

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 211-130**

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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 application upon receipt of the applicant's completed application on March 23 2011, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated March 20, 2012, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST**

The applicant, a retired [REDACTED]; pay grade E-9) asked the Board to correct his record by reinstating him on active duty or by retiring him with 30 years of active service at his current pay grade. The applicant was involuntarily retired from active duty on December 1, 2011 with approximately 22 years of active service as a result of selection for such retirement by a Career Retention Screening Panel (CRSP).

Prior to enlisting in the Coast Guard in [REDACTED] the applicant had served in the Army and Army Reserve for approximately 4½ years. After enlisting in the Coast Guard, the applicant advanced to pay grade E-8 and was subsequently commissioned a chief warrant officer, pay grade W-2 (CWO2) on September XXXXXXXXX. However, the applicant encountered some difficulty while serving as a warrant officer for which he received a punitive letter of reprimand on XXXXXXXXX for his "reproachable manner by engaging in excessive drinking with his subordinates; conduct that was a violation of station regulations and which undermined [the applicant's] authority as XXXXXXXXXX to enforce standards of behavior." The letter of reprimand also noted that the applicant had received non-judicial punishment for being derelict in the performance of his duties in violation of Article 92 of the Uniform Code of Military Justice (UCMJ), and for fraternizing with enlisted personnel in violation of Article 134 of the UCMJ.

The applicant received a special OER to document the NJP and his XXXXXXXXXXXX permanent relief of duty XXXXXXXX. The applicant stated that after review by a board of officers, his warrant officer commission was revoked and he was discharged from the Coast Guard in XXXXXXXX. However, his request for permission to reenlist in pay grade E-8 was granted and he reenlisted in the Coast Guard on XXXXXXXXXXXX. The applicant stated that after his reenlistment, he earned his CO's recommendation for advancement and in 2010 and 2011 and placed above the cut at XXXXXXXX on the [REDACTED] 2011 advancement list. He was selected for involuntary retirement by the CRSP panel that convened on September 27, 2010. He appealed his involuntary retirement on November 16, 2010. His appeal was denied on January 19, 2011.

## ALLEGATIONS

The applicant alleged that the CRSP decision to involuntarily retire him was unjust because it constituted administrative double jeopardy, because it was a breach of his contract, and because it used 14 U.S.C. § 357<sup>1</sup> improperly.

With regard to administrative double jeopardy, the applicant explained that the CRSP used the same adverse information to involuntarily retire him that the board of officers had already used to revoke his CWO commission and to discharge him from the Coast Guard in XXXX. The adverse information consisted of the NJP, the LOR, the special OER noting the applicant's relief as XXxx, and an alcohol incident letter. According to the applicant, the panel's decision to select him for involuntary retirement could only have been based on the adverse performance documentation because there was no other negative information in his record. The applicant stated that his enlisted performance prior and subsequent to his warrant officer service was impeccable.

With regard to the contract violation issue, the applicant argued that he has upheld the terms of his recent enlistment contract but the Coast Guard has not. The applicant reenlisted for an indefinite period in XXXX, which allowed him to remain in the service for up to 30 years. He stated that he does not know whether his involuntary retirement was due to the needs of the service or due to his performance.

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<sup>1</sup> The pertinent provisions of 14 U.S.C. § 357 are: "(a) Enlisted Personnel Boards shall be convened as the Commandant may prescribe to review the records of enlisted members who have twenty or more years of active military service. (b) Enlisted members who have twenty or more years of active military service may be considered by the Commandant for involuntary retirement and may be retired on recommendation of a Board—(1) because the member's performance is below the standards the Commandant prescribes; or (2) because of professional dereliction. (c) An enlisted member under review by the Board shall be—(1) notified in writing of the reasons the member is being considered for involuntary retirement; (2) allowed sixty days from the date on which counsel is provided . . . to submit any matter in rebuttal. (3) provided counsel . . . to help prepare the rebuttal . . . and to represent the member before the Board . . . (4) Allowed full access to and be furnished with copies of records relevant to the consideration for involuntary retirement prior to submission of the rebuttal . . . and (5) allowed to appear before the Board and present witnesses or other documentation related to the review."

