DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-168

[redacted]
[redacted]HS3/E-4 (Retired)

FINAL DECISION

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. After receiving the completed application on June 20, 2018, 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 November 22, 2019, 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, who was medically retired from the Coast Guard on April 4, 2017, asked the Coast Guard to correct her record by reversing her reduction in rank from health services specialist, second class (HS2/paygrade E-5) to third class (HS3/E-4) on July 7, 2016, so that she will be retired in paygrade E-5. She also asked the Board to award her the back pay she would be owed as a result of this correction.

The applicant explained, through counsel, that at a Captain's Mast in June 2016, she received non-judicial punishment (NJP) consisting of restriction to base for seven days and a reduction in rank that was suspended on condition of good behavior. She alleged that the subsequent vacation of that suspension, which caused the reduction in rank to go into effect on July 7, 2016, was based on her alleged failure to timely start the restriction and was erroneous and unjust for the following reasons:

- Her commanding officer (CO) improperly delayed her seven-day restriction to base.
- Her CO vacated the suspension of her reduction in rank based on an erroneous allegation that she had failed to timely start the restriction.
- Her CO improperly executed the vacation of the suspension without giving her an opportunity to respond.
- Her CO unfairly and improperly held her "medical condition against her thereby depriving her of her retirement at the rank of E5."

The applicant further explained that she had begun experiencing back pain due to a herniated disc and disc bulge in January 2014. She was transferred to the Base in April 2015. She alleged that "[b]ecause of her medical appointments, back pain, and a pending Medical Evaluation Board (MEB), [she] got a poor reputation for missing work and not doing her share. She began experiencing difficulty with her supervisors and her coworkers, who apparently believed that she was malingering." Therefore, on April 14, 2016, she filed a Military Equal Opportunity (MEO) complaint. Subsequently, she was moved to a different duty section to resolve her complaint.

The applicant stated that on April 19, 2016, an MEB convened and concluded that she was not expected to become fit for full duty again. The next day, she filed a complaint under the Health Information Portability and Accountability Act (HIPAA) against her supervisor (an HS1) and a physician's assistant (PA) at the Base clinic where she worked. She alleged that this complaint was never resolved because the MEB intervened.

The applicant stated that in May and June 2016, her "back was so bad that she had many medical appointments and had to miss a considerable number of duty days":

- On Thursday, May 19, 2016, she was placed on 3 days of convalescent leave[1] by the PA.
- On Friday, May 27, 2016, her doctor prescribed her with 30 milligrams of morphine once every 12 hours for 7 days, as well as continuing her on Amrix and a Butrans patch.[2] He recommended that she not work until June 6, 2016. Therefore, after the holiday weekend, on May 31, 2016, the PA changed her status to sick in quarters for 7 days and post-operative limited duty for 30 days.
- At a post-operative follow-up appointment on June 2, 2016, the applicant was given a prescription for Percocet for 14 days. The doctor also continued her prescriptions for Butrans and Amrix.
- On June 10, 2016, the PA placed her on 25 days of convalescent leave and told her to follow up at the clinic on July 1, 2016. The PA did not mention whether she was fit to serve a restriction to Base.

The applicant stated that on June 14, 2016, she was punished at mast while still on convalescent leave and taking opioids and a muscle relaxant. Her CO gave her NJP including a suspended reduction in rate to HS3/E-4 and seven days of restriction to Base. However, she was on convalescent leave (at home off Base), and the CO delayed her restriction to Base and wrote on the Court Memorandum, "Restriction to be issued once medical clearance received." The applicant argued that under Article 1.E.3.d. of the Military Justice Manual (MJM), her CO did not

[1] Coast Guard Medical Manual, COMDTINST M6000.1, Chap. 9.B.5.h., states, "Convalescent leave/Sick leave is a period of leave not charged against a member's leave account. It can be a recommendation to the command when a patient is Not Fit For Duty … and whose recovery time can reasonably be expected to improve by freedom from the confines of quarters."

[2] The applicant submitted medical reports dated May 27, June 2, and July 14, 2016, showing that she had been prescribed Percocet, Amrix, Butrans, Hydrocodone, Morphine Sulfate, and other medications at various times.

have the authority to delay her restriction to Base under these circumstances because the PA had not found that she was unfit to serve the restriction.[3]

The applicant also alleged that being not fit for duty and on convalescent leave did not make her unfit to serve a restriction. She stated that in accordance with Article 1.E.3.e. of the MJM,[4] being not fit for duty only makes one unfit for extra duties. She argued that for her to be unfit to serve a restriction on the day of the mast or to be deemed fit to serve the restriction when her convalescent leave ended, the PA had to make a separate, specific finding to that effect, not just find her fit for duty/limited duty or end her convalescent leave. She argued that the CO should have but failed to get determinations from the PA as to whether she was fit to serve a restriction.

The applicant argued that because her restriction to Base was not legally deferred by the CO, it began immediately on June 14, 2016, and occurred while she was at home on convalescent leave. Therefore, she argued, the CO lost the opportunity to have her serve the restriction because he failed to get determinations from the PA as to whether she was fit to serve a restriction.

At a follow-up appointment on Wednesday, June 29, 2016, the PA changed the applicant's status from not fit for duty (NFFD) to fit for limited duty (FFLD) for the next 30 days. The applicant argued, however, that she reasonably believed that her convalescent leave was still in effect because she had previously been placed on convalescent leave for 25 days. She thought that the purpose of "the appointment was to make sure she was fit to return to duty when her convalescent leave was over." She stated that this belief was reasonable because the only reason her appointment was on June 29, instead of Friday, July 1, 2016, was because the PA was unavailable that Friday. Moreover, the applicant noted, the PA said nothing about whether she was fit to serve a restriction to Base.

Therefore, the applicant alleged, she was unaware that her CO considered her "fit for restriction," and she left the Base. Later, a "coworker" called her and told her that the CO considered her fit for restriction and expected her to begin serving it immediately, but "[n]o official

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[3] Military Justice Manual (MJM), COMDTINST M5810.1E, Article 1.E.3.d. states that a CO "imposing punishment may not defer the execution of an unsuspended punishment, except as provided below:

(1) Vessel Underway at the Time of NJP…
(2) Appeal [of NJP is pending].
(3) New Punishment [may be delayed until a prior punishment ends].
(4) Medically Unfit. If the member is found by proper authority to be medically unfit to serve the punishment, the commanding officer may defer the execution of the punishment until the member is determined by proper authority to be medically fit to serve the punishment.
(5) Emergency Leave. …
(6) Unauthorized Absence. …"

[4] Article 1.E.3.e. of the MJM states the following about a member being in "not fit for duty status":

> If a member who is serving extra duties as a punishment is placed in a not fit for duty status, the not fit for duty status defers the service of extra duties. If the extra duties are being served concurrently with restriction, the restriction will continue to run in spite of the not fit for duty status (so long as the member is medically fit to serve restriction). When the member is returned to a fit for duty status, the remaining punishment of extra duties shall be immediately reinstated. Any extra duty remaining to be served when the sentence to restriction is completed is remitted.

notice was provided … that her convalescent leave was terminated early and that she had been expected to report for restriction." The applicant did not state when the coworker called her or when she reported for duty at the Base.

