


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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-017

 (retired)

FINAL DECISION

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. After receiving the completed application and military records on November 13, 2015, the Chair docketed the case and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 9, 2016, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant served on active duty in the Coast Guard for more than eight years, from July 18, 1995, to May 26, 2004, when he was retired due to a physical disability. However, he was retired five days after he was reduced in rate at mast from MK3/E-4 to SNMK/E-3. The applicant asked the Board to correct his retired pay grade going forward from E-3 to E-4.

The applicant explained that in November 2014 he received notice that he had been overpaid in the amount of \$15,912 because his "high 3" retired pay had been paid as if he had been retired as an E-4, instead of an E-3. He had been unaware of the problem and so his debt was waived by the Department of Hearing & Appeals (DOHA).

Since the discovery of the overpayment, the applicant stated, his retired "pay is now reduced to a number not agreed on, and had I known the full impact of my mast I would have appealed the captain's judgment. I am only finding out now that my pay is reduced, more than 10 years after being [retired] and although DOHA has sided with me on my past pay, I was advised that the [BCMR] can correct my future pay."

The applicant argued that his pay grade should be restored because "the punishment was not fully outlined 10 years ago and only now surfacing with more penalties. My mast was rushed with no good representation 4 days prior to my discharge." He stated that due to the discovery of the error, his retired pay has been reduced by \$142 per month since November 2014.

The applicant stated that he had “an outstanding record with the USCG with many search and rescue cases.” He also alleged that the captain who reduced him in rate ‘did not take into [account] the effect [of] the ailment or the medication I was on and ultimately his punishment and consequences of the NJP were not fully outlined in a timely fashion. Had I known it would reduce my pay by this much in 2005, I would have appealed his decision.” The applicant stated that he was also prevented from advancing due to his ailment.”

In support of his allegations, the applicant submitted a DOHA decision waiving the Coast Guard’s claim against the applicant for \$15,912.93. DOHA found that although the Coast Guard claimed that the applicant should have realized that his retired pay “should have been based upon the basic pay of an E-3 and not his high 36 average from when he was an E-4,” DOHA did not agree. DOHA stated that the applicant “states that he was unaware he was being overpaid. He states that all pay records reflected he was being paid as an E-3. He attaches his May 2004 leave and earnings statements (LES) which reflects his rank as an E-3. He also attaches his Retiree/Annuitant Statement which reflects his pay grade as an E-3.” In addition, an Authorized Certifying Officer at the Pay & Personnel Center had corroborated how the overpayment was discovered and stated that the applicant “would not have known of the incorrect calculation of his retired pay.” Also, an Auditor’s Worksheet for Disability Retirees prepared for the applicant on June 22, 2004, shows his pay grade as E-3, and a letter to the applicant dated June 22, 2004, from the Personnel Service Center advised the applicant that he was entitled to retirement computed on the base pay for an E-3. However, DOHA also stated that the Coast Guard had stated that the applicant “was not aware of the loss of his high-3 as a result of his reduction in rank and there is no documentation reflecting that he was counseled concerning the effect of his reduction in rank on the calculation of his retired pay. Therefore, under the circumstances, we believe that [the applicant] accepted the overpayment in good faith and that all other conditions necessary for waiver of the claim have been met.” DOHA also noted the Coast Guard’s argument that the reduction in rate was a punishment imposed at NJP that should not be lessened or offset by administrative error, but responded that a “waiver under 10 U.S.C. § 2774 is an administrative remedy based on equity. There is no basis for denying waiver in order to carry out a member’s punishment under the NJP when an administrative error occurred and there is no evidence of fault on the member’s part.”

The applicant also submitted a printout showing how the overpayment was calculated; the notification of the overpayment he received, which is dated October 21, 2014; and several documents that reflect positively on his service, which are included in the summary of the record below.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on July 18, 1995. He completed recruit training and was assigned to Station [REDACTED] to train as a machinery technician (MK).

A Page 7 dated August 26, 1996, commends the applicant, who was then an E-2, for his hard work and positive attitude in repairing a ship’s propulsion generator.

On July 17, 1998, the applicant received his first Good Conduct Award, denoting three years of service without discipline.