Subsection (j) states that "When the Secretary orders a reduction in force, enlisted personnel may be involuntarily separated from the service without the Board's action."

With regard to the legality of the CRSP, the applicant argued that the Secretary violated the spirit and intent of 14 U.S.C. § 357(j) by using it as a workforce shaping tool to enhance the opportunity for advancement of junior personnel by involuntarily retiring members with more than 20 years of service without the board action required by 14 U.S.C. § 357(b)-(i). The applicant pointed out that 14 U.S.C. § 357(j) states “When the Secretary orders a reduction in force, enlisted personnel may be involuntarily separated from the service without the [enlisted personnel board’s] action.”

The applicant stated that the Secretary approved a Coast Guard memorandum that authorized involuntary retirements without board action, but she did not order a reduction in force. According to the applicant, the memorandum approved by the Secretary on behalf of the Coast Guard states that “the [CRSP] is required to address high retention and its adverse impact on workforce flow.” The applicant also stated:

Of the 1181 candidates, 377 were selected for involuntary retirement; however at the end of 2011, the Coast Guard workforce numbers will remain the same. . . . In fact the Coast Guard boasts that over 1000 advancements will result from this measure. The [CRSP’s] precept . . . states that there is no quota for the number of personnel selected for involuntary retirement; further confirming that this was not a reduction in force but a cost effective means to conduct a panel. The Secretary . . . provided authorization for involuntary retirements without Board action, yet the Coast Guard proceeded with a performance-based panel, clearly as a means to circumvent the law. Unfortunately for those affected by the panel’s decisions, conducting a panel in such a manner did not afford each of the 1181 candidates due rights or process.

The applicant stated that although convening a board in accordance with 14 U.S.C. § 357 (a)-(i) would have been costly, it would have afforded each candidate certain rights that they were denied with the CRSP. Members undergoing an enlisted personnel board would have been

- notified in writing of the reasons the member is being considered for involuntary retirement;
- allowed 60 days from the date on which counsel is provided to submit a rebuttal;
- provided with counsel to assist in preparing the rebuttal and to represent the member before the board;
- allowed full access to and be furnished with copies of records relevant to the consideration for involuntary retirement prior to submission of the rebuttal; and
- allowed to appear before the board and present witnesses or other documentation related to the review.

The applicant stated that the only due process provided by the CRSP to candidates was 15 days to appeal an adverse decision of the CRSP and the basis of the appeal was limited to material error, newly discovered evidence, or the presence of improper documents in the record.

The applicant argued that the Coast Guard already has workforce management tools in place such as High Year Tenure (HYT) and enlisted personnel boards under 14 U.S.C. § 357 (b). The applicant argued that adhering to the HYT policy would have achieved similar results at the E-5 and E-6 level and possibly the E-7 level. The applicant stated that using the HYT policy would have provided long term effects whereas using the CRSP was only a temporary measure. The applicant concluded his statement with the following:

Beyond the unlawful use of 14 U.S.C. 357 by conducting the CRSP in the manner that they did; which was unjust to an additional 376 Coast Guardsman, the Coast Guard further disregarded my rights of double jeopardy and which resulted in a breach of contract. Furthermore, the panel did not adhere to their own precept or goals. I have shown my value to the organization and ability to advance within the organization, which will in turn allow others to advance. My retirement as senior chief petty officer or advancement to master chief petty officer will afford the same members the opportunity to advance in their respective pay grades regardless.

#### **BACKGROUND FOR THE CRSP**

#### **ALCOAST 165/10<sup>2</sup>**

On April 1, 2010, the Coast Guard issued ALCOAST 165/10 entitled “ACTIVE DUTY MILITARY MANAGEMENT.” It stated the following in pertinent part:

Within our active duty workforce, we continue to experience historically high retention levels in both our officer and enlisted ranks. Currently we have more active duty enlisted members and officers than funded billets. Looking ahead to fiscal year (FY) 2011, the president’s budget for the Coast Guard projects billet losses that will exacerbate this overage in our active duty workforce. A military workforce requires flows at all levels to ensure career progression for our people. Absent normal separation rates at all levels, opportunities for advancement and promotion become significantly reduced, thus increasing time-in-grade at every level.