On July 7, 2016, the applicant stated, she was notified that the suspension of her reduction in rate had been vacated because on June 29, 2016, she had been "placed in a light duty status and determined to be fit to commence light duty work. In this duty status, you are able to complete light duty and begin seven days of restriction. … You failed to communicate your new duty status with anyone in your chain of command and departed [the Base]." The applicant alleged that a chief warrant officer (CWO A) "witnessed [the Base Executive Officer] inform [her] that she had no choice but to sign the vacation action." However, the applicant noted, the Manual for Courts-Martial United States (MCM) and the MJM provide that a member is "ordinarily" given an opportunity to respond before a suspension of NJP is vacated and may be granted a hearing.[5] She alleged that there was no reason not to give her an opportunity to defend herself. Moreover, she alleged, when her counsel asked CWO A for a statement about what he had witnessed during the meeting when she signed the vacation memorandum, the CO "demonstrated his unreasonable ire" against her by ordering CWO A not to talk to her counsel.

The applicant alleged that the CO failed to show any compassion for her condition. He ignored the fact that she had been in pain for months, had lodged complaints against members of the command, and was facing the termination of her Coast Guard career and, instead of being compassionate, "faulted her for believing her convalescent leave continued for the full 25 days." She noted that the CO himself never called her and ordered her to report for duty. Instead, he waited a week and then vacated the suspension of her reduction in rate. She argued that he thus "kicked her on her way out the door," which is an error and injustice that "cannot be allowed to stand."

As a result of her reduction in rate, following the Physical Disability Evaluation System (PDES) proceedings, the applicant was medically retired on April 4, 2017, in paygrade E-4, instead of E-5. To support her allegations, the applicant submitted copies of records and emails, which are included in the summary below.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on August 14, 2007. On August 11, 2008, she received NJP for failing to obey an order and making a false official statement. In 2010, she completed HS "A" School, and she advanced to HS3 in December 2010.

On February 6, 2014, while assigned to the clinic at a training center, the applicant was diagnosed with a lumbosacral sprain and muscle spasms. An MRI conducted on February 8, 2014, showed "[s]mall central disc protrusion at L5-S1. No evidence of spinal canal stenosis or foraminal narrowing and no appreciable neural impingement." The applicant reported that medications such as Toradol injections, Ibuprofen, Prednisone, and Percocet had not resolved her symptoms, and she was referred for physical therapy. On April 7, 2014, she was referred to a pain management specialist.

[5] MANUAL FOR COURTS-MARTIAL UNITED STATES (MCM), Part V, para. 6.a.(5); MJM, Art. 1.E.5.b. and Enclosure 7.

The applicant advanced to HS2 in September 1, 2014, but on December 29, 2014, she acknowledged by signature receiving the following counseling from the CO of the training center:

> 14NOV2014: During the past four weeks you have struggled to follow proper procedures and protocols as demonstrated by your actions. Your inability to complete tasking with minimal supervision has caused the dental supervisor to question your ability to be assigned complex tasks such as water testing and dental sterilization. These items have enormous impact on whether the dental clinic can complete its daily mission of safe patient care while meeting tight time deadlines to graduate recruit companies on schedule.
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> On 10 October 2014, while assigned to the Dental Central Sterilization room at the end of the day, you failed to run one of two sterilizers. The next day, unsterilized dental instruments were distributed to exam rooms, which was fortunately recognized by others. While no unsterilized instruments were used, this oversight in proper sterilization procedure could have had dire consequences. As a qualified sterilization technician in the dental department, you are well aware of sterilization techniques and standards required, making this oversight completely unacceptable.
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> Moving forward, you will strive to meet standards by communicating effectively and professionally with your dental supervisor, while setting a top-notch example for subordinates and recruits alike. Proper policies and procedures will be followed in their entirety and as required, with greater attention to detail used to ensure mission success and patient safety. Future instances of procedural lapses or unprofessionalism on your part will result in further disciplinary action.

An MRI conducted on March 23, 2015, showed "[c]entral to rt paracentral disc herniation measuring 4mm at L5-S1 which impinges upon the central to rt side of the thecal sac." The applicant was diagnosed with spondylolysis.

The applicant completed her tour of duty that spring and was transferred to a Base clinic. She subsequently complained of increasing back pain, and on October 27, 2015, a third MRI showed similar results to the prior MRIs with no evidence of spinal canal stenosis or neural foraminal narrowing.

On March 22, 2016, the applicant underwent a mental health evaluation. The MEB stated that she was referred because there did "not appear to be a significant organic cause [for her pain] and she has failed to respond significantly to all attempted medical interventions." At the evaluation, the applicant told the psychologist that she had been referred for the evaluation because of her chronic pain. She also told her that she felt depressed and ostracized by her coworkers. She reported that she was having a conflict with one coworker with whom she had been friends and that she had "a general feeling that people are upset with her because she has frequent medical appointments." Near the end of the appointment, the applicant told the psychologist that she had been referred specifically because of her complaints of leg pain that made her limp despite there being no evidence of nerve impingement. She told the psychologist, "They think it's somatic." The psychologist diagnosed the applicant with depression but noted that she was psychologically fit for duty.

On April 14, 2016, the applicant sent an email to a Coast Guard civil rights office stating that, as discussed on the telephone, she wanted "to start an EEO complaint against member(s) of my command." In response, she was sent the complaint procedures, which included an initial 15-day period "to give CO/OIC a chance to resolve the matter. … However if the matter is not

resolved within the 15-day period, on the 16th day the military member may initiate the pre-complaint process with a CRSP. On the 16th day if your concern is not resolved you will entered into the Informal Complaint process, unless you elect to withdraw your complaint."

On April 19, 2016, the MEB found the applicant fit for limited duty (no sea duty or prolonged walking or standing or lifting more than ten pounds) because of right lumbar radiculopathy, chronic back pain, and muscle spasms in her back. The MEB reported that her prognosis was "poor as she continued to have pain despite multiple medical interventions" and that she was not expected to become fit for full duty (FFLD) again. The MEB also noted that "[t]here is disciplinary action pending," indicating that the applicant had been charged with an offense.

