

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-152

FINAL DECISION

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. After receiving the applicant's completed application on June 16, 2014, the Chair docketed the case and assigned it to [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated March 13, 2015, 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 asked the Board to expunge from his military record documentation of non-judicial punishment (NJP) he received at mast on June 9, 2011, for violation of Article 92 of the Uniform Code of Military Justice (UCMJ)¹, failure to obey an order, and for violation of Article 107 of the UCMJ,² making a false official statement. The applicant also asked to be restored to his previously held rank [REDACTED] (E-6) because as a result of the NJP, the applicant was reduced in rank to a [REDACTED] Second Class [REDACTED] (E-5). The applicant alleged that the NJP he received was not "disposed of" in an appropriate or just manner and that he was not afforded the opportunity to have the mast representative he requested. The applicant stated that the failure to allow him to have the representative he requested is noted on the Report of Offense and Disposition form, which the applicant stated was changed "against his will." The applicant also alleged that his Command

¹ 10 U.S.C. § 892 (Article 92, UCMJ): Failure to obey order or regulation
Any person subject to this chapter who—

- (1) violates or fails to obey any lawful general order or regulation;
- (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or
- (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.

² 10 U.S.C. § 907 (Article 107, UCMJ): False official statements

Any person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct.

waited to hold the mast until the last day that the outgoing commanding officer (CO) could impose NJP against him and that the CO made derogatory comments about him at the mast, which were intended to damage his career “beyond repair.” The applicant also alleged that the date on the NJP is incorrect. In Direct Access, the NJP has an effective date of June 15, 2011, whereas the Court Memorandum states that the effective date is June 9, 2011.

The applicant argued that due to unjustly receiving NJP, he lost all of the extra points that are factored in for the service-wide exam, which has made it difficult for him to compete amongst his peers and advance in his career. The applicant has twice submitted requests to have his rank restored to his previously held higher rank, both of which were denied by his new CO. The applicant noted that because of those denials, action from the Board is his last option “to restore [his] rank and recover all [he] has lost.” The applicant alleged that he discovered the error and injustice in his record on January 5, 2014.

In support of his application, the applicant provided a copy of the Court Memorandum and the Report of Offense and Disposition. The Court Memorandum specifically states:

Offense Narrative: Art. 92 UCMJ: Failure to obey an order, in that [applicant], did, on board [USCGC], on 08JUN2011, fail to follow a lawful regulation, to wit: proper treatment of bilge waste COMDTINST M15455.1, Chapter 5.B.1 Art 107 UCMJ: False official statement, in that, [applicant] did, on board [USCGC], on 08JUN2011, make to the inport engineer of the watch, [redacted] [P], an official statement that drystore bilges were being pumped to the 4-165-1-F oily waste tank, which statement was totally false and logged in the 08JUN2011 [redacted] log.

Sentence Narrative: [Applicant] restricted to [USCGC] for period of 45 days (suspended for period of 6 months). [Applicant] assigned extra duties for period of 45 days (suspended for period of 6 months). [Applicant] to forfeit \$1851.80 per month for period of 2 months (suspended for period of 6 months). [Applicant] reduced in rank to E-5.

The Report of Offense and Disposition, provided by the applicant, shows that the date of offense was June 8, 2011; the offense reported on June 9, 2011; and the mast was held on June 15, 2011. It also shows that the applicant asked that one member serve as his mast representative but a different member was assigned instead. It is not clear from the report whether the change was made at the applicant’s request or not (see attached). The form also references a previous offense (DUI) for which the applicant received NJP on March 9, 2007. That NJP had consisted of a seven-day restriction and five days of extra duty.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on August 8, 2002. In addition to the disputed NJP, the applicant’s record contains several positive Page 7s concerning his completion of qualifications and negative Page 7s documenting his lack of judgment and maturity in 2004 in an incident for which a charge of disorderly conduct was dismissed with a warning at mast; his arrest for DUI and consequent NJP, alcohol incident, alcohol rehabilitation training, and loss of driving privileges in February and March 2007; and his sexual harassment of a subordinate crewmate in March 2012.

