

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2012-198**



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**FINAL DECISION**

This is a proceeding under 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 August 21, 2012, after receiving the applicant's completed application, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 12, 2013, 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 honorably discharged on June 30, 1995, asked the Board to correct his record to show that he was retired with 20 years of service, instead of discharged with more than 18 years of service. The applicant alleged that because, at the time of his discharge, he had more than 18 years of active duty in the Navy and Coast Guard, he was entitled to be retained on active duty until he could retire with 20 years of service under 10 U.S.C. § 1176.<sup>1</sup> Moreover, he argued, because of his time in service, the Coast Guard could not discharge him without granting him a hearing before an administrative discharge board (ADB). However, he was denied his right to an ADB and discharged without any due process after more than 18 years of active duty.

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<sup>1</sup> Paragraph (a) of the statute, 10 U.S.C. § 1176 (1995), states the following:

A regular enlisted member who is selected to be involuntarily separated, or whose term of enlistment expires and who is denied reenlistment, and who on the date on which the member is to be discharged is within two years of qualifying for retirement under section 3914 or 8914 [which authorize Army and Air Force retirements] of this title, or of qualifying for transfer to the Fleet Reserve or Fleet Marine Corps Reserve under section 6330 [which authorizes Navy and Marine Corps retirements] of this title, shall be retained on active duty until the member is qualified for retirement or transfer to the Fleet Reserve or Fleet Marine Corps Reserve, as the case may be, unless the member is sooner retired or discharged under any other provision of law.



The applicant wrote on his application form that he discovered the alleged error on January 1, 2011, because that is the date he learned he had been entitled to an ADB, which was not provided.

### SUMMARY OF THE RECORD

[REDACTED]

Eight days later, on May 20, 1985, the applicant enlisted in the Coast Guard for four years, through May 19, 1989, as a [REDACTED]. Following indoctrination, he was assigned to an [REDACTED]. He earned his first Coast Guard Good Conduct Medal on May 19, 1988.

On June 15, 1988, the applicant submitted a request to transfer from the [REDACTED] which he found dissatisfying, to the [REDACTED]. He asked for an assignment to train for this rating at "A" School in 1989. His request was initially denied, but after he resubmitted it in October 1988, it was granted. The District Commander noted that the applicant had an excellent performance record and had "been counseled and fully understands the contents of Chapter 5, CG Personnel Manual," which concerns the requirements for advancement. On February 6, 1989, the applicant extended his enlistment for 26 months, through July 19, 1991, to obligate sufficient service to attend "A" School. On June 16, 1989, he successfully completed "A" School and became an [REDACTED] E-4).

On June 10, 1991, the applicant extended his enlistment for another two years, through July 19, 1993; on December 9, 1992, he extended it for 7 months, through February 19, 1994; on May 26, 1993, he extended it for 6 months, through August 19, 1994; on August 20, 1994, he extended it for 9 months, through May 19, 1995; and on March 27, 1995, he extended it for 2 months, through July 19, 1995. The purpose of these short extension contracts is not apparent in the record.

During his enlistment, the applicant earned a second Coast Guard Good Conduct Medal on May 19, 1991, Coast Guard Unit Commendation Medals, Humanitarian Service Medals, and several Letters of Appreciation and Page 7s for hard work and devotion to duty. He successfully completed training in [REDACTED] maintenance and qualified as an [REDACTED], but he never advanced above [REDACTED] E-4 through the servicewide examinations (SWEs) for advancement.<sup>2</sup>

<sup>2</sup> Following an SWE, members in each rating were placed on an advancement list based on their total number of points out of the maximum possible of 175 points: SWE score (80 points), performance marks (50), time in service (20), time in present rating and grade (10), medals and awards (10), and amount of sea duty (05). Personnel Manual, Art. 5.C.3.b. For each advancement list, the Personnel Command would announce a cutoff based on the number of vacancies expected in the next higher rating in the coming year, and only those whose names appeared above the cutoff were guaranteed advancement. Personnel Manual, Art. 5.C.31.

The record before the Board contains no documentation concerning the applicant's discharge apart from his discharge form, DD 214,<sup>3</sup> which shows an honorable discharge on June 30, 1995, for the "convenience of the Government" with a JBC separation code and an RE-3R reentry code. The JBC code denotes an involuntary discharge<sup>4</sup> when a member has "attained maximum service or time in grade" under the Coast Guard's High Year Tenure (HYT) program, which is described below. The applicant had completed a total of 18 years, 2 months, and 13 days of active duty.