On April 20, 2016, the applicant filed a HIPAA complaint, accusing her supervisor (HS1) and the PA of violating her right to privacy. She stated that on November 24, 2015, a nurse in her neurosurgeon's office called her and told her that after reviewing her MRIs, the neurosurgeon had concluded that she was not a candidate for spinal surgery. The applicant gave the nurse permission to inform the PA of this fact. Then on December 11, 2015, when the HS1 told her that she might be moved from the Front Desk watch to Outpatient, she told him that she might not be working in Outpatient for long because she was going to have an MEB soon. When he asked her why, she told him that the neurosurgeon had said that she was not a candidate for surgery, to which the HS1 replied, "I know." When she asked him how he knew, he replied, "She told me." The applicant stated that the only person who could have told the HS1 that she was not a candidate for surgery was the PA, and she had not given the PA permission to tell him.

On April 26, 2016, the applicant refused to acknowledge with her signature counseling that was provided on a CG-3307 ("Page 7") signed by her CO. The Page 7 states the following:

> You are being counseled for violating the service's Core Values of Honor, Respect and Devotion to Duty. On 7 April 2016, you were observed eavesdropping on your supervisor while their door was closed for a private meeting. Other clinic staff members observed you place your ear to the clinic supervisor's closed door in an apparent attempt to hear the private conversation of the clinic supervisor. Your conduct was reported to the clinic administrator. Clinic staff also reported to the clinic administrator you had previously been observed eavesdropping on the clinic supervisor on at least one other occasion. Your conduct is of great concern as you are expected to maintain the integrity and privacy of others as a Health Services Technician. Additionally, you are expected to set a positive example for junior petty officers in the clinic. Your actions demonstrated a failure to uphold the Coast Guard's Core Values.
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> You are also being formally counseled for departing the clinic prior to liberty being granted. On 6 April 2016, you left your place of duty before liberty without notifying your immediate supervisor, the clinic supervisor or the health services administrator. You are required to inform your chain of command of any incidence where a deviation of the routine of the day is required (illness, medical appointments, family support, etc.).
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> You are not authorized to depart your work space without the permission of your chain of command. Any future incidents of departing your work space without notifying your chain of command or failure to uphold the Coast Guard's Core Values may result in additional administrative action, including relief of your duties as the Base … clinic.

On April 28, 2016, an employee at the civil rights office sent the applicant an email stating that the Executive Officer (XO) of the Base had told the employee, regarding the applicant's MEO complaint, that the applicant had "told [the XO] that [her] concerns were addressed and resolved." The employee then stated the following:

> Later in a follow-up conversation … I called to verify your response. In addition, I was able to clarify the MEO process for you and provide further information to assist you. However, in the course of our conversation, I discovered that the remedies that you requested were granted. The command moved you out of the environment that you were in as well as ensured that your medical board is processed in a timely manner. At the close of our conversation, you stated that the command resolved your concerns that you brought forward on April 14, 2016, at 11:35 AM. Please concur or non-concur with this email. …[6]

On May 19, 2016, the PA completed a Base "Duty Status Profile" prospectively placing the applicant on convalescent leave for three days from May 25 to 28, 2016.

On May 27, 2016, the applicant's doctor reported that she should not return to work until June 6, 2016, and should not bend, twist, or lift more than ten pounds for three months.

On May 31, 2016, the PA completed another Duty Status Profile placing the applicant in Sick in Quarters status for 7 days followed by limited duty status for 30 days, during which she should not walk or stand for a prolonged period; perform sea duty, sports, or physical training; lift more than ten pounds; climb; bend; or twist and should perform "desk work only."

On June 10, 2016, the PA completed another Duty Status Profile indicating that the applicant was not fit for duty, placing her on convalescent leave for 25 days, and instructing her to return for a follow-up appointment on July 1, 2016. Also that day, the Personnel Service Center advised the applicant, the HS1, and others in her chain of command by email that the MEB's report had been received and would be processed through the PDES. The email included a summary of the PDES procedures.

A Court Memorandum shows that on June 14, 2016, the applicant was taken to mast and received NJP for violating the Uniform Code of Military Justice (UCMJ) by failing to obey an order and making a false official statement. The NJP consisted of seven days' restriction to Base and a rate adjustment. The narrative states the following:

> Offense Narrative:
> Art. 92, UCMJ: Failure to obey order or regulation, Art. 107, UCMJ: False statements[.] On 23 Mar 2016 around 1155, [the applicant] returned to the [Base] clinic after being seen at the Emergency Room. Member disclosed to [an HSC] that she was given a Narcotic prescription while at the ER & wanted to depart early. [HSC] instructed [her] not to drive & to find alternate arrangements; [the applicant] reported her husband was going to pick her up from work. At approximately 1220, [the applicant] was seen departing the clinic. An inquiry was made to members at the front gate who reported [she] departed the base alone. Security tape was reviewed with [another member] that showed [the applicant] departed base despite HSC's orders.
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> Sentence Narrative:
> 6/14/2016 Rest to Base … for 07 days. Reduction to pay grade suspended for 06 months. Restriction to be issued once medical clearance received. 07/07/2016 The suspension of punishment of reduction in rank from E5 to E4 is vacated as a result of your departure from your appointed place of duty without the permission of your supervisor. On 29 Jun 2016, you were placed in a light duty work. In this duty status, you [were] able to complete light duty and begin seven days of restriction imposed at Captain's Mast on 14 Jun 2016. You failed to communicate your new

[6] The applicant submitted these emails but did not submit her response to show whether she concurred or non-concurred.

> duty status with anyone in your chain of command and departed Base … . This is the second documented incident where you have departed your place of duty without appropriately communicating with your chain of command. Member received a negative CG-3307 on 26 Apr 2016 for similar conduct.

At a follow-up appointment at 9:00 a.m. on June 29, 2016, the PA completed another Duty Status Profile, which changed the applicant's status to fit for limited duty for 30 days.