In a letter dated November 20, 1998, the CO of a cutter forwarded the applicant's performance evaluation to his permanent command with an attached Command Letter of Appreciation. The certificate and letter highly praise the applicant for his "outstanding support from 05 Sep 1998 thru 21 Nov 1998" for the cutter's emergency repairs and a Far East patrol. A Page 7 dated November 21, 1998, notes that the applicant had received a high mark of 7 on his performance evaluation for the dimension "Stamina" because from September 5 to 21, 1998, he had "put in numerous 18 – 20 hour days" working in "high heat." Statements signed by an MK1, an MKC, and an Ensign in support of the high performance marks state that the applicant had reported to their cutter for temporary duty and had spent long nights working very hard to ensure that the cutter could get underway. They highly praised his performance and knowledge, which "is greater than any FN" they had worked with.

On a Page 7 dated June 26, 1999, the applicant was praised for working long, hard hours and making "considerable personal sacrifice to ensure the success of the boats, shop, and overall maintenance and casualties" at Station New York. An undated newspaper article names the applicant as a member of a boat crew that saved eight people who were clinging to a life raft after their sailboat burned.

Another Page 7 dated June 26, 1999, and signed by his CO, commends the applicant for "outstanding work and performance of duty," "an exceptional degree of stamina," volunteering his own time to help others qualify, "demonstrat[ing] unrivaled knowledge," being "an outstanding role model," and "being a tremendous asset to the engineering department."

A Page 7 dated September 16, 1999, documents the applicant's receipt of high marks of 7 on his performance evaluation for his "Quality of Work" and "Stamina." The Page 7 states that with minimal supervision, he had "overhaul[ed] Station New York's Engineering Department parts inventory," which was an MK2's assignment, after the inventory had been deemed "not ready for inspection." The Page 7 highly praises him for other "tireless efforts" and an outstanding quality of work.

On November 1, 1999, the applicant advanced to MK3/E-4 on November 1, 1999.

On February 15, 2000, the applicant was counseled about "inappropriate and insubordinate conduct towards a Coast Guard police officer on 02 January 2000," which showed "poor judgment, a lack of maturity and failure to adhere to the Coast Guard's core values."

The applicant received his second Good Conduct Award on July 17, 2001, noting another three years of service without discipline.

A Medical Board Report [REDACTED] December 2, 2003, indicates that the applicant had first been evaluated by a medical board on May 30, 2000, and that he been diagnosed with and found unfit for duty because of the following conditions: chronic hepatitis C infection, chronic fatigue syndrome, nodulocystic acne, PPD converter, anxiety disorder, gastroesophageal reflux disease (GERD), gastritis, microscopic colitis, and nephrolithiasis.

A letter from the applicant's CO dated December 5, 2003, states that the applicant had first been diagnosed in the fall of 1996 and began medical treatment. In the fall of 2000, the CO stated, the applicant, who was wont to push himself too hard, became unable to work "because of his medical condition and the strict regimen of medication that he was required to take. He was placed in an indefinite Not Fit For Duty [NFFD] status." In September 2003, the CO reported, the applicant had returned to his unit in a Limited Duty capacity and stood a communications watch until mid November 2003, when his condition worsened and he was again NFFD.

The applicant's case was referred for review by a Central Physical Evaluation Board (CPEB). After additional testing, on January 20, 2004, the CPEB recommended that the applicant be retired with a 60% disability rating.

On May 21, 2004, the applicant was punished at mast by his CO, a captain. The Court Memorandum documenting the mast shows that he waived having a representative and was found by the CO to have violated Article 92 of the Uniform Code of Military Justice (UCMJ), failure to obey an order or regulation, because he "on numerous occasions, ... knowingly went on leave without submitting a request, to inform command and receive permission to do so"; and Article 123 of the UCMJ, forgery, by "with intent to defraud, prepare a letter containing facts pertaining to his medical condition and falsely sign the name of his physician." The applicant was awarded NJP of a reduction in pay grade and forfeiture of \$900 in pay.

The applicant's DD 214 shows that his last day on active duty was May 26, 2004, and that he was permanently and honorably retired by reason of disability.