Over the past six months, the Coast Guard has implemented several initiatives to reduce the impacts of high retention, including eliminating all selective re-enlistment bonuses (SRB), waiving up to 12 months time-in-grade requirements for retirements, and reducing accessions to TRACEN Cape May to their lowest level on record. Officer accessions have also been reduced. *Even with this careful management, the active duty workforce still remains above our funded*

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<sup>2</sup> An ALCOAST is a directive from the Commandant, the Vice-Commandant, or the Chief of Staff of the Coast Guard.

*level. This situation, coupled with the planned military billet reductions proposed in the President's FY 2011 budget necessitates the use of additional workforce management tools. (Emphasis added.)*

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*To manage the enlisted workforce: CG-PSC-EPM will consider waiving obligated service requirements based on needs of the service.*

The President's FY 2011 budget proposal has not yet been approved by Congress . . . we must prepare now to match the number of people in our active duty workforce to the number of funded billets. To help mitigate the impact of these overages, we will: [Insource] work presently conducted by contractors [and] Market transition . . . to the Reserve.

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If the above measures are unable to align body to billet levels . . . We will use a performance-based retention panel to align the enlisted work force.

#### **ALCOAST 333/10**

June 25, 2010, the Coast Guard issued ALCOAST 333/10 that suspended the voluntary separation programs due mainly to Deep Water Horizon. The ALCOAST also noted the following:

[Through voluntary separation programs for both enlisted and officers], to date we have processed over 700 officer and enlisted member requests from all levels of the service.

[The voluntary separation] initiative has met our desired goals and provided some relief to our personnel strength. There is still some concern due to our continued high retention that other workforce shaping initiatives may be needed to ensure we have the vibrant and healthy workforce for the long term, including normal accessions and advancement opportunities.

#### **ALCOAST 408/10**

The Coast Guard issued ALCOAST 408/10 on August 5, 2010. It stated the following in pertinent part:

Over the course of the last two years the entire military workforce has experienced record high retention that has decreased accessions, reduced A-school quotas, and significantly slowed down advancements/promotions. To ensure viability and growth potential, we must take steps to ensure that we maintain workforce flow and advancement opportunities.

Similar workforce shaping tools similar to those of officers do not exist for the enlisted workforce. Given our high retention rates, this inconsistency compromises our ability to maintain a healthy advancement flow. . . . It is necessary to implement an additional workforce tool. Our goal is to ensure that the Coast Guard has vibrant and healthy enlisted workforce for the long term, one with consistent accession levels and steady advancement opportunities.

To meet this goal, we are planning to hold a career retention screening panel (CRSP) for enlisted personnel who [who are retirement eligible].

### **Commandant's Request for Coast Guard Active Duty Enlisted Career Retention Screening Panel (CRSP)**

In an August 13, 2010 memorandum, the Commandant requested approval from the Secretary to conduct an active duty enlisted CRSP in the fall of 2010 to address high enlisted retention and its adverse impact on the workforce flow. The Coast Guard stated that 14 U.S.C. § 357 (j) and 10 U.S.C. § 1169<sup>3</sup> gave the Secretary the authority to order the CRSP and that “[p]er Title 14 U.S. Code, Section 3357(j), the Secretary of Homeland Security *must provide authorization for involuntary retirements without board action.*” (Emphasis added.) The memorandum further stated the following:

The Coast Guard has taken steps to resolve the retention problem. We have reduced our accessions to the lowest level in our records. We temporarily waived obligated service requirements to allow voluntary separations. However, the majority (91%) of over 700 recent voluntary separations were from junior enlisted ranks, and not our more senior workforce. If allowed to continue, this trend, along with our reduced accessions, will result in an imbalance in the enlisted workforce's experience level for many years to come.

