


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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-157

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XXXXXXXXXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

 **Deputy Chair:**

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The BCMR received the application on July 25, 2002, and docketed it on August 12, 2002, upon receipt of the applicant's military records.

This final decision, dated June 19, 2003, is 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 correct his record to show that he was retired on August 1, 1999, as an E-7 rather than an E-6. He also asked the Board to award him the back pay he would be due as a result of the correction.

The applicant stated that he was advanced to E-7 in June 1991 and "served honorably in that grade for several years." However, he was reduced in rank to E-6 following a court-martial in 1999. The determination that E-6 was the highest rate he had held satisfactorily was made by the Commander of the Coast Guard Personnel Command (CGPC) and not by the Secretary as, he alleged, is required by 14 U.S.C. § 362. Therefore, he argued, that determination was made without authority.

The applicant alleged that because 14 U.S.C. § 362 provides that the Secretary determines what grade an enlisted member should be retired in, Article 12.C.15.e. of the Personnel Manual, which allows the Commander of CGPC to make such determinations, is in conflict with the statute. He also alleged that the Secretary is not allowed to

delegate his authority under the statute and that there is “no evidence that the Secretary promulgated the Coast Guard Personnel Manual or had it issued under his authority.”

SUMMARY OF THE RECORD

On June 22, 1970, the applicant enlisted in the Coast Guard. He became an [REDACTED] and was advanced to the rank of chief petty officer (E-7) on June 1, 1991.

The applicant received his first Achievement Medal for his work as Executive Petty Officer and Senior Technical Officer at a LORAN Station from April 1991 to July 1992. The citation states that he "overcame personnel and experience shortcomings and led his unit to perform above the 99.7 percent usable time expected of an isolated LORAN Station. He spearheaded self-help projects to restore the Station's [REDACTED] boats and engines, enhancing morale and saving nearly \$15,000 in contract labor costs. ... [He] demonstrated exceptional concern for the morale and well-being of his crew. ... [His] dedication, judgment, and devotion to duty are most heartily commended and are in keeping with the highest traditions of the United States Coast Guard."

The applicant received a second Achievement Medal for his work as Officer in Charge of another LORAN Station from July 1992 to June 1996. The citation states that he "made substantial capital improvements to the station buildings and grounds. Using excess property materials, [he] and his crew constructed a garage and storage building that earned the praise of Civil Engineering Unit Installation of plumbing and electricity in an old transmitter building allowed for bathrooms, a kitchen and badly needed office space for under \$15,000 dollars. ... [He] identified several safety problems. He prevented injuries to station personnel His foresight in obtaining a backpack fire extinguisher enabled station personnel to successfully fight a brush fire during the renovation. Throughout this project, the station maintained 100 percent of its transmitter capability. [His] hard work and dedication resulted in three operational awards for signal reliability. ..."

In April and May 1999, the applicant, who was serving as Officer in Charge of a LORAN station, was charged with 57 specifications of violating Articles 92 (willful or negligent dereliction of duty), 107 (making a false official statement), 121 (larceny), and 134 (false swearing) of the Uniform Code of Military Justice (UCMJ). At a special court-martial held on May 18 and 19, 1999, the applicant pled guilty to 45 of the specifications for dereliction of duty and wrongful appropriation (a lesser included offense to larceny). The charges to which he pled not guilty were withdrawn. The applicant was found guilty of most of the charges to which he pled guilty. The judge stated that the maximum sentence that he could set was a bad conduct discharge, six months' confinement, forfeiture of two-thirds pay for six months, and reduction to pay grade E-1. The judge sentenced the applicant to reduction to pay grade E-5, forfeiture of \$7,000, confinement for 56 days, and hard labor without confinement for 3 months. However, on July 21, 1999, after the applicant asked for clemency based on the financial hardship

that the reduction in pay grade would cause his family, the convening authority approved "only so much of the sentence as provides for confinement for 56 days and a reduction to pay grade E-6." The fine and hard labor were disapproved.

On August 1, 1999, the applicant was honorably retired from the Coast Guard.

VIEWS OF THE COAST GUARD

On January 24, 2003, the Chief Counsel of the Coast Guard recommended that the Board deny the applicant's request for lack of merit.

The Chief Counsel stated that the Secretary of Transportation "delegated the authority to take personnel actions, such as the determination of highest grade held, on his behalf to the Commandant of the Coast Guard under 49 C.F.R. § 1.45(a)(1). The Commandant, in turn, delegated his authority to the Coast Guard Personnel Command." He stated that these delegations are authorized under 49 U.S.C. § 322.

The Chief Counsel argued that the regulations in effect when the applicant retired "did not permit him to be retired at a higher grade than that to which he was reduced at his court-martial." Under Article 12.C.15. of the Personnel Manual, he stated, the highest grade of a member who has been court-martialed "shall not be higher than that to which the member has been reduced unless he or she subsequently advances." Therefore, he argued, the applicant was properly retired as an E-6.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 3, 2003, the BCMR sent the applicant a copy of the views of the Coast Guard invited him to respond within 15 days. The applicant requested and was granted an extension and responded on February 21, 2003.

The applicant asked the Board to consider whether Article 12.C.15.e.2. of the Personnel Manual "has removed the discretion from the Commandant to determine the highest grade the enlisted member served under 14 U.S.C. and transferred it to the convening authority who approves the results of the enlisted member's court-martial."

