


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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-118

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FINAL DECISION


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 Chair docketed the case on May 19, 2006, upon receipt of the completed application and military records.

This final decision, dated February 15, 2007, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his military record to show that he retired as a YN1 (pay grade E-6), the highest grade he held in the Coast Guard, rather than as a YN2 (pay grade E-5).

APPLICANT'S ALLEGATIONS

The applicant alleged that he satisfactorily performed the duties of a YN1 for 36 months and should have been retired in that grade. He stated that Article 12.C.15.e. of the Personnel Manual states that "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 [Coast Guard Personnel Command (CGPC)] or the Commandant, as appropriate, determines he or she performed duty satisfactorily, but not lower than his or permanent grade or rate with retired pay of the grade or rate at which retired." The applicant requested the same relief and made a similar allegation in an earlier application, BCMR No. 2005-085, which is discussed later in this opinion.

BACKGROUND

The applicant enlisted in the Coast Guard on February 5, 1980. After approximately 24 years of active service, the applicant requested voluntary retirement, which was approved on December 3, 2004, with an effective date of July 1, 2005. Prior to his scheduled retirement date, the applicant's urine tested positive for cocaine on December 27, 2004. On January 24, 2005, he was found guilty of illegal use of cocaine at a non-judicial punishment ((NJP) also known as captain's mast) under Article 15 of the Uniform Code of Military Justice (UCMJ). The commanding officer (CO) punished the applicant by reducing him in rank from YN1 to YN2, fining him \$800, and by restricting him to the base and assigning him extra duties.

On January 25, 2005, the applicant requested to be retired in lieu of being discharged by reason of misconduct due to drug abuse.

In a February 3, 2005, letter to CGPC, the applicant's CO recommended that the applicant be allowed to retire instead of being discharged by reason of misconduct. He also recommended that the applicant be retired in pay grade E-5. The CO noted that the applicant's urine had tested positive for a second time on January 11, 2005 and that he anticipated punishing the applicant at NJP for this violation of the UCMJ.

The CO stated in his letter to CGPC that for several years the applicant's performance had been far below that expected of a journeyman petty officer. He informed CGPC that the applicant had been placed on performance probation on April 6, 2004 and had failed to show improvement during the first few months of probation. The CO stated that the applicant was habitually tardy, failed to communicate with his supervisor, and was inept in his rating and lacked good judgment. The CO also noted that from 1982 through 1992, the applicant had been to NJP for disrespect and unauthorized absences, and that he had been counseled extensively on his poor performance as well as his financial irresponsibility. The CO concluded his letter to CGPC by stating the following:

I recommend that [the applicant] be retired as soon as possible, hopefully no later than 1 April 2005 . . . Because of his dismal performance as a YN1/E6, I recommend that [the applicant] receive permanent retirement as a YN2/E5. He will very likely be discharged as a YN3/E-4 in the wake of his pending NJP! Additionally, because of his repeated misconduct, I recommend that [the applicant] surrender all uniforms and be given a reenlistment code that prevents future military service.

On February 17, 2005, the applicant was taken to NJP for his second drug violation. The CO ordered the applicant to forfeit \$250 per month for two months, to be

reduced to pay grade E-4, to be restricted for 30 days, and to perform extra duties for 30 days.

On February 23, 2005, Headquarters Enlisted Division personnel informed the applicant that he would be discharged no later than April 1, 2005 and that based upon an administrative review of his service record he would be retired in pay grade E-4. On March 31, 2005, the applicant was retired in pay grade E-4.

Prior Case (BCMR No. 2005-085)

The Coast Guard retired the applicant in pay grade E-4 (YN3) on March 31, 2005. About that same time, the applicant filed an application with the Board arguing that he had satisfactorily served in pay grade E-6 and should have been retired in that grade. His application was docketed as BCMR No. 2005-085. The applicant alleged that although CGPC convened a rate determination board to determine the highest held, he was not notified in writing of the determination board or its decision, as he should have been. He also alleged that he was denied the opportunity to consult with counsel and present evidence to the determination board. He stated that he feels that he is being punished twice for the same offenses.