The panel will review approximately 1600 records, including the records of all first class petty officers and below with twenty or more years of service and all chief petty officers and above with twenty or more years of service and three years or more time in grade. Because the panel will only review those with twenty or more years of service, every one reviewed will be retirement eligible. Members asked to involuntary retire will still be entitled to full retirement benefits.

Your endorsement of this memo will provide the Coast Guard with the legal authority required to conduct this panel.

The Secretary approved the Commandant's request to hold a CRSP to select members for retention.

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<sup>3</sup> Section 1169 of title 10 of the United States Code states that “no regular enlisted member of an armed force may be discharged before his term of service expires, except—(1) as prescribed by the Secretary concerned; (2) by sentence of a general or special court-martial; or (3) as otherwise provided by law.”

## **ALCGENL 140/10**

ALCGENL 140/10 announced to enlisted personnel the implementation of the CRSP and that it was scheduled to convene in the fall at PSC to assess the continued service of retirement eligible personnel who meet the following criteria:

- A. All retirement eligible E6 and below with 20 or more years of active military service as of 1 September 2010.
- B. All retirement eligible E-7 and above with 20 or more years of active military service who have three or more years time in grade as of 1 September 2010.

Section 12.B. stated that personnel selected for involuntary retirement can appeal the decision based only on material error, newly discovered evidence, or the presence of improper documents in the member's personnel file.

Section 12.F. stated that personnel may request a waiver extending beyond 1 December 2011, waivers were to be considered based on service need and approval by PSC-EPM.

## **ALCOAST 464/10**

ALCOAST 464/10 issued on September 21, 2010 announced further guidance with regard to the CRSP and noted that it would be held on September 27, 2010 and that it would be performance based. In this regard, the ALCOAST provided the following guidance, in pertinent part:

- 4. Documented misconduct and substandard or marginal performance are the primary reasons CRSP eligible candidates will be considered for involuntarily retirement . . . The focus will be performance within the last five years, or since the members advancement to their current grade . . . whichever timeframe is longer . . . The factors listed below will indicate to the panel that an individual may not meet the performance requirements for continuation . . .
  - A. Substandard performance of duty to include receipt of a not recommended for advancement based on an unsatisfactory conduct mark or declining performance with the same approving official in the rating chain.
  - B. Receipt of an enlisted evaluation report with a minimum average characteristic marks of 3.5 or below.
  - C. Moral or professional dereliction, such as relief for cause.
  - D. Failure to meet service norms or regulations concerning alcohol use and body fat standards.
  - E. Documented misconduct involving violation of the UCMJ, e.g., non-judicial punishment, or conviction by military court-martial/conviction by a civilian court.
  - F. Other documented adverse information clearly indicating the CRSP candidates' continuation may be inconsistent with national security interests

or may otherwise not be in the best interest of the Coast Guard, such as losing one's security clearance.

- G. Financial irresponsibility, such as failure to pay just debts or a pattern of government credit card delinquency, including revocation of the government credit card due to misuse or failure to pay outstanding balance.
- H. Performance probation
- I. Failure to demonstrate upward mobility by not qualifying or participating in the service wide examination.

The pertinent ALCOAST stated that the panel may consider the above factors along with the entire official military personal data record to select candidates for the continuation. While the list of factors is not all inclusive, it provides the performance indicators the panel will consider to select those CRSP candidates for involuntary retirement.

The CRSP met on September 27, 2010 and selected 377 members for involuntary retirement out of 1,181 candidate records considered. The applicant was one of those selected for involuntary retirement. The results of the panel were subsequently approved by the Commandant.

### **VIEWS OF THE COAST GUARD**

On September 9, 2011, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny relief. The JAG argued that the CRSP was properly convened and duly composed in accordance with Coast Guard policy and law. The JAG stated that on September 21, 2010, the Secretary approved the Commandant's request to hold a CRSP in accordance with 14 U.S.C. § 357(j) and 10 U.S.C. § 1169 to address high retention and its adverse impact on the Coast Guard workforce flow.