### HIGH YEAR TENURE (HYT) PROGRAM

On November 15, 1993, when the Coast Guard needed to reduce its workforce, the Commandant issued COMDTINST 1040.10, "Enlisted High Year Tenure (HYT)," which introduced the following new policy:

1. PURPOSE. The Instruction announces Coast Guard High Year Tenure (HYT). ... [HYT] establishes Professional Growth Points (PGP) for paygrades E-4 through E-9. The PGP's represent the maximum time in service for each pay grade. Advancement earns a higher PGP and increased time in service. PGP's will affect the time for which a member may be eligible to reenlist/extend. This Instruction also prescribes procedures to request waivers of the PGP's. All active duty and reserve enlisted personnel and enlisted supervisors, officer and civilian, should be familiar with the contents of this Instruction.

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4. DISCUSSION. The Coast Guard, like all other federal agencies, will continue to face the formidable challenge of accelerating technical change in a constrained budget environment. Properly managing the enlisted workforce is paramount if we are to successfully meet this challenge. A "healthy" enlisted workforce affords promotion opportunities and timely entry level training (Class "A" schools). It is also an experienced workforce, but not to the point that it becomes too costly. In the past, the Coast Guard has relied on the "recruiting valve," voluntary early-outs, and on rare occasions, reductions in force (RIF's) to manage the size and shape of the enlisted workforce. Additional tools are necessary if we are to improve this process. HYT is one such tool; it has been used successfully by the Department of Defense for many years. The Coast Guard is trying to improve management of the enlisted workforce by better balancing the need for experienced personnel with greater advancement and training opportunities. ...

5. PROCEDURES. Unit commanding officers and officers in charge shall:

a. Ensure all personnel are familiar with the contents and requirements of this Instruction ...

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Enclosure (1) to COMDTINST 1040.10

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<sup>3</sup> This application was docketed based on copies of numerous military records provided by the applicant himself. Upon receiving the application in March 2011, the Chair repeatedly ordered his records from the National Personnel Record Center (NPRC) in St. Louis, but neither the NPRC nor the Coast Guard could find his records. According to letters from NPRC dated February 16, 2011, and January 9, 2012, NPRC received and registered the applicant's military records after his discharge in 1995, but they were removed from NPRC's file area in response to a prior inquiry (from an unidentified office) and cannot now be found. Therefore, the Chair agreed to docket the case based upon the records submitted by the applicant.

<sup>4</sup> Because his discharge was involuntary under HYT, the applicant was eligible for separation pay if he agreed to enlist in the Reserve upon his discharge. Separation pay is calculated as "10 percent of the product of (A) his years of active service, and (B) 12 times the monthly basic pay to which he was entitled at the time of his discharge or release from active duty." 10 U.S.C. § 1174(b) and (d). For the applicant in 1995, separation pay would have been 10% x 18 years x 12 months x \$1,322.40, which equals \$28,563.84. (The basic pay of an E-4 does not increase with time in service beyond 6 years. See <http://www.dfas.mil/militarymembers/payentitlements/militarypaytables.html>.)



POLICIES AND PROCEDURES CONCERNING ADMINISTRATION  
OF HIGH YEAR TENURE (HYT)

1. GENERAL INFORMATION

a. Background. High Year Tenure (HYT) will help the Coast Guard provide more consistent training and advancement opportunities to the enlisted workforce. ... With more balanced and consistent opportunities, the Coast Guard hopes to retain the most highly motivated personnel. ...

b. Goal. HYT is one of a number of measures designed to increase personnel flow and encourage members to advance in their rating. ...

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d. Implementation. In light of the significance of the changes which HYT introduces, a two-year implementation period has been prescribed. This will be retroactive to 1 July 1993 and extend through 30 June 1995. HYT will be fully effective on 1 July 1995. Effective 1 July 1995, everyone (all pay grades) who does not conform to HYT's PGP or has over 30 years of active service, and does not have an authorized waiver, will be separated or retired. The terms of this Instruction will override all existing enlisted contracts.

2. CRITERIA.

a. Professional Growth Points are:

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(4) E-4 – 7 years active Coast Guard service or 10 years active military service, whichever is greater. May reenlist/extend up to, but not beyond 7 years, 1 month active Coast Guard service or 10 years, 1 month active military service.

(5) E-5 – 20 years active military service. May reenlist/extend up to, but not beyond 20 years, 1 month active military service.

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b. Members unable to meet HYT's requirements will be discharged (with appropriate compensation) or retired at the end of the month in which they exceed their PGP. ...

c. ... Extension agreements in whole month increments ... which comply with HYT's PGP's are authorized ...

d. Personnel who have competed in the Servicewide Examination (SWE) and are above the cutoff on the eligibility list for advancement can reenlist/extend for terms authorized for their prospective vice current grade level. ...

e. ... Personnel with 20 or more years of service may request retirement in lieu of discharge ...

g. Members discharged under HYT will be eligible for separation pay ...