The applicant's record contains an email exchange in which someone notes that the applicant's "high 3" had been calculated before his reduction in rate on May 21, 2004, and that it needed to be redone. A retirement pay technician noted that under 10 U.S.C. § 1407(f)(2)(a), "a member reduced [in rate] by Court Martial, NJP or an administrative action would be retired at the reduced rate unless subsequently promoted." Another email dated June 7, 2004, states that the applicant's separation orders had been corrected to show his rank as FN instead of MK3.

VIEWS OF THE COAST GUARD

On March 24, 2016, a Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion and recommended that the Board deny the applicant's request to change his retired rate to MK3/E-4.

The JAG stated that the applicant could have refused NJP and demanded trial by court-martial but opted to accept NJP. At NJP, his CO, a captain, was authorized to award a punishment to an E-4 that included a reduction in rate.

The JAG stated that pursuant to COMDTINST M5212.12A, the report of the investigation that led to the mast would have been destroyed after four years, and it is no longer available. However, he noted, the Court Memorandum shows that the applicant was punished for numerous instances of unauthorized absence and for forging his doctor's signature on a letter related to his medical condition. The JAG noted that the applicant could have appealed his punishment within five days on grounds of it being unjust or disproportionate, but he did not. The JAG stated that

the applicant has not proven or argued that his reduction in rate was too severe for the offenses he committed or that he could not have appealed the reduction in rate within five days. He also argued that the applicant's CO presumably weighed the facts and took the applicant's circumstances into account before making the decision to reduce him in rate shortly before his retirement.

Regarding the applicant's claim that he was unaware that the NJP would reduce his retired pay, the JAG argued that the applicant certainly knew that he was being reduced in rate and that the DOHA decision reflects the applicant's knowledge that he was retired as an E-3 "and that he was being paid, he believed, as an E-3 throughout the period of the overpayment."

The JAG stated that the Coast Guard erroneously paid the applicant an E-4's retired pay for ten years and the overpayment debt has been waived. The JAG argued that there is no remaining error or injustice concerning his retired pay to correct.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 19, 2016, the applicant submitted his response to the JAG's advisory opinion. The applicant submitted an email from a chief warrant officer to a senior chief stating that DOHA had approved waivers for all of the cases that were like the applicant's and that she did not believe he would be able to retain his previous pay grade because he had been reduced in rate due to misconduct.

The applicant stated that he should have been counseled that the reduction in rate would reduce his retired pay, but he was not. He argued that the DOHA decision shows that he was not. He argued that no one at his command knew the effect of his reduction in rate, and he is certain that the captain did not.

Regarding his failure to remain SIQ, the applicant stated that he had undergone multiple courses of a chemo-like drug and a painful liver biopsy, lost most of his hair, had a lymph node removed from his neck, lost sensation in his fingers for a year, and had his gall bladder removed due to his liver problems. The applicant stated that he was on "mind altering medications to combat the effects of the interferon and [had] dealt with 9/11 in NY harbor as a crewmember." He stated that he left his barracks when he was SIQ because he "felt there was no difference [between] being SIQ in the barracks or elsewhere. I was not allowed to work due to my treatment."

The applicant stated that he participated in more than 500 search and rescue cases during his first four years and had worked harder than average to mask his condition. He claimed that he "would remain at work for weeks without going to the barracks. I was assigned to every boarding of tankers and containers in NY harbor to conduct contraband searches."

The applicant stated that his retired pay rate should be upgraded based on his performance record but to "appease and satisfy the Coast Guard I would be fine with keeping my demoted rank yet keeping the agreed upon pay." In support of his request, the applicant cited his prior submissions and also submitted the following:

- In an endorsement to the original medical board report, dated July 11, 2000, the applicant's CO stated that the applicant had reported to Station New York as a fireman apprentice in 1995 and had qualified as a communications watchstander, boat crewman, boat engineer and boarding team member. The CO stated that he had maintained his qualifications and been a productive member through his tour. The CO stated that the applicant sometimes pushed himself too hard, creating safety concerns for the unit, which would require the command to intervene. The CO stated that the applicant was "motivated, willing and able to perform his duties here most of the time" but that "his condition and/or treatment severely limit his effectiveness when standing duty."
- A printout from CVS pharmacy shows the numerous prescriptions the applicant had filled from January 13 to June 16, 2004.
- The applicant's LES for May 2004 reflects two different rates of basic pay and housing allowance applied during the month and that his pay grade was E-3.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed within three years of the applicant's discovery of the alleged error.

