The Board is persuaded that the applicant has suffered an injustice and finds that justice demands that he be granted the relief requested. More of an effort should have been made by the Coast Guard to find a reasonable assignment for the applicant.

13. The Coast Guard has stated that to advance the applicant without returning him to active duty for a minimum period of two years is contrary to regulation. However, this regulation does not divest the Commandant of the ability to

separate (or retire) a member for good and sufficient reasons or if such a separation is in the Coast Guard's best interest. Article 12-B-12.a.16 & 17, Personnel Manual.

14. Accordingly, the Board finds that the applicant's record can be corrected to show that he obligated himself for two years of duty on September 1, 1999 and that he was also advanced to pay grade E-7 that same day. The record can be further corrected to show that at the direction of the Commandant, with the consent of the applicant, he was retired on October 31, 1999 at pay grade E-7.

After making the above pertinent findings and conclusions, the Board entered the following Order in Docket No. 2000-035:

The application of [the applicant] USCG (Ret.) for the correction of his military record is granted. His record shall be corrected to show that he was advanced to pay grade E-7 on September 1, 1999, and that he retired on October 31, 1999, as an E-7. The applicant's advancement to E-7 shall be effective for all purposes, including pay and allowances.

BCMR DOCKET NO. 2007-050 (CURRENT APPLICATION)

In support of his request for three years of additional active duty, the applicant argued that the Board in Docket No. 2005-035 found that he acted reasonably in requesting retirement in light of the Coast Guard's policy of high year tenure; that he was punished unfairly, which placed him in a position of having to deal with issues of high year tenure and a total loss of retirement; and that the Board was not persuaded that the Coast Guard made a good faith effort to work out an acceptable arrangement for him to return to active duty. The applicant further argued that he should be credited with the three years of service that *he intended to serve* if the 1999 NJP had not occurred. The applicant submitted an Assignment Data Sheet dated October 29, 1998, showing that his career intention was to extend/reenlist for three years in 1999. He further argued that the Board already ordered that his record be corrected to show that he obligated himself for two years of service in Finding 14. of the Final Decision in Docket No. 2000-035 and that the Coast Guard failed to correct his record in this regard.

The applicant claimed that he did not discover the alleged error until October 31, 2006. He stated that it is in the interest of justice to consider his application and waive the three year statute of limitations if the application is untimely because "[t]he Board found that my record could be corrected to show that I obligated myself for two years." He further stated that Docket No. 2000-175 supports his request for relief.³ In that case the Board ordered that applicant's

³ In 2000-175, the applicant was not seeking advancement to a higher grade. He asked the Board to correct his retirement date to show that he retired with thirty years of service rather than with twenty-eight. Earlier the Coast Guard had miscalculated the applicant's active duty base date by seven months which was administratively corrected to December 1, 1997. The applicant argued in Docket No. 2000-175 that because the Coast Guard suspended its high year tenure (HYT) in the summer of 1997, if the miscalculation had not occurred, he would have been able to continue serving until he had completed thirty years of active duty. Under the ALDIST suspending HYT for certain rates, members who would have been required to retire between October 1 and December 31, 1997 could apply for two year waivers. Commanding officers were to counsel members on the opportunity to remain on

record corrected as follows: “The separation date shown on his DD 214 shall be November 30, 1999 instead of November 30, 1997, so that he shall be deemed retired as of December 1, 1999. The Coast Guard shall pay the applicant any sums, such as back pay, allowances, retirement pay he may be owed as a result of this correction.”

VIEWS OF THE COAST GUARD IN CURRENT APPLICATION

On May 10, 2007, the Board received an advisory opinion from the Judge Advocate General (JAG), recommending that the Board deny the applicant's request for relief because the application is untimely and because it lacks merit. In this regard, the JAG offered the following analysis:

a. The application isn't timely and the applicant fails to adequately justify the delay. An application for correction of a record must be filed within three years after the applicant discovered or should have discovered the alleged error. 33 C.F.R. § 52.22. The BCMR issued its final decision in [Docket No. 2000-035] on November 9, 2000. The Coast Guard implemented the relief ordered by the Board in January 2001.^[4] This application requesting additional relief on the same basis as his 1999 application comes more than five years after the Coast Guard corrected the applicant's record. This application should be denied for timeliness.