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i. Keeping track of one's career in relation to HYT's PGP's will be the member's responsibility. Counseling can be expected from one's unit at the time extensions/reenlistments are considered. There is no requirement to document this counseling. ... Members/PERSRU's will be identified by Commander (MPC/SEP) when they are within 12 months of their PGP.

j. Members discharged under HYT will not be eligible for an Administrative Discharge Board [ADB], irrespective of the number of years of active military service.

3. SPECIAL CONDITIONS.

a. Members serving beyond their PGP on 1 July 1993 will be allowed to remain on active duty until 30 June 1995. If they have not achieved their PGP within this time frame, they will be denied the opportunity to reenlist/extend and subsequently separated. Personnel with 20 or more years active service may request retirement in lieu of discharge.



- b. Members who exceed their PGP during the implementation period will be separated no later than 30 June 1995. Personnel with 20 or more years [of] active service may request retirement in lieu of discharge.
- c. Members who advance during the implementation period will be allowed to reenlist/extend within the terms of their new PGPs.
- d. Members serving beyond their PGP whose enlistment, reenlistment, or extension contract expires during the implementation period may extend their contracts for a period of time that would take them to 30 June 1995 without approval from Headquarters.

#### 4. WAIVERS

- a. Waivers may be submitted by members in paygrades E-4 through E-9. Members requesting waivers of the PGP must submit a letter to Commander (MPC-EPM) six to 12 months prior to their PGP or the expiration of their approved waiver period.
- b. Waivers to HYT will not normally be granted. Waivers will be considered only from personnel who possess critical skills or qualifications, or present an unusual or specially deserving case. Requests should clearly describe the member's situation and contain all necessary supporting documentation. ... Any circumstance that reflects an impending hardship must include a specific request outlining the length of the waiver requested and a plan of action to support this length of time. This time must be two years or less. ...
- c. The length of a waiver will be determined by the waiver panel in 1 to 2 year increments. ...
- d. The waiver panel [composed of Chief of the Enlisted Personnel Management Division of the Military Personnel Command, the Chief of the Commandant's Force Planning Staff, and the Master Chief Petty Officer of the Coast Guard] ... recommendations will be based upon a majority vote and submitted to Commander (MPC) [Military Personnel Command] for approval.

HYT was incorporated into the Personnel Manual as Article 12-D-6 in August 1995, two months after the applicant was discharged. Article 12-D-6.h. specified that a member who voluntarily requested a change in rating was subject to the same PGP as a member who did not change his rating, but the request would not be granted if, after the change in rating, the member would not have the opportunity to compete for advancement in at least two SWEs before his PGP. Article 12-D-6.i. more clearly described the criteria for a waiver as follows:

- (a) whether the member possessed critical skills the Service needed to retain,
- (b) whether unusual circumstances prevented the member from competing for advancement, or
- (c) whether the member had "a specially deserving circumstance, which was somewhat unexpected, such that retention beyond the PGP date would reduce an impending hardship upon the member's separation or retirement."

### VIEWS OF THE COAST GUARD

On January 30, 2013, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant [REDACTED]. In so doing, he adopted the findings and analysis in a memorandum prepared by the Personnel Service Center (PS [REDACTED])



PSC noted that the application was not timely filed within three years of the applicant's discharge. Regarding the applicant's claim that he should have been retained on active duty until he could retire because he had over 18 years of active duty, PSC alleged that the applicant's reliance on 10 U.S.C. § 1176 was erroneous because 10 U.S.C. "primarily applies to DoD military members."

PSC stated that the applicant was discharged pursuant to its High Year Tenure (HYT) policy, which "limits the amount of time an Active Duty enlisted member can remain at each pay grade. This program is not always in effect, but was in effect at the time of the applicant's discharge." PSC stated that the applicant was discharged because he exceeded the maximum number of years allowed for an E-4 under HYT, and under the HYT rules, he was not entitled to an ADB regardless of the amount of his time in service. PSC submitted copies of recent regulations to support these claims, rather than the regulations actually in effect in 1995, though the regulations have not changed significantly in the interim. Based on this analysis, PSC argued that the Board should deny relief.

#### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On February 8, 2013, the Chair sent the applicant's attorney a copy of the Coast Guard's advisory opinion and invited him to submit a written response within 30 days. The applicant requested and was granted several extensions of the time to respond in accordance with 33 C.F.R. §§ 52.42(d) and 52.26, and his response was received on July 5, 2013.

Regarding the timing of his application, the applicant stated that he discovered the alleged error during his father's military funeral on August 30, 2010, while discussing his service with another servicemember. He then tried repeatedly to get copies of his military records, but was told that NPRC could not locate them. Nevertheless, he submitted his application in March 2011, and it was finally docketed after he submitted copies of every military record he himself had saved.