In its advisory opinion in BCMR No. 2005-086, the JAG admitted that the Coast Guard did not refer the matter to a special board of officers to review the applicant's record and make a recommendation to the Commandant on whether the applicant should be retired in a higher grade, as required by Article 12.C.15.g.4. of the Personnel Manual. To cure the error, the JAG recommended that the Board grant alternative relief to the applicant by returning the record to the Coast Guard and directing it to convene a special board of officers, in accordance with Article 12.C.15.g. of the Personnel Manual.

On December 8, 2005, the Board ordered that pursuant to Article 12.C.15.g.4. of the Personnel Manual, the Coast Guard shall

convene a special Board of officers to review the applicant's military record and to recommend to the Commandant whether the applicant should be retired in the highest grade held while on active service. The Coast Guard is directed to provide the applicant with any due process rights to which he may be entitled during this administrative process. The special board shall be convened within 60 days from the date of this final decision. If the Commandant directs the applicant's retirement in a grade higher than YN3/E-4, the Coast Guard shall correct the applicant's record in this regard and pay him any sum due as a result of the correction.

In the Findings and Conclusions, the Board also told the applicant that he could request a further review of his case if he was dissatisfied with the Coast Guard review.

Current Case (BCMR No. 2006-118)

On March 22, 2006, the Coast Guard convened a highest grade held board to review the applicant's record, as directed in BCMR No. 2005-086. The three members of that board voted unanimously to recommend YN2 as the highest grade satisfactorily held by the applicant. In support of its decision, the board stated the following:

The board determined that while a majority of the time [the applicant] served as a First Class was satisfactory, pursuant to the provisions of the Personnel Manual, Article 12.C.15.g. his overall performance for the entire period as an E-6 was not satisfactory. His performance at pay grade E-6 was substandard as evidenced by negative CG-3307 entries, performance probation, unsatisfactory performance evaluations, illegal drug use, and the Commanding Officer's statement regarding [the applicant's] performance in the discharge recommendation.

[The applicant's] enlisted evaluations and record support that he satisfactorily served in the grade of Yeoman Second Class, E-5. During the 4 year and 10 month period of July 1994 through May 1999, there were no performance issues noted and he was subsequently advanced to YN1 in May 1999.

The applicant disagreed with the findings of the highest grade held board. He stated that the board noted his negative page 7s, performance probation, unsatisfactory evaluations, and illegal drug use. The applicant argued that he has already been punished twice for illegal drug use and that the action of the highest grade held board is to punish him a third time for the same offense.

The applicant argued that he deserved to be retired as an E-6 rather than an E-5. He stated that he gave 25 years, 1 month, and 18 days of his life to the Coast Guard and he should not be punished for the rest of his life for his illegal drug use.

VIEWS OF THE COAST GUARD

On September 27, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief. The JAG asserted that the Coast Guard had complied with the order in BCMR No. 2005-086 and with the procedures of Article 12.C.15.g. of the Personnel Manual. He argued that the applicant has not shown by a preponderance of the evidence that the Coast Guard committed an error or injustice in finding that the applicant should be retired in pay grade E-5 as the highest grade satisfactorily held while in the Coast Guard. The JAG attached a memorandum from the Commander, Coast Guard Personnel Command (CGPC), as part of the advisory opinion.

CGPC stated that as required by Article 12.C.15.g.1 of the Personnel Manual, the highest grade held board considered the applicant's entire official record. CGPC further stated that the applicant was afforded the due process required by the pertinent regulation. In this regard, the applicant submitted a statement to the board on February 14, 2006. CGPC pointed out that the board convened on March 22, 2006 and recommended that the highest grade held by the applicant was YN2. The Commandant

approved this recommendation on April 5, 2006. CGPC argued that the applicant has not pointed to any error or injustice in the processing of his case before the highest grade held board.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 28, 2006, a copy of the Coast Guard views was mailed to the applicant with 30 days allotted for him to respond. The BCMR did not receive a response from the applicant.

APPLICABLE REGULATION

Article 12.C.15.g. (Procedure to Certify Highest Grade or Rate on Retirement) of the Personnel Manual provides the following, in pertinent part:

"1. Commander, (CGPC-epm) or (CGPC-opm) 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.

"2. 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 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.