In a memorandum dated July 7, 2016, the CO notified the applicant, who initialed the memorandum for her record, that she was being reduced in rank:

> 1. On 14 Jun 2016, you were imposed non-judicial punishment of seven days restriction and reduction in rank from E5 to E4. The reduction in rank was suspended for a period of six months.
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> 2. This memo is to advise you that the suspended reduction in rank from E5 to E4 is vacated.
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> 3. The suspension of punishment of reduction in rank from E5 to E4 is being vacated as a result of your departure from your appointed place of duty without the permission of your supervisor. On 29 Jun 2016, you were placed in a light duty status and determined to be fit to commence light duty work. In this duty status, you are able to complete light duty and begin seven days of restriction imposed at Captain's Mast on 14 Jun 2016. You failed to communicate your new duty status with anyone in your chain of command and departed Base … . This is the second documented incident where you have departed your place of duty without appropriately communicating with your chain of command. You received a negative CG-3307 on 26 Apr 2016 for similar conduct.

On July 28, 2016, the applicant acknowledged by signature receipt of another Page 7 signed by her CO with the following counseling:

> This is to inform you that your conduct while assigned to Base … has been unsatisfactory. In accordance with Article 1.B.15.c. and 1.B.17.c. of COMDTINST M1000.4 (series) you are being placed on probation. Your probationary period will end 12 months after being notified of this probation. The reasons you are being placed on probation include:
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> (a) You departed work early on several occasions without discussing the matter with anyone in your chain of command.
> (b) You were observed eavesdropping on your supervisor's door on two separate occasions.
> (c) You disobeyed a lawful general order issued by a senior/supervisor.
> (d) You provided a False Official Statement while being investigated for disobeying a lawful order.
> (e) You failed to update your supervisor of your new duty status issued by medical and promptly departed Base … when fit to begin work.
> (f) You have used your van pool as an excuse for departing work early outside of Base … core working hours.
> (g) You posted derogatory comments towards members you served with at Base … on social media without specifically identifying any single individual.
>
> To successfully complete this probation period you must adhere to the service's Core Values of Honor, Respect and Devotion to Duty. Regarding Honor, you must not lie or shade the truth for your personal benefit. You must provide honest and clear responses when questioned by members in your chain of command or others you serve. Regarding Respect, you must display an appropriate level of respect to every member of the service and Base … . You may not make derogatory comments about peers, supervisors, or subordinates and post on social media – even if you do not specify a specific individual. Regarding Devotion to Duty, you must work a full work day unless early liberty is granted by the Commanding Officer, supervising Department Head, and/or Clinic Administrator. You must report to work on time. You shall perform all tasks assigned by members of your chain of command to the best of your ability.

> Should you fail to meet the requirements of this probation, you will be subject to separation from the Coast Guard by reason of unsuitability and/or misconduct as outlined in Article 1.B.15.c. and 1.B.17.c. of COMDTINST M1000.4.

On April 4, 2017, the applicant was medically retired as an HS3/E-4.

VIEWS OF THE COAST GUARD

On February 11, 2019, a Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion and recommended that the Board deny relief in this case.

Medical Allegations

The JAG stated that although the applicant alleged that she was punished at mast because of her medical condition, she was instead punished at mast for making a false official statement to the HSC about being picked up by her husband and then disobeying the HSC's order not to drive herself home since she had taken a narcotic medication earlier in the day.

The JAG stated that under the Rules for Courts-Martial (RCM) Rule 909, a member is fit to stand trial unless the member is suffering from a mental disease or defect rendering her "mentally incompetent to the extent that … she is unable to understand the nature of the proceedings against [her] or to conduct or cooperate intelligently in the defense of the case." Although the applicant complained that she had been prescribed opioids and a muscle relaxant at the time of the mast, the JAG stated that there is no evidence that she was mentally incompetent to defend herself at mast, where she was represented by legal counsel who raised no objections related to her mental competence for the mast. The JAG concluded that the applicant was mentally competent, although on convalescent leave due to her back condition, and so the mast was "authorized and appropriately held."

Delay of Restriction

The JAG argued that the applicant's CO committed no error or injustice in deferring her restriction to Base. The JAG noted that Article 1.E.3.d. of the MJM authorizes a CO to defer punishment when the applicant is medically unfit for duty, and at the time of the mast, the applicant was NFFD and on convalescent leave. The JAG noted that a member is placed on convalescent leave when they are NFFD "and, necessarily, unfit for restriction."

The JAG argued that the applicant's reliance on Article 1.E.3.e. of the MJM is misplaced because it concerns only members who receive restriction to base with extra duties as NJP but are physically unfit to perform the extra duties. The JAG pointed out that the applicant was not given extra duties as punishment, and "the quoted language mandates that restriction will be imposed so long as the member is in a 'fit-for-duty' status." The JAG stated that the applicant was not fit for duty at the time of her mast because she was on convalescent leave until June 29, 2016.

Vacation of Suspension of Reduction in Rate

The JAG also argued that the CO committed no error in vacating the suspension of the applicant's reduction in rate. The JAG stated that when her medical status changed from convalescent leave to FFLD on June 29, 2016, the applicant had an obligation to inform her command and knew it, but instead left the Base. The JAG noted that she had previously been counseled in writing about leaving work without permission.

The JAG pointed out that the vacation memorandum was apparently signed by both the CO and the applicant on July 7, 2016. In addition, the JAG noted that there is actually no requirement that a member receive a hearing or an opportunity to respond to the vacation of a suspension of NJP. Moreover, "[w]hat Applicant fails to state in her application is that she was, in fact, given an opportunity to oppose the vacation of suspension." The JAG noted in this regard that the applicant admitted that she was presented the memorandum during a meeting with the XO and CWO and signed it to acknowledge receipt, which she could have refused to do. The JAG noted that the applicant had not appealed the NJP and was clearly informed of the basis for the decision to vacate the suspension of the NJP in the memorandum dated July 7, 2016. And although the applicant had pointed out that the memorandum did not follow the suggested script for vacating a suspension in the MJM, the JAG stated that the script is only suggested. The JAG stated that the applicant's signature on the memorandum shows that "[a]t the very least [she] was told that the command intended to vacate the suspension, the basis for the decision to do so, and – at least orally – she could oppose the command's intended actions on the date she was asked to sign the memo. The JAG claimed that from her signature, "it may be inferred that because Applicant initialed the memo she had an opportunity to speak with her commanding officer to oppose it." The JAG noted that the applicant's signature was witnessed by a CWO and that she "could have appealed the vacation of suspension if she felt it was 'disproportionate' as defined in Chapter 1.F.1.a.(2)," but she did not appeal it.[7]

The JAG concluded that the applicant received due process and that the Coast Guard did not commit an error or injustice in this case.

The JAG also adopted the findings and analysis provided by Commander, Personnel Service Center (PSC) in a memorandum dated December 12, 2018. PSC likewise recommended that the Board deny the applicant's request. PSC stated that the applicant's CO had deferred her restriction of duty "until medically cleared as by policy." PSC further noted that the applicant's reduction in rate had gone into effect because she had left the Base without notifying her chain of command even though her duty status had changed and she was fit for light duty. PSC noted that it was the second time she had left her place of duty without communicating with her chain of command.