2. The applicant alleged that his reduction in rate at mast four days before his retirement and his retired pay grade of E-3 are erroneous and unjust because of his excellent prior performance, because his mast was rushed, and because he was not properly counseled and so was unaware of the effect his reduction in rate would have on his retired pay. In considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed documents in an applicant's military record are correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the documents are erroneous or unjust.¹ Absent specific evidence to the contrary, the Board presumes that Coast Guard officers and other Government officials have carried out their duties "correctly, lawfully, and in good faith."²

3. The record shows that the applicant received many accolades for his performance as a non-rate from July 18, 1995, until he advanced to MK3/E-4 on November 1, 1999. After his advancement, the applicant's medical condition deteriorated and so he was processed under the Physical Disability Evaluation System for a variety of medical conditions beginning in 2000. The applicant's disability processing was delayed for additional testing and treatment, but on January 20, 2004, the CPEB recommended that the applicant be retired with a 60% disability rating. The record shows that during some of this period from May 2000 to May 2004, the applicant was able to perform limited duty, but for much of it he was NFFD and SIQ. On May 21, 2004, five days before his retirement, the applicant was punished at mast for numerous unauthorized

¹ 33 C.F.R. § 52.24(b).

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

absences and for forgery. His NJP included forfeiture of \$900 and a reduction in rate. Because one's retired pay depends on one's rate, the reduction from E-4 to E-3 substantially reduced the applicant's retired pay, but he was erroneously paid at the higher, E-4 rate for more than ten years. However, because DOHA has waived the debt, he is not required to repay it.

4. Although the applicant alleged that his mast was rushed, there is no evidence of this, and the mast was conducted five days before his retirement, so he had the full five days allowed under the UCMJ to appeal his reduction in rate. As the JAG noted, the applicant could have rejected NJP and demanded trial by court-martial or he could have appealed the NJP as unjust or disproportionately severe, but he did neither. At mast, he was not entitled to an attorney, and the Court Memorandum shows that he waived representation by a non-attorney.

5. The applicant's claim that he was unaware that his reduction in rate would adversely affect his retired pay is contradicted by the DOHA decision that granted the waiver of the debt. The DOHA decision shows that the applicant believed that he was being paid as an E-3 from May 2004 until he was notified of the problem in October 2014 because all of the paperwork he received showed his rate as E-3. (In fact, DOHA would not likely have waived the debt if it found that he was aware that he was being paid as an E-4.) The fact that the applicant believed that he was being paid as an E-3 but failed to complain about it for more than ten years is very strong evidence that he considered E-3 retired pay to be correct and did not believe that he was entitled to E-4 retired pay after his reduction in rate mast.

6. The applicant argued that the E-4 level of his retired pay should be restored because he had "agreed" to that level of pay. The emails in the applicant's record indicate that prior to his reduction in rate, the Personnel & Pay Center (PPC) had calculated the applicant's retired pay based on his E-4 rate and may have informed him what it would be. Such a notification is not a contract or agreement between the applicant and the Coast Guard because the basis for enlisted members' pay is statutory, not contractual.³ Under the applicable statute, 10 U.S.C. § 1372, the applicant's correct retired pay grade was his pay grade on the day he retired, which was E-3.

7. The applicant alleged that the reduction in his retired pay is unjust given his prior, exceptional service and the fact that he was on medication. There are many highly laudatory entries in the applicant's record, which his CO would have reviewed before determining the applicant's punishment. The applicant's offenses—numerous unauthorized absences and forgery—are serious enough that the Board cannot conclude that his reduction at mast was unjust even though his prior service was exceptional and even though he was taking several prescription medications.

8. The Board finds that the applicant has not proven by a preponderance of the evidence that his current and future receipt of retired pay at the E-3 rate is erroneous or unjust. Therefore, relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

³ *United States v. Larinoff*, 431 U.S. 864, 869 (1977), citing *Bell v. United States*, 366 U.S. 393, 401 (1961).

ORDER

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

September 9, 2016