On December 13, 2011, the applicant submitted a request to the Personnel Service Center (PSC) through his chain of command to restore his rate from [REDACTED] to [REDACTED] based on his performance since the mast. He stated the following:

I respectfully request to be reinstated as a First Class [REDACTED]. Over the past six months I've been able to reflect upon my actions. I have realized that it takes more than technical ability to be a First Class Petty Officer. You need the ability to make sound judgment that reflects the traits of our core values. I have made decisions in my past without fully contemplating the repercussions or impact my actions would have made. I know now that I will make all choices with care and proper judgment to ensure that I will live up to the First Class Petty Officer that I'm expected to be. Thank You for your consideration.

On December 22, 2011, the applicant's new CO forwarded his request to PSC with an endorsement in which he strongly recommended that the applicant's request be granted. The CO stated that the applicant had "displayed outstanding leadership and technical skills" and performed at the level of an [REDACTED] since the mast. He described several recent incidents in which the applicant had worked proactively to ensure the cutter's readiness and safety despite personnel shortages

On January 26, 2012, PSC disapproved the applicant's request to restore his rate to [REDACTED]. The Chief of Enlisted Personnel Management (EPM) for PSC explained that the applicant's offense and decision to lie about it were very serious and that he had previously been awarded NJP in 2007. The Chief also noted that the applicant had not been recommended for advancement on three of his recent performance evaluations. The Chief noted that the applicant should re-compete for advancement in May 2012 and if his next evaluation "shows sustained strong performance, you may request reconsideration." However, the applicant was not recommended for advancement on his next performance evaluation, dated April 30, 2012, presumably because of the sexual harassment documented on a Page 7 dated March 22, 2012.

On July 3, 2013, the applicant's [REDACTED] CO submitted another request for the restoration of the applicant's rate to [REDACTED]. He noted that the applicant had been reduced at mast for improperly disposing of condensate wastewater and also claimed the following:

Over the past 2 years, the member has been able to reflect upon his actions. He has realized that it takes more than technical ability to be a First Class Petty Officer. A keen analytical thought process and the insight to make appropriate decisions that project an ideal image upon our Service is a must. He has made decisions in his past without fully contemplating the repercussions or perceptions that could negatively affect his intentions or the Coast Guard's. He now exercises careful deliberation before making judgments and taking action. During his time at this unit, he has shown good judgment and the ability to lead both peers and subordinates in a positive manner.

On September 18, 2013, the Chief of EPM disapproved the CO's request to restore the applicant's rate. The Chief stated that the applicant's April 30, 2012, performance evaluation showed that he had failed to demonstrate sustained, high performance since his mast in June 2011, and that he had not been recommended for advancement for a fifth time in six years. The Chief also stated that the applicant had "performed extremely poorly on the most recent [REDACTED] SWE" and "does not merit special advancement."

VIEWS OF THE COAST GUARD

On October 21, 2014, the Judge Advocate General (JAG) submitted an advisory opinion recommending that the Board grant partial relief in this case in accordance with the findings and analysis provided in a memorandum submitted by the [REDACTED]. Specifically, the JAG recommended that the Board deny relief with respect to restoration of rank and the expunging of the NJP and grant relief with respect to correcting the effective date of the NJP. In addition, the JAG provided the following additional comments:

The member requests in his DD149 both that his rank be restored and that the NJP be expunged. The member has provided no documentation or facts, beyond the member's own comment, from which any irregularities or injustice in the NJP proceedings can be found. As noted in Enclosure (1), based on the facts presented, the Command was in compliance with the current policy on conducting NJP proceedings. Therefore, the member's request to have his NJP expunged should also be denied.