b. The applicant has failed to meet his burden of showing that he is entitled to have his retirement recalculated to be based on 25 years of active duty at the 2005 pay scale. He points to no provision in the law or language of the BCMR's final decision in his 1999 case that would permit him to receive active duty credit for a period of time for which he did not serve. Title 10 USC § 1401a prohibits re-computation of a retired member's basic pay to reflect an increase in basic pay unless otherwise specifically provided for by law. See 10 USC §1401a.^[5]

c. The applicant relies upon the BCMR's language [in] the 2000-035 Final Decision to support his claim. The applicant points particularly to the language

active duty. The JAG recommended correcting the applicant's record to show that he retired on December 1, 1999. Although the JAG did not find Coast Guard had committed an error, he stated that it was clear from the record that the applicant “never had actual notice of the HYT waiver policy implemented in March 1997.” The JAG further stated that the applicant in Docket No. 2000-175 would have most assuredly applied for such a waiver if he had been informed of the HYT amendment and probably would have received the waiver.

⁴ In a letter to the applicant dated January 8, 2001, the Commanding Officer of the Coast Guard Human Resources Service & Information Center informed the applicant that he was retired in pay grade E-7, that his service time for retirement (multiplier) was 21 years, 8 months, and 21 days, and that service time for pay (pay scale) was 22 years, 4 months, and 15 days. A note at the end of the letter stated “a partial payment of \$2,593.17 for the period 1 November 1999 through 31 December 2000 has been processed . . . This represents a total underpayment of \$3,601.62 less federal income tax of \$1,008.45. Your retirement rank has been changed from [REDACTED] E6 to [REDACTED] E7.”

⁵ Section 1401(a)(a) of title 10 of the United States Code states that “Unless otherwise specifically provided by law, the retired pay of a member or former member of an armed force may not be recomputed to reflect any increase in the rates of basic pay for members of the armed forces.”

that the record could be corrected to show that he obligated himself for two years of service. This argument is without merit. The Board's purpose of stating that the Coast Guard could correct the applicant's record to show that he obligated himself for two years of service was to comply with [the Personnel Manual Chapter] 5.C.25.e.1. and then separate him under [chapter] 12-B-12a. 16 & 17 was to refute the Coast Guard's argument at the time that it could not advance the applicant under the regulations. It was not a mandate that the Coast Guard change the record to show that he obligated himself for additional service. In effect the Board's decision was that the Coast Guard should waive this requirement in the applicant's case. The Coast Guard corrected the applicant's DD-214 in accordance with the Order . . . of the Final Decision. The Coast Guard also corrected the applicant's retirement pay to reflect the change in pay grade retroactive to his retirement date as required by the Board's final decision . . .

d. While the BCMR in its 2000 decision felt that applicant's case warranted granting relief, there is nothing in that decision to suggest that applicant should receive additional years of service credit for the purposes of increasing his retirement pay. Pursuant to 10 USC § 1405, the years of service for the purposes of determining retirement pay is comput[ed] by adding the total years of service. The applicant's total years of service have been calculated under this statute and there is no other provision to recalculate that number based on years of service he would have obligated himself for.

APPLICANT'S REPOSE TO THE VIEWS OF THE COAST GUARD FOR THE CURRENT APPLICATION

On May 18, 2007, the Board received the applicant's initial response to the views of the Coast Guard. On May 30, 2007, the Board received an additional response from the applicant. He disagreed that his application was untimely and argued that the issue is moot because the Chair determined that his claim that the Coast Guard had not properly implemented the Board's Order in Docket No. 2000-035 should be treated as a new case.

In the event that his application is determined to be untimely, the applicant argued that any untimeliness should be excused. In this regard, the applicant stated that in July 2002, water damage destroyed records that he kept in his home, including his copy of the final decision in Docket No. 2000-035. He stated that he searched, without success, for a copy of the final decision on the BCMR website. He then called the BCMR to inquire why that final decision was not available for review and copying. He stated that in November 2006, he again searched the Board's website for Docket No. 2000-035 and found that it was still not available. He stated that he then called the BCMR and requested that a copy of the decision be mailed to him.