APPLICABLE LAW

Title 14 U.S.C. § 362 states that "[a]ny enlisted member who is retired under any provision of section 353, 354, 355, or 357 of this title shall be retired from active service with highest grade held by him while on active duty in which, as determined by the Secretary, his performance of duty was satisfactory, but not lower than his permanent grade or rating."

Title 49 U.S.C. § 322, titled "General Powers," provides the following:

(a) The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer.

(b) The Secretary may delegate, and authorize successive delegations of, duties and powers of the Secretary to an officer or employee of the Department. An officer of the Department may delegate, and authorize successive delegations of, duties and powers of the officer to another officer or employee of the Department. However, the duties and powers specified in sections 103(c)(1), 104(c)(1), and 106(g)(1) of this title may not be delegated to an officer or employee outside the Administration concerned.

Title 49 C.F.R. § 1.45(a) states that "[e]xcept as prescribed by the Secretary of Transportation, each Administrator is authorized to: (1) Exercise the authority of the Secretary over and with respect to any personnel within their respective organizations."

Article 12.C.15.e. of the Personnel Manual provides as follows:

1. Any enlisted member who retires under any provision of 14 U.S.C. retires from active service with the highest grade or rate he or she held while on active duty in which, as Commander (CGPC-epm-1) or the Commandant, as appropriate, determines he or she performed duty satisfactorily, but not lower than his or her permanent grade or rate with retired pay of the grade or rate at which retired (14 U.S.C. 362).

2. In cases where a member has been reduced in grade by a court-martial, the highest grade satisfactorily held shall be no higher than the grade to which the member has been reduced by the court-martial, unless the member subsequently advances or is again reduced. Where a member subsequently advances or is again reduced following a reduction by a court-martial, the highest grade satisfactorily held shall be no higher than the pay grade to which the member advanced or was reduced to following the court-martial.

Article 12.C.15.g. of the Personnel Manual states that "Commander (CGPC-epm) ... will administratively review the record of each individual scheduled to retire to determine the highest grade or rate in which his or her Coast Guard service is satisfactory."

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 submissions, and applicable law:

1. The Board has jurisdiction over this matter pursuant to the provisions of 10 U.S.C. § 1552. The application was timely.

2. Title 49 U.S.C. § 322(b) clearly authorizes the Secretary to delegate his duties under 14 U.S.C. § 362 to the Commandant, and it clearly authorizes the Commandant to delegate his duties under the statute to the Commander of CGPC or any other officer.

3. In 49 C.F.R. § 1.45(a), the Secretary clearly delegated his authority with respect to such personnel matters as that at issue in this case to the Commandant, as the Administrator of the Coast Guard. Article 12.C.15.g. of the Personnel Manual indicates that the Commandant has delegated his duties with respect to the determination for retirement purposes of the highest grade that an enlisted member has satisfactorily held to the Commander of CGPC.

4. The applicant has not proved that under 14 U.S.C. § 362 and laws of delegation, the determination of his grade upon retirement could only be made by the Secretary himself.

5. Under Article 12.C.15.e. of the Personnel Manual, “where a member [such as the applicant] has been reduced in grade by a court-martial, the highest grade satisfactorily held shall be no higher than the grade to which the member has been reduced by the court-martial, unless the member subsequently advances or is again reduced.” The record indicates that the applicant was reduced in rate to E-6 by a court-martial and was not advanced to E-7 before his retirement. The Board concludes that the applicant was properly retired as an E-6 in accordance with Article 12.C.15.e.

6. The applicant asked the Board to consider whether Article 12.C.15.e.2. of the Personnel Manual has removed the Commandant’s discretion to determine the highest grade a member served under satisfactorily and transferred it to the convening authority of the member’s court-martial. Although the convening authority of a court-martial may approve or mitigate a reduction in grade ordered by court-martial, the second sentence of that Article shows that the convening authority does not make the final determination of the member’s grade upon retirement. While the convening authority determines the member’s sentence, Article 12.C.15.g. of the Personnel Manual clearly provides that the Commander of CGPC determines the member’s grade upon retirement.

7. Under Article 12.C.15.e.2. of the Personnel Manual, the Commandant has established a long-standing, firm rule that leaves the Commander of CGPC with no discretion to consider the quality and duration of a member’s service in a higher pay grade once the member has been reduced in grade by a court-martial and the sentence has been approved by the convening authority, unless the member has been subsequently advanced. The applicant has not proved that the Commandant has abused his discretion in establishing this rule.

8. Although the applicant has not proved that the Coast Guard committed an error in determining his grade upon retirement, the question remains whether the rules, though properly applied, have caused an injustice to the applicant that requires correction. 10 U.S.C. § 1552(a). In BCMR Docket No. 2002-040, the delegate of the Secretary held that “[t]he Coast Guard has committed an injustice against one of its members when the Coast Guard’s action, or lack thereof, shocks one’s sense of justice. Reale v. United States, 208 Ct. Cl. 1010, 1011 (1976). The BCMR has the authority to decide on a case-by-case basis if the Coast Guard has committed an error or injustice.”

9. The record indicates that the applicant provided excellent service as an E-7 from 1991 until he committed the crimes for which he was court-martialed and that he received two Achievement Awards during that period. Nevertheless, the Board finds that his being retired as an E-6 instead of an E-7 as a result of his crimes and sentence by court-martial does not shock the Board’s sense of justice.

10. Accordingly, the applicant’s request should be denied.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of retired xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