PSC noted that on two separate occasions, CG PSC EPM-1 reviewed the applicant's NJP documentation, as well as the applicant's performance and discipline record, and objectively determined that the applicant's rank should not be restored to his previously held higher rank. PSC stated that there had been a steady decline in the total average of all the categories of [REDACTED] the applicant's last two employee review marking periods since his last request to have his rank restored [REDACTED].

PSC acknowledged, however, that with regard to the effective date of the applicant's NJP, an error did occur, and as such the effective date of the NJP should be corrected. PSC stated that upon review of the Court Memorandum filed in Direct Access, the date of the mast was incorrectly entered as June 9, 2011, instead of June 15, 2011. Therefore, PSC recommended that because the applicant was not officially reduced in rank until June 15, 2011, he should be entitled to "the difference of Basic Pay and Career Sea Pay for the period of 09 June through 14 June 2011 between the ranks of [REDACTED] and [REDACTED] if there is a difference after PPC's review." PSC stated that no other relief [REDACTED] recommended for the applicant.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 3, 2014, the Chair of the BCMR sent the applicant a copy of the Coast Guard's views and invited him to submit a written response within thirty days. The BCMR did not receive a response.

APPLICABLE LAW AND POLICY

Coast Guard Personnel Manual. COMDTINST M1000.6A

Article 5.C.38.b.2 of the Coast Guard Personnel Manual in effect at the time of the applicant's NJP, provides guidance on reductions in rate as a punishment. The rule provides that, "[u]nder the authority of Article 15 of the Uniform Code of Military Justice, a commanding officer may reduce an enlisted person in pay grades E-2 through E-6 to the next inferior pay grade as a NJP, if the individual concerned had previously been 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 personnel, and are considered to 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 person, except a chief petty officer under their command, to the next inferior pay grade for disciplinary purposes.

Military Justice Manual, COMDTINST M5810.1E

Article 1.C.3.b. of the Military Justice Manual provides guidance for when an individual requests for a particular mast representative. The rule specifically provides that, “[i]f there is an individual attached to the unit whom the member desires to have as a mast representative, such individual should be appointed, if practicable and reasonably available, provided that he or she is neither involved in the matter that is the subject of the mast nor expected to be a witness in the proceedings. The command is not required to assign the requested mast representative in every situation (e.g., if the requested mast representative is deemed incapable of providing mature advice to the member, etc.), and may, in those situations where a requested representative is not assigned, assign as a mast representative an individual deemed capable of best assisting the member to present his or her case.”

Enlisted Accessions, Evaluations, and Advancements Manual, COMDTINST M1000.2

Article 3.A.27.b. states the following about restoring the rate of a member who has been reduced in rate as NJP:

- (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). In making such a recommendation, the present commanding officer shall set forth in detail a full justification of the action recommended based on at least 5, 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. ...

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.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.³ The applicant claimed that he discovered the alleged error in his record on January 5, 2014, but he clearly knew that he had been reduced in rank at NJP in June 2011. Although the application was not filed within three years of the applicant's discovery of the alleged error or injustice he wants removed, his application is considered timely because he has been serving on continuous active duty since the alleged error occurred.⁴

3. The applicant asked the Board to remove from his record documentation of non-judicial punishment he received dated June 9, 2011, for violation of Article 92 of the Uniform Code of Military Justice (UCMJ), failure to obey an order, and for violation of Article 107 of the UCMJ, making a false official statement. The applicant alleged that he was unjustly denied the representative he requested and that the CO unjustly tried to damage the applicant's career "beyond repair." 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.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