The applicant repeated his allegation that 10 U.S.C. § 1176 applies to all members of the Armed Forces. He claimed that two House bills have contained provisions regarding the retention on active duty of enlisted personnel within two years of their eligibility for retirement and that they would apply to the Coast Guard. He also alleged that the Coast Guard did not properly analyze the regulations it submitted with the advisory opinion. He alleged that the Coast Guard could retire someone with just 18 years of service because Article 1.C.11.a.(2)(a) of the Military Separations Manual allows a member to submit a request for a 20-year retirement when the member has 18 years of active service. He argued that if he had been told of this provision, he would have submitted a request for retirement when he had 18 years of service, and his command would have supported his request. He also noted that the Coast Guard can keep members who are unfit for duty on active duty until they retire with 20 years of service.

The applicant alleged that because of his change of rating from ██████████ in June 1989, he was in a "no win" situation in 1995, and yet he was not offered the option of switching back to the ██████████ rating. In addition, he alleged that he was repeatedly told that he would be discharged with separation pay and was never told that he could submit a request for a waiver or request retirement.

## 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.
2. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record.<sup>5</sup> Although the applicant alleged that he discovered the error in his record in August 2010 because that is when someone claimed he should have had an ADB, the alleged error that he is actually asking the Board to correct is his lack of retirement from the Coast Guard. Since the applicant was discharged and not retired in 1995 and received his DD 214, which states that he was discharged, the Board finds that he knew of the alleged error—no retirement—upon his discharge in 1995. Therefore, his application is untimely.
3. Under 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if it is in the interest of justice to do so. In *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that to determine whether the interest of justice supports a waiver of the statute of limitations, the Board “should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review.” The court further instructed that “the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review.”<sup>6</sup>
4. The applicant did not explain or justify his long delay in seeking retirement.
5. A cursory review of the merits of this case indicates that the applicant was properly discharged on June 30, 1995, pursuant to the Coast Guard's HYT policy in COMDTINST 1040.10. In this regard, the Board notes that on his date of discharge, he had more than 14 years of combined military service in paygrade E-4 and more than 10 years of Coast Guard service as an E-4 and so was discharge on June 30, 1995, pursuant to paragraph 3.a. of Enclosure (1) to COMDTINST 1040.10. Although the applicant alleged that he was entitled to an ADB prior to his discharge, paragraph 2.j. of Enclosure (1) to COMDTINST 1040.10 expressly stated that members discharged under HYT were not entitled to ADBs.<sup>7</sup>
6. The applicant also alleged that he could not be discharged because he had more than 18 years of service. However, 10 U.S.C. § 1176 protects only those members who have more than 18 years of active military service *and* who can retire under §§ 3914, 6330, or 8914—i.e., members of the Army, Navy, Marine Corps, or Air Force, respectively. Congress did not provide similar statutory protection for members of the Coast Guard with more than 18 years of service. The applicant cited regulations noting that Coast Guard members can *submit their*

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<sup>5</sup> 10 U.S.C. § 1552(b); 33 C.F.R. § 52.22.

<sup>6</sup> *Allen v. Card*, 799 F. Supp. 158, 164-65 (D.D.C. 1992); *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

<sup>7</sup> 10 U.S.C. §§ 101, 1169 (defining the phrase “Secretary concerned” to include the Secretary of Homeland Security with respect to the Coast Guard and authorizing “the Secretary concerned” to prescribe regulations regarding discharging members before their enlistments end).



*requests* for retirement prior to their 20<sup>th</sup> anniversaries on active duty, but that does not mean they can be retired before their 20<sup>th</sup> anniversaries without statutory authority. The applicable statute, 14 U.S.C. § 355 (1995), states that “[a]ny enlisted member who has completed twenty years’ service may, upon his own application, in the discretion of the Commandant, be retired from active service.” The Board is unaware of any statute in effect in 1995 that would have allowed the Coast Guard to retire the applicant based on 18 years of service.

7. In light of the above cursory review, the Board finds that the applicant’s claim cannot prevail on the merits, and he has not justified his long delay in seeking retirement. Therefore, the untimeliness of his application should not be excused, and his request should be denied.

8. The Board notes, however, that this decision is based only on the copies of the military records saved and submitted by the applicant himself because NPRC has apparently mislaid his original military records. The applicant should periodically check with NPRC to see whether his military records have been found. When NPRC finds his original military records, the applicant should reapply to this Board within two years, so that the Board may grant further consideration and determine whether his military records contain evidence of error or injustice with regard to his discharge and lack of retirement.

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

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**ORDER**

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