The JAG stated that the CRSP convened on September 27, 2010, and considered the records of 1,181 members for involuntary retirement, including the applicant's record. Three hundred seventy-seven enlisted members were selected for involuntary retirement. The CRSP recommendations were reviewed and approved by the Commandant.

The JAG asserted that the applicant has failed to substantiate an error or injustice regarding the CRSP recommendation for his involuntary retirement from the Coast Guard and has therefore failed to meet his burden of proof. The JAG stated that the applicant's argument that the CRSP recommendations are unlawful and should be overturned is without merit. The JAG stated that the applicant's assertions are speculative at best and fail to show that the Coast Guard violated policy or law regarding the CRSP processes. The JAG noted that the applicant was afforded an additional level of due process by submitting an appeal on November 16, 2010, which was denied.

The JAG attached comments from the Commander, Personnel Service Center (PSC) to the advisory opinion. PSC argued that 10 U.S.C. § 1169 authorized the Secretary to prescribe how an enlisted member may be "discharged before his term of service expires" and that 14 § 357(j) permits Coast Guard enlisted personnel to be involuntarily retired from the service



without an individual hearing before a board *when the Secretary orders a reduction in force*. (Emphasis added.) PSC further stated:

Because the Coast Guard has recently experienced historically high retention rates for senior enlisted personnel, on September 21, 2010, the Secretary of Homeland Security exercised her authority under both 10 U.S.C. § 1169 and 14 U.S.C. § 357(j) to direct the Coast Guard to conduct an active duty enlisted CRSP to efficiently identify retirement eligible enlisted personnel for involuntary retirement.

By identifying senior, retirement eligible personnel, and directing their separation from the Service, the Secretary and the Coast Guard acted to accelerate advancement of junior members by returning advancement and “A” School opportunities to adequate levels and by reinvigorating accession of recruits into the Coast Guard. The CRSP considered the records of 1,181 retirement eligible members for potential involuntary retirement including the applicant . . .

With regard to the applicant’s “administrative double jeopardy” argument, the Coast Guard stated that the applicant’s view that since one administrative action was taken based on information properly documented in his record no additional actions could be taken based on that same information is wrong. In this regard, PSC pointed to the paragraph 5 of the guidance provided to the CRSP, which states in pertinent part:

Just as you must consider positive performance, you must consider incidents of misconduct and substandard performance documented in a CRSP candidate’s official Military Personnel Data Record (PDR) when determining those CRSP candidates to be recommended for continuation. For those CRSP candidates who are recommended for continuation and who have received disciplinary action, or whose privileged information record contains matter relating to conduct or performance of duty that occurred **within the past five years** or since active duty advancement to their current pay grade . . . whichever is longer . . . must be fully disclosed when the slates are briefed for recommendation . . . prior to the final panel decision. (Emphasis added to quote.)

PSC noted that the applicant did not allege that the information contained in his PDR was inaccurate or improperly placed in his record. Therefore, the applicant he has not shown that the information was improperly considered.

### **APPLICANT’S REPLY TO THE ADVISORY OPINION**

On January 27, 2012, the Board received the applicant’s reply to the views of the Coast Guard. The applicant disagreed with the advisory opinion’s conclusion that he had not submitted evidence that the Coast Guard committed an error or injustice.

The applicant’s major contention is that the Secretary of Homeland Security violated the intent of 14 U.S.C. § 357(j) by using the law as a workforce shaping tool to screen and

involuntarily retire members with 20 or more years of service for the stated goal of enhancing junior enlisted advancement instead directing involuntary retirements due to a reduction in force. The applicant points out that 14 U.S.C. § 357(j) states “When the Secretary orders a reduction in force, enlisted personnel may be involuntarily separated from the service without the [enlisted personnel board’s] action.”

The applicant stated that the advisory opinion’s statement that the Secretary enacted the CSRSP in order to “accelerate advancement of junior enlisted members by returning advancement and “A” school opportunities to adequate levels and by reinvigorating accession of recruits into the Coast Guard” is an admission that the Secretary did not approve the CSRSP to implement an order for a “reduction in force,” as required by 14 U.S.C. § 357(j). He argued that since the Secretary used 14 U.S.C. § 357(j) as a workforce shaping tool, he should have been afforded the due process as outlined in 14 U.S.C. § 357 (b), (c), and (f).