PSC noted that under the MJM, a vacation hearing is not required and if granted, "is normally very brief." PSC further noted that if a hearing is held "the mast authority need not make a determination on every allegation of misconduct. It is sufficient that the mast authority determine that any misconduct or violation of a condition of suspension occurred in order to vacate the suspension of prior punishment."

[7] However, Article 1.E.5.e. of the MJM states, "The decision to vacate suspension of NJP is not an issue that may be appealed under paragraph 7 of Part V, MCM."

PSC stated that although the applicant claimed that she was not allowed to present her case to the CO, both she and the CO initialed the vacation memorandum, "so it can be presumed a conversation was had with the Commanding Officer."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 12, 2019, the Chair sent the applicant a copy of the views of the Coast Guard and invited her to submit a written response within thirty days. After receiving extensions of the time to respond, the applicant submitted her response to the JAG's advisory opinion on August 15, 2019.

The applicant, through her counsel, disagreed with the JAG's characterization of her complaint as an allegation that the CO held her medical condition against her at the mast. The applicant stated that this characterization not only ignores "multiple regulatory irregularities" but ignores the fact that she did not contest the mast itself; she only contests the vacation of the suspension of her reduction in rate.

The applicant repeated her argument that Article 1.E.3. of the MJM required a specific medical finding that she was fit to serve the restriction, which was not obtained by the command. The applicant argued that if she was sufficiently fit to attend the mast, then she was fit to serve the restriction. And if being on convalescent leave made her unfit for duty, then she should have been considered unfit for all duty, including attending the mast on June 14, 2016.

The applicant alleged that she was not given an opportunity to respond to the vacation action and noted that the vacation memorandum did not mention such an opportunity. Nor was she given a verbal notification of such an opportunity. She alleged that she was "ordered" to sign the document and so she did. She alleged that the animosity against her because of her medical condition is shown in the fact that the memorandum did not inform her of her right to respond, and the mere fact that her supervisor, CWO A, was present does not mean that she received due process. The applicant also stated that the memorandum did not state that the CO intended to vacate the suspension but that he had already done so: "The first implies an opportunity to respond. The second simply informs of a completed act."

The applicant also argued that the JAG erroneously asked the Board to presume from her signature on the memorandum that she had received due process: One cannot presume due process, it must actually be provided. It was not provided, therefore, the vacation should be voided."

The applicant provided a separate statement in which she repeated claims about being poorly treated when her condition worsened. She stated that her command had the Coast Guard Investigative Service investigate her for possible use or abuse of prescription medications, but they found no evidence and the charge was dropped. The applicant alleged that she filed the HIPAA complaint because she heard that the HS1 and the PA "were sharing my medical information with others within and outside the clinic, causing me to file a HIPAA Complaint. After everything started to add up the clinic became too much to deal with and I filed an EEO Complaint against the clinic. … [The Base XO] contacted me via email asking if changing work environment would satisfy the complaint. … So she agreed to move to the [Base] Supply Shop and

would be working with the SK's and their supervisor, [CWO A]. I could not be happier with this arrangement and the EEO Complaint was completed at that time."

The applicant wrote that although she did not contest the NJP, she does contest "the manner in which it came about. I have enough respect for the chain of command that I, to my own disservice, attended the Mast while still physically incapacitated." She stated that she was taking narcotics and using a cane when she attended the mast, where she

> took responsibility for all all accusations against me and received punishment without contest. I understood that after my con leave was up I was to complete the punishment of 'Restriction to Base for 07 days.' I also was informed by my supply supervisor that when returning to work from con leave I was to bring them an updated duty status so that I could continue working without question. So when I went to receive an updated duty status from the clinic [on June 29, 2016], I was given a duty status of limited duty and was told by [the PA] that 'it takes effect after my con leave was completed since it was only a couple of days away.' Still on convalescence leave I left the base under the assumption of bringing the duty status chit to my supply supervisor on July 1st 2016.
>
> The only reason that I arrive[d] at work prior to my con leave ending was due to a phone call that I received from [an SK1] stating '[the XO] was just down here talking with [CWO A] and myself stating that you received a duty status today and then left base without telling Supply about this chit. [The XO] seems to think that the duty status takes place immediately and is expecting you here tomorrow to begin your restriction to base. Did you know this? Did anyone tell you about your restricting starting tomorrow?' I informed her that I had no idea what she was talking about and I couldn't believe that [the PA] did not inform [the XO] of what she told me about con leave continuing. That is the only reason that I arrive[d] the next day, not wanting my suspension to be compromised.

The applicant alleged that she reported for duty the next day and was assigned to a room so that she could serve the restriction to Base. She handed her new duty status to CWO A, who told that they had "a meeting with [the XO] in the Command Room upstairs." Once in the room, she was given the memo "and a pen was slammed down on top of it with [the XO] stating sternly 'You don't have a choice in signing this one!'" The applicant stated that she started to cry and told them both that she "was confused because of the con leave" and that she had not done anything wrong. She stated that she signed the memorandum under duress. She also stated, "On 7 July 2016, I am sure that my compromised physical and related psychological condition played a large part in the coercion I felt by the circumstances. That coercion, I feel, led to my suspension being vacated by [the XO] and my forced signature on said document." The applicant stated that shortly thereafter she decided to find an attorney to help her challenge the reduction in rate.

The applicant also claimed that at the Base, "[t]ragic circumstances and a failure of support from command have led to severely tragic circumstances." She alleged that in the three years since she was separated, three members have committed suicide. Of the two she knows, one had similar health issues to hers and the other killed his wife and children before killing himself. The stated, "[t]here appears to be a pattern that should not be taken lightly. … I was just lucky enough to have a strong support system that are still supporting me to this day and that is the only difference in this matter."

APPLICABLE LAW AND POLICY

Military Separations Manual

Article 1.C.12.f. states the following about an enlisted member's retired rate:

> Unless entitled to a higher grade under some other provision of law, any Coast Guard member who retires for physical disability or is placed on the temporary disability retired list (TDRL) under 10 U.S.C. §61 is entitled to the grade or rate equal to the highest of:
>
> (1) The grade or rate in which the member served on the date his or her name was placed on the TDRL or, if his or her name was not carried on that list, on the date when the member retires.
>
> (2) The highest grade or rate in which the member served satisfactorily, as the Commandant determines.