* * *

"4. If the administrative review described in subparagraph 1. does not result in a determination of satisfactory service, the determination will be referred to a special board of officers who will review the member's official records and make its recommendation to the Commandant. The Board acts in an advisory capacity and its recommendation shall be considered as such. The Commandant makes the final determination of satisfactory service."

FINDINGS AND CONCLUSIONS (Analysis)

The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code, and the application was timely. Although 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 concurred in that recommendation finding that sufficient evidence existed in the record to decide the applicant's application without a hearing.

The applicant served on active duty in the Coast Guard for over twenty years. The highest grade he held during this period was pay grade E-6, to which he was advanced in May 1999. The applicant had requested voluntary retirement, which was approved on December 3, 2004, with an effective date of July 1, 2005. However, prior to the effective date of his retirement, he committed two violations of Article 112a (wrongful drug use) of UCMJ in December 2004 and January 2005. He was punished at NJP in January for the December drug offense and was reduced one pay grade to E-5. He was subsequently punished at a February NJP for the January drug offense and was reduced further, to pay grade E-4. Rather than discharging the applicant as a result of the drug offenses and NJPs, the applicant's CO recommended that he be allowed to retire in lieu of discharge. The applicant was retired in March 2005 in pay grade E-4.

In an earlier BCMR application, BCMR No. 2005-086, the applicant challenged the determination to retire him in pay grade E-4. In the advisory opinion for that case, the Coast Guard admitted that it had committed an error by not referring the matter to a highest-grade determination board as required by Article 12.C.15.g.1. of the Personnel Manual. This provision requires that a board be convened to determine the highest grade held should an administrative review result in a determination of unsatisfactory service. By retiring the applicant in pay grade E-4, CGPC determined that he had not served satisfactorily in either pay grade E-6 or E-5. Based on the Coast Guard's admission of error, the Board, in BCMR No. 2005-086, directed the Coast Guard to hold a highest grade held board in the applicant's case. The Board informed the applicant that if he were dissatisfied with the outcome of that board, he could reapply to the BCMR.

On March 22, 2006, the Coast Guard convened a highest-grade held board as directed by the BCMR. That board determined that the highest grade in which the applicant satisfactorily served was pay grade E-5. This recommendation was approved by the Commandant, as required by Article 12.C.15.g.4. of the Personnel Manual. The applicant submitted a new application to the Board, BCMR No. 2006-118, alleging that his service in pay grade E-6 was satisfactory and that he should have been retired in that grade. He alleged that by retiring him in a lower grade, he is being punished a third time for the same drug offenses.

While the applicant disagrees with the Commandant's determination that the highest grade in which he satisfactorily served was E-5, he did not provide any evidence, other than his own statement, that the commandant's determination was erroneous. Article 12.C.15.g.4. of the Personnel Manual gives the Commandant the authority to make "the final determination of satisfactory service" after receiving the recommendation from a highest grade held board. For a correction to his record, the

applicant must prove an error or injustice. He has pointed to no error in this current case.

The applicant argued, however, that it is an injustice for the Coast Guard to retire him in the lower E-5 grade because he served for over three years satisfactorily in pay grade E-6. An injustice is defined as treatment by military authorities that shocks the sense of justice. See *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976). The Board finds no such unjust treatment in this situation. Article 12.C.15.g.2. of the Personnel Manual states that the applicant must have served at least 31 days in the higher grade and that his official record indicate *overall satisfactory performance for the entire period that he served in the higher grade*. In the applicant's situation, as a YN1, he was punished at captain's mast twice for illegal drug use. His punishment each time included a reduction in rate. Based on this evidence alone, the Board finds that the Commandant was justified in finding that the applicant had not served satisfactorily in pay grade E-6 for the entire period he held that grade. The two NJPs coupled with the negative page 7 entries, performance probation, and unsatisfactory performance evaluations that the applicant received while serving in pay grade E-6, which were noted by the highest grade held board, fully support the Commandant's determination that the highest grade satisfactorily held by the applicant was E-5. The applicant offered no evidence, except for his own statement, to prove that his performance as an E-6 was other than as described by his CO and the highest grade held board.

Accordingly, the Board finds that the applicant has not demonstrated an error or injustice in this case and it should be denied.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