The applicant disagreed with the Coast Guard that it had properly interpreted and implemented the Board's order in Docket No. 2000-035. In this regard, the applicant stated that the Coast Guard has attempted to interpret the Board's intent but should have sought clarity of the Board's intent pursuant to 33 CFR § 52.73. This provision states: "If the intent or import of the final decision is not clear to the Coast Guard or if the Coast Guard believes that executing all

of part of the order in the final decision is beyond the Coast Guard's authority, the final decision shall be returned to the Board for clarification or technical amendment."

In arguing that the Board's final decision in Docket No. 2000-035 directed that he be granted two years of additional active duty, the applicant pointed to the following: 1. The Coast Guard argued in the prior advisory opinion (in Docket No. 2000-035) that advancing me to E-7 without returning me to active duty for a minimum two year period was contrary to regulation. That Article 5.C.25.e. of the Personnel Manual stated that upon effecting the advancement to pay grade E-7, personnel incur two years of obligated service. 3. The Board found that 5.C.25.e. did not divest the Commandant of the ability to separate or retire a member for good and sufficient reason. See article 12-B-12.a.16 &17.

The applicant further argued that the Order in Docket No. 2000-035 stated that his advancement to E-7 shall be effective for all purposes including pay and allowances. He also stated that the Board found that his record should "be corrected to show that I obligated two years of duty on September 1, 1999, in order to be advanced to pay grade E-7."⁶ Therefore he argued that his retirement multiplier must reflect the two years allegedly awarded to him by the Board and that the Coast Guard failed to grant him the two years of active duty credit.

The applicant alleged that had the Coast Guard not caused him to retire to avoid HYT, he would have continued his career and points to his 1998 Assignment Data form that shows he had intended to enlist/extend or three years at the end of his then current enlistment in 1999. He argued as a result of the Coast Guard's alleged error he was deprived of at least two years of active duty. He stated that he was required to express this three year commitment to execute permanent change of station orders to [REDACTED] no later than October 31, 1999. (According to Docket No. 2000-035, these orders were cancelled after the NJP.)

The applicant also asserted that the Coast Guard's advisory opinion in the current application should not be considered because it was not submitted within the 135 days allotted to the Coast Guard for submission of an advisory opinion under 33 C.F.R. § 52.42.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10 United States Code.
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.

⁶ Actually, the Board stated in Finding 14. of Docket No. 2000-035 that the applicant's record "*can be corrected to show that he obligated himself for two years.*" (Emphasis added.)

3. The Chair docketed this application as a new case because it raised an issue not considered by the Board in the previous application, Docket No. 2000-035. In that case, the applicant did not ask for any additional active duty credit and the Board decided only the issue of whether he should have been advanced to [REDACTED] pay grade E-7). In granting relief with respect to the advancement issue, the Board issued the following order: “The application of [the applicant] USCG (Ret.) for the correction of his military record is granted. His record shall be corrected to show that he was advanced to pay grade E-7 on September 1, 1999, and that he retired on October 31, 1999, as an E-7. The applicant's advancement to E-7 shall be effective for all purposes, including pay and allowances.”

4. In the current case, the applicant claims that he is entitled to credit for the three years of active duty *that he intended to serve* if the 1999 NJP had not occurred based on the Board’s findings in Docket No. 2000-035. Two of the three years of credit requested are based on the applicant’s contention that the Board already directed such relief in Docket No. 2000-035 when it stated that his record could be corrected to show that he obligated himself for two years of active duty. However, a finding that a record can be corrected to show a member obligated service does not prove that the Board intended to grant actual or constructive service credit, and there is nothing in the Board’s order directing such relief. The applicant claims that he is entitled to active duty credit despite the fact that he did not request such credit in Docket No. 2000-035 and despite the fact that he voluntarily retired from active duty effective November 1, 1999. The issue of additional active duty credit was not before the Board in Docket No. 2000-035 and is a new issue before this Board. The attempt by the applicant to couch his request in terms of the Coast Guard’s failure to properly implement the Board’s order in Docket No. 2000-035 does not change the substance of his request. Therefore, the Chair was correct in docketing this matter as a new case.