Article 1.C.12.g. states that the Enlisted Personnel Management Branch of PSC reviews the record of each member being retired "to determine the highest grade or rate in which his or her Coast Guard service is satisfactory" and

> [i]n the absence of a reduction in grade by a Special Court-Martial or General Court-Martial, service will be considered satisfactory and the member will be certified to the highest grade if he or she served on active duty for at least six months in a commissioned officer grade or 31 days in a chief warrant officer or enlisted grade and his or her official records indicate overall satisfactory performance for the entire period served in the higher grade.

Manual for Courts-Martial United States (MCM)

Part V of the MCM governs NJP under Article 15 of the UCMJ, which is codified at 10 U.S.C. § 815.

Paragraph 1.C. of Part V states that NJP "provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in servicemembers without the stigma of a court-martial conviction."

Paragraph 1.i. of Part V, "Effect of Errors," states the following:

> Failure to comply with any of the procedural provisions of Part V of this Manual shall not invalidate a punishment imposed under Article 15, unless the error materially prejudiced a substantial right of the servicemember on whom the punishment was imposed.

Paragraph 6.a. of Part V states the following about suspending and vacating NJP in pertinent part:

> (3) Unless the suspension is sooner vacated, suspended portions of the punishment are remitted, without further action, upon the termination of the period of suspension.
>
> (4) Unless otherwise stated, an action suspending a punishment includes a condition that the servicemember not violate any punitive article of the code. The nonjudicial punishment authority may specify in writing additional conditions of the suspension.
>
> (5) A suspension may be vacated by any nonjudicial punishment authority or commander competent to impose upon the servicemember concerned punishment of the kind and amount involved in the vacation of suspension. Vacation of suspension may be based only on a violation of the condi-

> tions of suspension which occurs within the period of suspension. Before a suspension may be vacated, the servicemember ordinarily shall be notified and given an opportunity to respond. Although a hearing is not required to vacate a suspension, if the punishment is of the kind set forth in Article 15(e)(1)-(7),[8] the servicemember should, unless impracticable, be given an opportunity to appear before the officer authorized to vacate suspension of the punishment to present any matters in defense, extenuation, or mitigation of the violation on which the vacation action is to be based. …

Paragraph 7.a. of the MCM states, "Any servicemember punished under Article 15 who considers the punishment to be unjust or disproportionate to the offense may appeal through the proper channels to the next superior authority."

Military Justice Manual (MJM)

Article 1.E.2.b. of the MJM defines "Restriction" as follows:

> Restriction is moral restraint to specified geographical limits set by the commanding officer imposing the punishment. While the limits of restriction are usually specified to be that of the vessel or the boundaries of a shore unit, the limit can be greater or, within reasonable limits, lesser.
>
> • • •
>
> (3) Unless specified by the commanding officer, a restricted member will ordinarily be required to perform his or her full military duties.

Article 1.E.3.a. of the MJM, "Effective Date of Punishment," states that "[a]ll NJP takes effect on the date imposed" except under specified circumstances:

> (1) When the punishment is suspended.
>
> (2) If the member is assigned to a vessel …
>
> (3) If the member submits a timely appeal of the punishment awarded at NJP [see, section 1.F below] and action by the appeal authority is not taken on an appeal within 5 days …
>
> (4) When restriction and extra duties are combined to run consecutively, whichever punishment the commanding officer directs to start later will not take effect until the first of the consecutive punishments is completed.
>
> (5) If a punishment is imposed while a prior punishment of the same type resulting from a separate punitive action is in effect, …

But Article 1.E.3.d.(4) of the MJM states that one of the circumstances under which a CO may defer the execution of an unsuspended punishment is if the member is "medically unfit":

> Medically Unfit. If the member is found by proper authority to be medically unfit to serve the punishment, the commanding officer may defer the execution of the punishment until the member is determined by proper authority to be medically fit to serve the punishment.

Article 1.E.3.e. of the MJM, "Not Fit for Duty Status," states the following:

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[8] 10 U.S.C. § 815(e) (stating that the following types of NJP, if appealed, must undergo legal review: (1) arrest in quarters for more than seven days; (2) correctional custody for more than seven days; (3) forfeiture of more than seven days' pay; (4) reduction of one or more pay grades from the fourth or a higher pay grade; (5) extra duties for more than 14 days; (6) restriction for more than 14 days; or (7) detention of more than 14 days' pay).

> If a member who is serving extra duties as a punishment is placed in a not fit for duty status, the not fit for duty status defers the service of extra duties. If the extra duties are being served concurrently with restriction, the restriction will continue to run in spite of the not fit for duty status (so long as the member is medically fit to serve restriction). When the member is returned to a fit for duty status, the remaining punishment of extra duties shall be immediately reinstated. Any extra duty remaining to be served when the sentence to restriction is completed is remitted.

Article 1.E.4.a. of the MJM states the following about suspending a punishment:

> To suspend a punishment means to hold it in abeyance, or not execute it, for a specified period, with remission at the end of that period. Unless otherwise stated, an action suspending a punishment includes a condition that the member not violate any punitive article of the UCMJ. Other appropriate conditions of the suspension may be specified in writing by the NJP authority [see, paragraph 6.a.4., Part V, MCM]. If the member violates the conditions of the suspension, the suspension is vacated and the punishment is executed.

Article 1.E.5. of the MJM, "Vacation of Suspension," refers the member to the MCM and states the following:

> Any commanding officer competent to impose upon the member punishment of the type and amount involved in the vacation of the suspension may vacate a suspended punishment during the period of suspension. …
>
> **1.E.5.a. Reason to Vacate NJP Punishment**
> Unless otherwise stated, an action suspending a punishment includes a condition that the member not violate any punitive article of the UCMJ. Vacation of a suspension may be based on an offense under the UCMJ or other appropriate conditions of the suspension specified in writing by the NJP authority [*see*, paragraph 6.a.4., Part V, MCM].
>
> **1.E.5.b. Vacation Proceedings**
> [See, paragraph 6.a.(5),. Part V, MCM.]
> It is not necessary to hold a hearing in order to vacate a prior suspended punishment. However, the member should ordinarily be notified the command is considering vacating a prior suspended punishment and given an opportunity to respond. Enclosure (7a) contains a vacation proceeding script, which may be used if a hearing is held. …
>
> **1.E.5.c. Notification**
> The member shall be notified if all or a portion of the suspended punishment is vacated. Enclosures (7b-c), which may be reproduced locally, or correspondence in a similar format shall be prepared to ensure that these requirements are met and to create a record of the proceedings….
>
> **1.E.5.d. Effective Date of Vacation**
> Vacated punishment begins on the date the commanding officer orders the suspension vacated. The order vacating a suspension must be issued within a reasonable time after commencement of the vacation proceedings.
>
> **1.E.5.e. Effect of Vacation**
> Vacation of a suspension is not NJP. If proceedings to vacate a suspended punishment are combined with a new action under Article 15, UCMJ, the commanding officer must ensure it is clear to the member what portion of a prior suspension is vacated prior to imposing NJP for the new conduct. [See, paragraph 15, enclosure (1b) or (1c).] Action to impose NJP for the offense that formed the basis for the vacation is permitted. The decision to vacate suspension of NJP is not an issue that may be appealed under paragraph 7 of Part V, MCM.