The applicant asserted that a workforce reduction is intended to reduce the overall level of personnel in the service and is not to be used as a management tool to increase advancement opportunities for enlisted personnel. The applicant asserted that at the time the Coast Guard conducted the CSRSP there was an increase in overall manning levels from 34,540 at the end of 2010 to 35,207 at the end of 2011. Therefore he asserted that there was no reduction in force.

The applicant reasserted his argument that he has been the victim of administrative double jeopardy. He stated again that it appears that the only reason that he was selected for involuntary retirement was because of the incident that occurred when he was a warrant officer. He stated that he has paid for that transgression by losing his CWO commission and that that information should not be used against him a second time. He stated that the Coast Guard allowed him to reenlist as an E-8 on XXXXXXXXX. He stated that he was advanced to master chief petty officer (E-9 (highest enlisted pay grade)) on XXXXXXXXXXXX. (He was involuntarily retired on XXXXXXXXXX). He argued that the Coast Guard’s actions are contradictory. On the one hand the CSRSP found that he did not meet the performance requirements to continue to serve, and on the other hand, the Coast Guard found that he met the performance requirements to be advanced to E-9.

The applicant stated that the advisory opinion failed to address whether the Coast Guard violated its contract with him. In this regard, the applicant stated the following:

Pursuant to the Coast Guard Personnel Manual . . . 1.G.6 states, “a member entering an indefinite contract is authorized to serve on active duty up to the last day of the month that he or she completed 30 years of active service.” On XXXXXXXX, I signed an indefinite reenlistment contract and my performance from this point has been superb as evidenced by my selection to E-9. My obligations of my indefinite reenlistment contract have been met and the Coast Guard is violating their end of the agreement with selection of the CSRSP and not providing me with my due process rights under 14 U.S.C. § 357 (b) (c) and (f).

## **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 section 1552 of title 10 of the United States Code. The application was timely.

2. On August 13, 2010, citing 10 U.S.C. § 1169 and 14 U.S.C. § 357(j), the Commandant requested the Secretary's approval for the Coast Guard to conduct a CRSP to address enlisted high retention and its adverse impact on workforce flow by reviewing the records of approximately 1,600 retirement-eligible enlisted members and by involuntarily retiring those selected for retirement because the voluntary separation program did not reduce the senior enlisted workforce sufficiently to meet service need.

Section 1169 of title 10 of the United States Code states that "no regular enlisted member of an armed force may be discharged before his term of service expires, except—(1) as prescribed by the Secretary concerned; (2) by sentence of a general or special court-martial; or (3) as otherwise provided by law."

Section 357(j) of title 14 of the United States Code states, "When the Secretary orders a reduction in force, enlisted personnel may be involuntarily separated from the service without the Board's actions."

3. The applicant argued that his selection for involuntary retirement by the CRSP was erroneous and unjust because the review subjected him to administrative double jeopardy, because his involuntary retirement was a breach of his enlistment contract, and because the CRSP was convened in violation 14 U.S.C. § 357(j).

4. The applicant's allegation that the CRSP was convened in violation of 14 U.S.C. 357(j) is by far the most serious and the Board will address it first. In this regard, the applicant argued that his involuntary retirement under 14 U.S.C. § 357(j) was a violation of that statute because the Secretary never ordered a reduction in force, which was a necessary condition for the Coast Guard to involuntarily retire members without affording them hearings that included the due process rights articulated in 14 U.S.C. § 357 (b), (c), and (f). The applicant further asserted that the Coast Guard used 14 U.S.C. § 357(j) as a workforce management tool to involuntarily retire members so that junior enlisted personnel could have advancement opportunities.