5. The applicant’s current request for additional active duty credit is not timely. To be timely, an application for correction must be filed within three years of the date the alleged error or injustice was, or should have been, discovered. See 10 U.S.C. § 1552; 33 CFR § 52.22. Since the applicant bases his request for relief on the Board’s final decision in Docket No. 2000-035, which was issued on November 18, 2000, and a copy was mailed to the applicant on December 21, 2000, he should have filed his current application on or before December 21, 2003.

6. The applicant asserted that he did not discover the alleged error until October 31, 2006. However, the applicant should have discovered the alleged error sooner because the Board issued the final decision in Docket No. 2000-035 on November 18, 2000, a copy of which was mailed to the applicant on December 21, 2000. The applicant knew or should have known that he had not received constructive service credit from that point. Moreover, the Coast Guard implemented the Board’s order in Docket No. 2000-035 in January 2001 and informed the applicant by letter dated January 8, 2001 that his retired pay was based on 22 years, 4 months, and 15 days of active service. Therefore, the applicant certainly should have known in early 2001 that his retired pay was based on approximately 22 years of active duty and not 25 years as he now claims it should have been.

7. The applicant asserted that his delay in filing his application is excusable because his copy of the final decision in Docket No. 2000-035 was destroyed in a flood of his home in July

2002. However, he provided no evidence to support this allegation. He further alleged that his delay is excusable because the Board failed to post his decision to its reading room website. He stated that he searched the BCMR website after the alleged flood and discovered that a copy of the final decision in Docket No. 2000-035 had not been posted, after which he contacted the BCMR and inquired about the failure of the Board to post a copy of the final decision. He stated that he searched the website again in November 2006 and the decision still had not been posted, at which point he contacted the BCMR and a copy of it was sent to him. The Board concedes that a copy of the final decision in Docket No. 2000-035 is not posted to the BCMR website. However, the Board is not persuaded that this fact should excuse the applicant's failure to file timely. He does not deny that he received the Board's final decision in December 2000; nor does he deny that he was aware of the Board's order at that time. In addition, the Board finds that the applicant could have obtained another copy of the final decision in his case at any time from the Board, as he did in 2006. The applicant did not file an application with the Board until November 3, 2006, approximately three years beyond the statute of limitations. The Board finds nothing in the applicant's explanation to justify his delay in not bringing this application within the time period allotted by law.

8. The Board may excuse the failure to file timely if it finds that it is in the interest of justice to do so. In making such a determination, the Board should consider, in addition to the reasons for the delay, the likelihood of success on the merits of the claim. *See Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992); *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

9. The Board has conducted a review of the merits of the application and finds, for the reasons discussed below, that the applicant is not likely to prevail. The applicant is seeking three years of additional active duty credit and erroneously argues that the final decision in Docket No. 2000-035 already directed the correction of his record to show two years of active duty credit subsequent to November 1, 1999, even though he had voluntarily retired on that date. The applicant's request is for constructive active duty credit for the period from November 1, 1999 to October 31, 2002. Constructive service is a doctrine under which military personnel who have been illegally or improperly separated from service are deemed to have continued in active service until their legal separation. *See Anderson v. United States*, 59 Fed. Ct. 451 (2004). The Court further stated in *Anderson* 454, n.7 (citing *Adkins v. United States*, 68 F.3d 1317, 1326-27 (Fed. Cir. 1995)), "'Constructive service' in the military is a necessary predicate for back pay, and *constructive service only occurs if a discharge or separation is voided.*" (Emphasis added.) To restate, in Docket No. 2000-035, the Board never addressed the issue of whether the applicant's retirement from the Coast Guard was illegal or improper and should be voided, and the applicant never raised the issue or requested additional active duty credit.

10. Further, there is no language in the Board's Order in Docket No. 2000-035⁷ directing the Coast Guard to correct the applicant's record to show that he served on active duty after

⁷ That Order reads: "The application of [the applicant] USCG (Ret.) for the correction of his military record is granted. His record shall be corrected to show that he was advanced to pay grade E-7 on September 1, 1999, and that he retired on October 31, 1999, as an E-7. The applicant's advancement to E-7 shall be effective for all purposes, including pay and allowances."