Article 1.F.1. of the MJM states the following regarding NJP appeals:

> A member punished under Article 15, UCMJ, may appeal if he or she considers the punishment imposed "unjust" or "disproportionate" to the acts of misconduct for which punished. … The appeal must be submitted in writing within 5 calendar days of the imposition of the punishment, or the right to appeal shall be waived in the absence of good cause shown.

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.

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.[9]

3. The applicant alleged that her retirement as an HS3/E-4, instead of an HS2/E-5, is erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military records 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.[10] 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."[11]

4. The applicant alleged that her command was biased against her because of her numerous medical appointments and medical condition. She submitted no evidence of such bias and did not contest the fact that, as the Page 7 dated April 26, 2016, states, on April 6, 2016, she had eavesdropped at a superior officer's door and on April 7, 2016, she had left work without informing her supervisor. She alleged that she was told it was rare to get a Page 7 for eavesdropping and apparently considers that evidence of bias instead of understanding that such Page 7s are rare because members rarely act so poorly in the office by openly eavesdropping with their ear to a door. Nor did the applicant contest the fact that, as stated on the Court Memorandum, on March 23, 2016, she had disobeyed an order not to drive herself home because she was taking prescribed narcotics and lied to her supervisor about it. There is a little evidence that her doctors thought one of her complaints of pain might be somatic because her MRI results apparently did not support it, but the Board finds that the applicant has not proven by a preponderance of the evidence that her chain of command was biased against her.

5. The applicant alleged that her CO erroneously deferred her restriction following the NJP and so lost his opportunity to have her serve the restriction. For the reasons explained below, the Board finds that she has not proven by a preponderance that her CO committed an error or injustice when he deferred her restriction:

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[9] *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).

[10] 33 C.F.R. § 52.24(b).

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

a. Restriction as NJP is "usually specified to be that of the vessel or the boundaries of a shore unit" and, unless otherwise specified by the CO, the member must perform duty.[12] The Court Memorandum shows that the CO specified that this punishment was 7 days' restriction to Base. And the applicant admitted in her response to the advisory opinion that she knew that her punishment included "Restriction to Base for 07 Days," that when she returned to work she was to bring a duty status chit showing that she was fit to work, and that she was to be ready to serve the restriction to Base. Therefore, the applicant knew at the time that to be considered fit to perform the restriction, she only had to be fit to perform work at the Base.

b. Although the applicant alleged that the CO was not authorized to defer her restriction to Base under Article 1.E.3.e. of the MJM,[13] the Board agrees with the Coast Guard that this article applies only to situations in which a member receives both restriction and extra duties and is fit to perform the restriction but not the extra duties. Because the applicant received no extra duties as NJP and was not fit to perform the restriction on the date of the mast, the article is inapplicable.

c. The preponderance of the evidence shows that the applicant was medically unfit to serve the restriction to Base when the NJP was imposed on June 14, 2016. The Duty Status Profile dated June 10, 2016, shows that the applicant was unfit for duty and staying home on convalescent leave. Convalescent leave is only authorized "when a patient is Not Fit For Duty … and whose recovery time can reasonably be expected to improve by freedom from the confines of quarters,"[14] which are military barracks. Therefore, in placing the applicant on convalescent leave, the PA was indicating that for medical reasons, the applicant needed to be free from the confines of quarters. Because the applicant would have to sleep in the Base's barracks (quarters) for a week to serve her restriction to Base, the Duty Status Profile dated June 10, 2016, shows that the applicant had been found medically unfit to perform a restriction to Base. Accordingly, the Board finds that the applicant has not proven by a preponderance of the evidence that her CO erred when he deferred her restriction to Base until her convalescence leave ended and she was fit to serve the restriction by sleeping in the barracks, as authorized by Article 1.E.3.d.(4) of the MJM.

6. Likewise, the Board finds that the applicant has not proven by a preponderance of the evidence that the CO committed an error in finding that the deferment of the restriction to Base ended on June 29, 2016, pursuant to Article 1.E.3.d.(4) of the MJM. On that date, the Duty Status Profile shows, the PA changed the applicant's duty status from convalescent leave to fit for limited duty. To do so, the PA had to have determined that the applicant was no longer unfit for duty and no longer needed to be free "from the confines of quarters" because of her medical condition.

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[12] MJM, Art. 1.E.2.b.

[13] MJM, Art. 1.E.3.e. states, "If a member who is serving extra duties as a punishment is placed in a not fit for duty status, the not fit for duty status defers the service of extra duties. If the extra duties are being served concurrently with restriction, the restriction will continue to run in spite of the not fit for duty status (so long as the member is medically fit to serve restriction)."

[14] Coast Guard Medical Manual, Chap. 9.B.5 h.

7. The applicant alleged that the vacation of the suspension of her reduction in rank on July 7, 2016, was erroneous and unjust because she had not known that she was expected to report for duty when she was placed on limited duty on Wednesday, June 29, 2016. She alleged that she reasonably thought that she was still on convalescent leave because her prior Duty Status Profile dated June 10, 2016, had stated that her status was convalescent leave for 25 days—i.e., from June 10 through July 4, 2016. The Board finds that these allegations are not credible for the following reasons:

a. The Duty Status Profiles completed by the PA show that she was specific in denoting changes in a member's status. For example, on May 31, 2016, the PA indicated that the applicant's status was sick in quarters for 7 days followed by limited duty for 30 days. And 11 days later, on Friday, June 10, 2016, the PA changed the applicant's status from limited duty to convalescent leave, which began immediately (not at the end of the 30 days of limited duty noted on the May 31, 2016, Duty Status Profile). The Duty Status Profile that the PA completed at 9:00 a.m. on Wednesday, June 29, 2016, does not show any amount of convalescent leave and instead changes the applicant's current duty status to fit for limited duty for 30 days. Although the applicant claimed that her alleged belief that she was still on convalescent leave was reasonable because this appointment occurred on June 29, instead of Friday, July 1, 2016—because the PA's appointment calendar for July 1 was already full when the applicant scheduled the appointment—the Board finds that this change from the anticipated date of the appointment is irrelevant and does not explain or justify the applicant's failure to report for duty when the PA changed her status to fit for limited duty on the morning of on June 29, 2016.