4. Under Article 15 of the UCMJ and Article 5.C.38.b.2 of the Personnel Manual, the applicant's commanding officer had the authority to award NJP by reducing the applicant in rate at mast. The applicant failed to submit any evidence to show that his punishment at mast was unjust. He did not rebut the charges against him and he submitted nothing to show that his CO's comments about his conduct at mast were unwarranted. Even if the CO's oral comments were unduly derogatory, which the applicant has not proven, the applicant has not shown how the comments alone damaged his career, as he alleged. The record shows that his career was damaged by his misconduct, which reasonably caused his reduction in rate at mast, not by any oral comments about his conduct made at mast by his CO. Nor has he shown that the mast was scheduled inappropriately, as he alleged. The record shows that he committed the misconduct on June 8, 2011, was charged on June 9, 2011, and was punished at mast approximately a week later on June 15, 2011. The fact that June 15, 2011, was apparently the CO's last day in command is irrelevant to whether the NJP was warranted, proper, and fair. The applicant apparently failed to appeal the mast, but the timing did not prevent him from doing so.

5. With regard to the applicant's claim that he was not afforded the opportunity to have the mast representative he requested, the Board finds that he has not submitted sufficient evidence to overcome the presumption of regularity accorded the selection of his mast representative. The copy of the Report of Offense and Disposition he submitted shows that his mast representative was changed, but it does not show whether or not he agreed to the change. Even assuming that, as he alleged, he did not agree to the change in mast representative, the

³ 10 U.S.C. § 1552(b); 33 C.F.R. § 52.22.

⁴ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

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).

Board finds that he has not shown that the substitution was improper. Under Article 1.C.3.b. of the Military Justice Manual, COMDTINST M5810.1E, if there is [REDACTED] divi [REDACTED] attached to the unit whom the member desires to have as a mast representative, such individual *should* be appointed, if practicable and reasonably available, provided that he or she is neither involved in the matter that is the subject of the mast nor expected [REDACTED] the proceedings. While the applicant's first choice of representative should have been appointed if the member met these criteria, the applicant has submitted nothing to show that his first choice met all of the criteria or that the substitution of another member was improper under the regulation.

6. Pursuant to Article 3.A.27.b. of COMDTINST M1000.2, the applicant's new COs have twice, on December 13, 2011, and June 3, 2013, sent PSC memoranda strongly supporting his request for restoration of his rate. The Chief of EPM denied the first request due to the lack of evidence of "sustained strong performance" by the applicant, but he stated that if the applicant received one more performance evaluation showing sustained strong performance, he would reconsider the request [REDACTED]. However, the applicant was not recommended for advancement on his next evaluation in April 2012. The Chief of EPM also denied the 2013 request for restoration of rate, finding that the applicant had not demonstrated "sustained, high performance" given his poor performance on the May 2013 SWE and his April 2012 evaluation, which was the fifth time in six years that he had not been recommended for advancement. The Board find [REDACTED] the applicant has not proven by a preponderance of the evidence that the Chief of EPM failed to exercise his judgment and discretion under Article 3.A.27.b. in a reasonable and proper manner.

7. The record shows, as the applicant alleged, that the effective date of the NJP entered in Direct Access is incorrect, and the Coast Guard has confirmed this error. Therefore, the effective date of the applicant's NJP should be corrected to show that he was reduced in rate on June 15, 2011, rather than June 9, 2011, and he should receive any back pay and allowances owed to him as a result of this correction.

8. Accordingly, [REDACTED] applica [REDACTED] s not proved by a preponderance of the evidence that his reduction in rate a [REDACTED] Coast Guard's refusal to restore his rate pursuant were erroneous or unjust. Therefore, his request to have the NJP expunged and his rate restored should be denied. However, the date of his NJP and reduction in rate in Direct Access should be corrected to June 15, 2011, and he should receive any amount owed to him as a result of this correction.

(ORDER AND SIGNATURES ON NEXT PAGE)

[REDACTED]

ORDER

The application of [REDACTED] [REDACTED] USCG, for correction of his military record is denied, but the date of his NJP and reduction in rate to [REDACTED]/E-5 at mast should be corrected in Direct Access and other military records to June 15, 2011, and pay him any amount due as a result of this correction.

March 13, 2015