October 31, 1999. The Board is well aware of how to correct a record to grant constructive service credit if it intends to do so.⁸ There is no language in the Board's Order in Docket No. 2000-035 that would lead any reasonable person to conclude that the Board had granted the applicant additional active duty credit beyond that which he earned through his actual service. The sentence, "The applicant's advancement to E-7 shall be effective for all purposes, including pay and allowances" ensured only that the applicant would receive any pay and allowances to which he was entitled at the higher pay grade.

11. In support of his argument that he is entitled to three years of constructive active duty credit even though he was in a retired status during the period under review, the applicant selectively chooses certain of the Board's statements from the findings and conclusions in Docket No. 2000-035, such as: the applicant acted reasonably in requesting retirement in light of the Coast Guard's policy of high year tenure; the applicant was punished unfairly, which placed him in a position of having to deal with issues of high year tenure and possible total loss of retirement; and the Coast Guard failed to make a good faith effort toward working out an acceptable arrangement to return the applicant to active duty. However, after reading all of the Board's findings in Docket No. 2000-035, the Board is firmly convinced that the prior Board concluded that because of the unjustness of the NJP and because of the long delay in processing the appeal, the applicant had suffered an injustice that negatively impacted his advancement opportunity. The findings made by the Board were in support of its conclusion that under the circumstances of the applicant's case, it was an injustice not to advance him to E-7, which was the only issue before the Board in Docket No. 2000-035. The Coast Guard objected to granting the applicant's request for advancement arguing that Article 5.C.25.e.1. of the Personnel Manual states that "Personnel advancing to pay grade E-7 . . . will be required to remain on active duty for two years from the effective date of their advancement to the new grade." The applicant had not met this requirement, having retired effective November 1, 1999.

12. In light of Article 5.C.25.e.1. of the Personnel Manual and the Coast Guard's objection to advancing the applicant, the issue in Docket No. 2000-035 became how to correct the record without offending the regulation. According to Finding 13. in Docket No. 2000-035, the Board found the answer in Article 12-B-12.a.16 & 17 of the Personnel Manual, which gave the Commandant the authority to separate (or retire) a member for good and sufficient reasons or if such separation is in the Coast Guard's best interest. Therefore, the Board relied on this provision to advance and immediately retire the applicant. Findings 13. and 14. in Docket No. 2000-035⁹ were included in the final decision to provide guidance to the Coast Guard on how the

⁸ See Docket No. 2005-148 (directing that the applicant's record be corrected to show "that he was not released from active duty on January 10, 2003, but that he continued on active duty, without a break in service from October 29, 2001 until retired by reason of physical disability on February 10, 2005."); Docket No. 2006-070 (correcting the applicant's record to show that he was never discharged from active duty and that his commission was never revoked. He shall receive back pay and allowances, subject to appropriate off-sets.); and Docket No. 2004-141 (correcting the applicant's record to show that he was retired on May 1, 2003, rather than October 1, 2002. The applicant shall receive back pay and allowances subject to appropriate off-sets.)

⁹ Docket No. 2000-035 Findings 13. and 14 are as follows:

13. The Coast Guard has stated that to advance the applicant without returning him to active duty for a minimum period of two years is contrary to regulation. However, this regulation does not divest the

applicant's record could be corrected without offending the regulation. This guidance was not made a part of the Board's Order and its absence from the Order is evidence that the Board intended only to advance the applicant to pay grade E-7. Moreover, constructive service credit would not have been appropriate in Docket No. 2000-035 because it would have covered a period of future service through 2002. The Board rendered the final decision in 2000. The Board is not aware that it has ever granted constructive credit covering a future period of possible active duty. If the applicant wanted credit for this future period he would have been required to return to active duty and serve it.