b. The applicant was an HS2—a health services technician who had been trained and working in Coast Guard clinics for several years. It is simply not credible that an HS2 believed that her duty status continued to be convalescent leave even though the PA had changed her duty status to fit for limited duty on Wednesday, June 29, 2016. Even a non-HS petty officer would be expected to know that this change in status was immediate and that she should report for duty.

c. There is no evidence supporting the applicant's claim in her response to the advisory opinion that the PA told her on June 29, 2016, that the applicant could remain on convalescent leave for the rest of the 25 days before starting limited duty. And if the PA had told her such a thing, the Duty Status Profile completed on June 29, 2016, would have shown 6 days of convalescent leave followed by limited duty, but it did not.

d. The PA informed the XO that the applicant's duty status was fit for limited duty, which she would not have done if she had told the applicant that her convalescent leave would continue until July 5, 2016. Moreover, the applicant claimed that she only learned that she was expected to report for duty because a "coworker" called her, but the person who called her was her superior petty officer—an SK1—in the Supply Shop, and the SK1 told the applicant that she was passing information received directly from the XO. (Although the applicant complained that she was not formally notified that she was expected to report for duty, she has not shown that the SK1's phone call was not a proper means of communicating that fact or that she was entitled to a call from the CO, as she suggested.)

e. The applicant was quite vague about dates and times in her application. The record shows that her duty status changed while she was on Base at the clinic for a 9:00 a.m.

appointment on Wednesday, June 29, 2016, and so she should have gone to the Supply Shop to inform her supervisor of her new duty status that morning after her appointment, instead of leaving the Base. The applicant claimed in her response to the advisory opinion that she decided to return to the Base to bring her "duty status chit to my supply supervisor on [Friday,] July 1, 2016." But if she had actually thought that her convalescent leave was continuing, she would have thought that it ended on July 5, 2016, not July 1. The applicant never stated what date the SK1 called to tell her that she was expected to report for duty and restriction. She alleged that she reported for duty the day after the SK1 called her, but she also never stated what date she reported for duty. And the applicant claimed that when she reported for duty, her supervisor, CWO A, immediately escorted her to a meeting with the XO where she was required to sign the vacation memorandum. But the memorandum is dated July 7, 2016—eight days after she had been found fit for limited duty and two days after she should have reported for duty if her convalescent leave had continued—and the applicant alleged that it had already been signed by the CO. The Board finds that the applicant's vague and conflicting allegations about the timing of these events substantially undermines her credibility on these issues.

f. Finally, the applicant's military record shows that she twice received NJP for making false official statements in violation of Article 107 of the UCMJ, and there is no evidence or reasonable explanation supporting her claim that she reasonably assumed that she could wait until Friday, July 1, 2016, to reveal her new duty status to her supervisor.

8. The applicant has not proven by a preponderance of the evidence that she was erroneously or unjustly denied an opportunity to speak to the CO to contest the vacation of the suspension of her reduction in rate. As the JAG noted, an opportunity to speak to the CO is not legally required, and so the lack of documentation of such an opportunity is not evidence that the applicant did not have a chance to talk to the CO. The rules state that the applicant "should" ordinarily have such an opportunity,[15] but some of the applicant's claims are not credible, she has a history of making false official statements, and she was very vague about dates and times. She never said when the SK1 called her or what day she returned to work. If, as she alleged, she had intended to give the chit to her supervisor on July 1, 2016, then the SK1's call presumably happened on June 29 or 30, 2016. And her description of the SK1's call shows that she knew or should have known at that time that the command considered her failure to report to the Supply Shop on the morning of June 29, 2016, to be misconduct. Therefore, she knew or should have known after the SK1's call that the vacation of the suspension of her reduction in rate was likely. And the vacation memorandum shows that it was signed by the CO and the applicant about a week later on July 7, 2016. She alleged that the memorandum was signed the same day she returned to work, even though July 7 was long after her convalescent leave actually ended and two days after it would have ended if her status had not changed to fit for limited duty on June 29, 2016.

9. The applicant alleged that the CO was not in the room when she received the memorandum, but even assuming, *arguendo*, that this allegation is true, the Board is not persuaded that the applicant had no chance or was not offered an opportunity to speak to the CO before she signed the vacation memorandum on July 7, 2016. Her refusal to sign the Page 7 dated April 26, 2016, shows that she knew she could refuse to sign documents that her CO had already signed. And she has not shown that her supervisor or the XO were so biased against her

[15] MCM, Part V, para. 6.a.(5); MJM, Art. 1.E.5.c.

that they would have arbitrarily denied a request to speak to the CO. Most Coast Guard COs have an "open door policy" for subordinate's grievances pursuant to Article 1.D.2.g. of COMDTINST M1600.2,[16] and even if this CO did not have such a policy, the applicant could have submitted a request chit to formally ask to speak to the CO. Given the applicant's lack of credibility and the lack of a legal requirement for a documented hearing before the CO, the Board finds that the applicant has not proven by a preponderance of the evidence that the vacation of the suspension of her reduction in rate was erroneous or unjust because of the alleged lack of an opportunity to talk to the CO about the vacation.

10. Under Article 1.C.12.f. of the Military Separations Manual, the applicant was entitled to be medically retired pursuant to 10 U.S.C. § 1201 in the rate she held on the date of her retirement (HS3/E-4) or the "highest grade or rate in which the member served satisfactorily." And under Article 1.C.12.g. of the manual, a member is considered to have served satisfactorily in a higher grade only if the member's "official records indicate overall satisfactory performance for the entire period served in the higher grade." Given the two negative Page 7s and the NJP that the applicant received while still an HS2/E-5, the Board finds that she has not proven by a preponderance of the evidence that her records "indicate[d] overall satisfactory performance for the entire period" she served as an HS2/E-5.

11. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that the vacation of the suspension of her reduction in rate was erroneous or unjust or that her retirement as an HS3/E-4 is erroneous or unjust. Accordingly, her request for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

[16] COMDTINST M1600.2, Art. 1.D.2.g. ("Grievances[:] … An open door policy for complaints is a basic principle of good leadership, and commanding officer should personally assure themselves that adequate procedures exist for identifying valid complaints and taking corrective action.").

ORDER

The application of HS3 [redacted], USCG (Retired), for correction of her military record is denied.

November 22, 2019

[redacted]