5. The advisory opinion argued that 10 U.S.C. § 1169 authorizes the Secretary to prescribe how an enlisted member may be discharged before his term of service expires and that 14 U.S.C. § 357(j) permits Coast Guard enlisted personnel to be involuntarily retired from the service without receiving an individual hearing before an enlisted personnel board *when the Secretary orders a reduction in force*. The advisory opinion further argued that the Secretary exercised her authority under both 10 U.S.C. § 1169 and 14 U.S.C. § 357(j) on September 21, 2010, by directing the Coast Guard to conduct an active duty enlisted CRSP to identify retirement eligible enlisted personnel for involuntary retirement "to accelerate the advancement of junior enlisted members by returning advancement and "A" school opportunities to adequate levels and by reinvigorating accession of recruits into the Coast Guard."

6. Therefore, the question before this Board is whether the Secretary's approval of the Coast Guard's request for a CRSP to address high retention and its adverse impact on workforce flow by involuntarily retiring some enlisted members was, in fact, a reduction in force order. The statute does not define reduction in force. The Secretary of Transportation citing *FDIC v. Meyer*, 114 S. Ct. 996 (1994) stated in BCMR No. 167-94 that when there is no statutory definition for a particular term, it should be defined in accordance with its ordinary or natural meaning. A RIF (reduction in force) is the reduction in staff of a government organization, especially for budgetary reasons. See *The Random House Dictionary of the English Language*, the Unabridged Edition, p. 1232. However, a reduction in force can occur for other than budgetary reasons. In *Rahlf, Stelter & Johnson v. Mo-Tech Corp., Inc.*, 642 F.3d 633, 638 (8th Cir. 2010), the court recognized as legitimate Mo-Tech's reduction in force "because of shifting (and reduced) customer needs as well as concerns about continued profitability." Also in *Williams v. Emco Maier Corporation*, 212 F. Supp 2d 780, 784 (D.OH 2002), citing *Barnes v. GenCorp Inc.*, 896 F.2d 1457 (6<sup>th</sup> Cir 1990), the court stated "a reduction in force situation occurs when business considerations cause an employer to eliminate one or more positions within the company." Although neither the Coast Guard nor the Secretary used the words "reduction in force" the Board finds that at the time the Secretary authorized the use of the CRSP to select enlisted members E-6 and above with 20 or more years of active duty for involuntarily retirement, the Coast Guard was undergoing a reduction in force situation.

7. The Board is persuaded that the Coast Guard was undergoing a reduction in force based on the issuance of a series of ALCOASTs that began with ALCOAST 165/10 on April 1, 2010. In ALCOAST 165/10, the Commandant acknowledged that the Coast Guard had more personnel than it had funded billets and that the President's budget for FY 2011 projected billet losses that would exacerbate the situation, and therefore, it was necessary to implement workforce management tools. The Commandant's plan to alleviate the overage of personnel was first to use voluntary measures to get people to leave the service, but if the voluntary management tools failed to resolve the problem, a performance-based retention panel (the CRSP) to align the enlisted workforce would be implemented. In ALCOAST 333/10, issued on June 25, 2010, the Commandant stated that voluntary separation measures were suspended due to Deep Water Horizon, and that although the "[voluntary separation program] initiative has met our desired goals and provided some relief to our personnel strength, other workforce shaping initiatives may be needed to ensure we have the vibrant and healthy workforce for the long term." On August 5, 2010, in ALCOAST 408/10, the Commandant announced that the service was still experiencing high retention in its enlisted ranks that inhibited the Coast Guard ability to maintain a healthy advancement flow for the long term. To alleviate that problem, the Commandant announced that that it intended to hold a CRSP for members who were retirement eligible (20 or more years of service). On August 13, 2010, the Coast Guard requested the Secretary's approval under 10 U.S.C. § 1169 and 14 U.S.C. § 357(j) to conduct a CRSP that would lead to the involuntary retirement of members selected for retirement. The Board interprets the Coast Guard's announcement in ALCOAST 165/10 that it needed to reduce its numbers because it had more personnel than funded billets and was anticipating a cut in funding for billets in the FY 2011 budget to be a reduction in force decision.<sup>4</sup> The Coast Guard's plan to

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<sup>4</sup> The ALCOAST also noted the Coast Guard's problem with workforce flow and stated "A military workforce requires flows at all levels to ensure career progression for our people. Absent normal separation rates at all levels,

reduce its forces included voluntary as well as involuntary measures. The Coast Guard notified members that a CRSP would be convened to align the enlisted workforce if voluntary discharge programs were not effective.