13. The applicant further argued that his 1998 assignment data sheet, which indicated his intent to extend or reenlist for three years at the end of his then current enlistment in July 1999, and his PCS orders to [REDACTED] are proof that he would not have retired had it not been for the NJP and its potential of placing him in jeopardy of the Coast Guard's HYT policy. Although the applicant's assignment data sheet shows that in October 1998 he intended to reenlist or extend his enlistment in 1999, it is not proof that his retirement was illegal, involuntary, or improper. He has offered no evidence that he was forced or required to retire as a result of the NJP or even the HYT policy. While imposition of the NJP and the HYT policy may have created future obstacles in the applicant's career, he has not established that the Coast Guard required him to submit a retirement request. Docket No. 2000-035 notes on page 6. the applicant's statement that he had been granted a four month enlistment extension. The applicant has not presented any evidence that further extensions would not have been granted if he had requested them and wanted to remain on active duty, particularly if more time was needed to complete the NJP appeals process. The Board recognized the negative impact the NJP had on the applicant's advancement opportunity in granting his request for advancement in Docket No. 2000-035, but the Board never found that his retirement was involuntary. In addition, the Board notes that despite the applicant's arguments to the contrary, the evidence of record is that he did not want to remain on active duty. In this regard, he wrote in his retirement request that "whatever the outcome of my appeal, I have decided to retire from the Coast Guard." Further, the Board notes that the applicant declined the opportunity to return to active duty when he was offered reinstatement by the Coast Guard. He relies on the Board's findings in Docket No. 2000-035 (*see* finding 11., *supra*) as corroboration for his claim that he should have constructive credit. Again, the findings by the Board in Docket No. 2000-035 are not proof that the applicant's retirement was illegal or improper, but they were made to show the unjustness of not advancing the applicant to E-7 under that set of circumstances. The applicant's choice to request retirement rather than to wait for the outcome of his NJP appeal does not render his retirement involuntary. Finally, the Board notes that the applicant did not request reinstatement to active duty in his prior application, Docket No. 2000-035, and in fact expressed his desire not to return to active duty. *See* Docket No. 2005-035, p. 7. Accordingly, the applicant is not entitled active duty credit. "To gain the benefit of the constructive service doctrine, the applicant must show

Commandant of the ability to separate (or retire) a member for good and sufficient reasons or if such a separation is in the Coast Guard's best interest. Article 12-B-12.a.16 & 17, Personnel Manual.

14. Accordingly, the Board finds that the applicant's record can be corrected to show that he obligated himself for two years of duty on September 1, 1999 and that he was also advanced to pay grade E-7 that same day. The record can be further corrected to show that at the direction of the Commandant, with the consent of the applicant, he was retired on October 31, 1999 at pay grade E-7.

that he was ready, willing, and able to resume his military duties.” *Anderson*, at 458. The applicant’s expressed desire not to return to active duty, on more than one occasion, forecloses any grant of constructive service credit by the Board.

14. The applicant argued that Docket No. 2000-175 supports his request for active duty credit. However, that applicant came to the Board seeking constructive credit due to his erroneous involuntary retirement by the Coast Guard. That applicant demonstrated that the Coast Guard committed an error in his record that led directly and immediately to his mandatory retirement, and if that error had not occurred he would have served on active duty for 30 years rather than being involuntarily retired with 28 years of active duty. In the instant case, the applicant chose to retire and was not forced to do so, as was the applicant in Docket No. 2000-175. While the Board in Docket No. 2000-035 may have considered, understood, and found reasonable the applicant’s retirement request and his decline of an offer to return to active duty, it never found his retirement to be involuntary and neither does this Board.

15. The applicant complained that the Coast Guard did not submit its advisory within 135 days as called for in the regulation. The fact that the Coast Guard was a few days late in submitting its advisory opinion did not prejudice the applicant. He was given the full 30 days to respond to the advisory as required by regulation, and he could have been granted additional time if he had requested it.

16. Contrary to the applicant’s suggestion, the Coast Guard was only required to seek clarification of the final decision in Docket No. 2000-035 if the intent or import of that final decision was not clear to the Service. See 33 C.F.R. § 52.73. Apparently, the Coast Guard was satisfied that it understood the Board’s order since it made no request for clarification or a technical amendment. The Coast Guard is not required to seek clarification whenever an applicant belatedly decides to seek additional relief. In this regard, the Board notes that the applicant was satisfied with the manner in which the Coast Guard implemented the Board’s Order in Docket No 2000-035 for approximately five years. The applicant waited until 2006 to begin complaining about the implementation of that Order.

17. Accordingly, the Board finds that the application should be denied because it is untimely and because it lacks merit.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXXXXXXXXXXX, USCG (Retired), for correction of his military record is denied.