Although the Coast Guard was able to reduce its numbers through voluntary separations, that program did not reduce the senior enlisted ranks to a number that allowed for workforce flow and for future stability of the Coast Guard. The Commandant described this as a problem that “will result in an imbalance in the workforce’s experience level for many years to come, if not corrected.” The CRSP and the involuntary retirement of those selected for retirement allowed the Coast Guard to realign its force as part of its overall plan to reduce its numbers and effectively manage its personnel. The board is not aware of any law or regulation that states that a reduction in force cannot include a reshaping of the workforce during a reduction in force or a reshaping of the workforce after a reduction in force occurs. In light of the above, the Board finds that the Coast Guard’s use of 14 U.S.C. § 357(j) was proper because it obtained the necessary approval for that portion of the Coast Guard’s reduction in force plan that called for the involuntary retirement of certain members with 20 or more years of service without board action.

8. With regard to the allegation of administrative double jeopardy, the applicant has presented no authority which states that only one administrative action may be taken based upon properly documented adverse material in the service record. Once good or negative performance is properly placed in a service record, it is there for each succeeding board or entity to review as necessary. The Board notes that the applicant does not argue that any of his positive performance information should be disregarded. Moreover, the applicant was not treated any differently than other members of the Coast Guard who had adverse material in their records. Double jeopardy refers to protection from a second criminal prosecution for the same crime. The CRSP was not a criminal proceeding and the applicant’s selection for involuntary retirement was not a punishment. The applicant’s selection for involuntary retirement was an administrative measure based on the needs of the service. The Board is not persuaded by the applicant’s administrative jeopardy argument.

9. The applicant’s claim that he is entitled to relief because the Coast Guard violated his contract is not persuasive. In *Giglio v. United States*, 17 Cl. Ct. 160, 166 (1989), the court stated that “[i]t is established . . . that enlisted personnel in the military service do not have a contractual right to remain in the services until the expiration of their enlistment terms.” However, that court, citing *Waller v. United States*, 198 Ct. Cl. 908, 913 (1972), recognized that “an administrative discharge issued to an enlisted person prior to expiration of his or her enlistment term is void, if it exceeds applicable statutory authority, or ignores pertinent procedural regulations, or violates minimum concepts of basic fairness.” *Giglio* at 166. None of which is present in the applicant’s situation.

10. The applicant argued that there was no reduction in force because by the end of FY 2011 there were more individuals in the Coast Guard than at the end of FY 2010. The Court

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opportunities for advancement and promotion become significantly reduced, thus increasing time-in-grade at every level.”

stated in *Williams v. Emco Maier Corporation* at 785, that the fact that a company employs more people than it did when the reduction in force began does not mean that the company did not engage in a reduction in force. The court further stated that “a company facing financial hardships may wish to eliminate certain positions in an effort to alleviate those difficulties, while still adding other positions in an effort to improve the company’s operations.” *Id.* The fact that the Coast Guard may have had more personnel at the end of FY 2011 than at the end of FY 2010 does not prove that there was not a reduction in force. The applicant has produced insufficient evidence that any increase in the Coast Guard’s active duty personnel during the reduction in force was for other than improving the Coast Guard’s operations and long term stability.

11. The applicant alleged that there were other workforce shaping tools available to the Coast Guard other than involuntary retirements. However, apparently the Coast Guard determined that a CRSP to select members for involuntary retirement met the needs of the Service at that particular time. The fact that the Coast Guard chose one method over another does not prove that the method used was in error or unjust.

12. Accordingly, the applicant has failed to prove an error or injustice with regard to his involuntary retirement and the application should be denied.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

**ORDER**

The application of XXXXXXXXXXXXXXXXXXXXXXXX for correction of his military record is denied.

