DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-008

[redacted]

DECISION OF THE PRINCIPAL DEPUTY GENERAL COUNSEL AS THE OFFICIAL WITH DELEGATED AUTHORITY TO TAKE FINAL ACTION ON BEHALF OF THE SECRETARY OF THE U.S. DEPARTMENT OF HOMELAND SECURITY

I approve the Recommended Final Decision of the Board for Correction of Military Records of the United States Coast Guard and grant the relief recommended therein.

Date: [9/4/2014]

[redacted]

Principal Deputy General Counsel
U.S. Department of Homeland Security

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RECOMMENDED FINAL DECISION

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. Upon receiving the completed application on November 4, 2013, the Chair docketed the case and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated August 1, 2014, 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 was retired from the Coast Guard Reserve as a BM2/E-5 on April 1, 2011. He asked the Board to correct his record to show that he was not reduced in rate from BM1/E-6 to BM2/E-5 as non-judicial punishment (NJP) at a captain's mast on January 4, 2005. He also asked that his retired pay grade be corrected to E-6 because he served well in the higher rate for many years before he was reduced in rate at mast.

The applicant stated that the punishment was very disproportionate to the offense he committed, which he did not even know was an offense when he committed it. He alleged that while serving on active duty as a trainer in 2004, he returned from an assignment on the road one Friday and was home for the weekend but knew that he was going back on the road for a formal class that was beginning on Monday. Therefore, he used his travel card over the weekend to get a cash advance for his travel. He noted that he usually traveled on Sunday evening if a training class began early Monday morning. He traveled for the training and sometime after he returned was served with formal charges alleging that he had disobeyed an order by using his card for a cash advance at a time when he was not in receipt of written travel orders. Although he had received verbal orders for his travel, written orders had not been issued even by the time the class ended on Friday, but this was not unusual because of his unit's operational tempo. He and other members at the unit "frequently traveled on verbal orders receiving written orders for travel expense reimbursement claims after [their] return." When he was charged, however, he was told that there were standing orders somewhere, which he had not seen, stating that travel cards could not be used to get cash advances unless the member had written travel orders in hand.

The applicant stated that he knew he would be traveling to conduct the training even though the orders had apparently not been issued yet and he was unaware of the standing order prohibiting use of the travel card for cash advances before travel orders were issued. The applicant stated that he explained these circumstances to the investigator, but he was charged nonetheless. He accepted mast in lieu of court-martial and "reasonably expected that given that I was an E-6 and had held the rate honorably for ten years and had been in the service nearly thirty years without NJPs or court-martials that I would be required to submit to off duty instructional time on these travel card rules which were not known to me and receive a page seven entry noting that I had pled to the charges." At the mast, he pled guilty but presented evidence in mitigation and character witnesses. Instead of the punishment he expected, however, his commanding officer (CO), a young lieutenant, shockingly imposed a reduction in rate, which stunned him, his mast representative (who was not an attorney), and his crewmates.

The applicant stated that an attorney from the District office attended the mast and conferred with his CO in hushed, inaudible voices throughout the mast. The attorney both initiated consultations and responded to the CO's requests. The applicant and others believe that the District had been looking for a scapegoat to make an example of regarding travel card misuse and that, through this attorney, the District exerted unlawful influence on his CO to reduce him in rate. The applicant alleged that Rule 105 of the Rules for Courts-Martial applied to the mast and prohibited such unlawful influence.

The applicant alleged that in awarding the reduction in rate, his CO—who should have ensured that his travel orders were timely issued in the first place—ignored specific admonitions in the Manual for Courts-Martial about punishing first offenders and senior petty officers by handing down the most severe punishment he was authorized to award. And the CO ignored his evidence in mitigation and reduced him in rate permanently even though the CO himself was responsible for the fact that his subordinates were having to travel without written travel orders and despite the fact that the applicant was never accused of having misused the money for anything other than official travel, and he always paid his travel card bills on time.

Moreover, the applicant alleged, during the mast, his CO interrupted his evidence in mitigation and "burst out with an angry assault on me claiming all sorts of aggravating behavior on my part that had nothing to do with the charges as read and … nothing to do with the travel claim at all." The CO's claims were either not true at all or "half truths" that twisted facts so that "the truth was missed entirely." For example, the CO made "quite a fuss" over the fact that the applicant used an ATM in a gambling casino to get his cash advance even though there was no evidence that the applicant used the money for anything other than official travel expenses and using an ATM in a casino in [redacted] is not unusual since casinos have good security. The applicant noted that the day after the mast, he was presented with a Page 7 about his NJP that also contained unsupported allegations of indebtedness and a gambling addiction that were irrelevant as these allegations were not part of the charges against him since he was not charged with misusing the money but with misusing the card by getting the cash advance at a moment when he did not have written travel orders, although he had verbal orders to travel to another training class.

The applicant stated that at the end of the mast, he was advised to appeal the NJP. When he told his Executive Officer (XO) that he intended to appeal the NJP, the XO was calm until he entered the CO's office to tell him. The applicant could hear through the wall that the CO was

angry and his tone was threatening, so the applicant "was discouraged then and there, uncertain of whether or not on appeal they would increase the damage they had done to me." In addition, he alleged, the people responsible for the malfunctioning travel system worked for the District office, and his appeal would likely go to the District Commander. Therefore, the applicant argued, he was illegally "pressured not to proceed" and did not appeal his NJP.

After this stint of active duty, the applicant was released to drill but later recalled to active duty before being involuntarily transferred to the Inactive Status List and then mandatorily retired at age 60. He was retired as an E-5 and did not learn that he could appeal the reduction in rate through the BCMR until October 2012. The applicant argued that his retirement as an E-5 is particularly unjust because he served honorably as an E-6 for more than ten years before his unjust reduction in rate and had already qualified for retirement as an E-6 with more than 30 years of satisfactory service and could have retired as an E-6 several years earlier. However, following his mast, he was told by superior officers not to worry about his retired pay because his rate would be restored to E-6 upon retirement as that was his highest rate held. This erroneous advice convinced him not to challenge the NJP and reduction in rate until the erroneousness of the advice became clear upon his retirement in pay grade E-5.

The applicant alleged that if he had been properly counseled by an attorney, he would not have pled guilty at mast and could have mounted a strong defense. After all, it was his CO, who convened the mast, who was ultimately responsible for ensuring that the applicant and his other subordinates received their written travel orders timely and had failed in this duty. The CO failed to ensure his subordinates received written orders before executing his verbal orders, and the applicant had no authority to have the written orders issued, could not disobey his CO's verbal orders, and had no money to execute the verbal orders. Yet despite issuing conflicting orders, his CO dared to reduce him in rate despite the CO's own negligence and the broken travel system.

The applicant alleged that he would not have been able to travel to perform his next training had he not received the cash advance. Therefore, in getting the cash to complete his mission, his conduct "was in keeping with the highest military tradition concerning conflicts between paper requirements and mission accomplishment." In addition, the applicant argued, he could have mounted the "good soldier defense" as described in *United States v. Wilson*, 28 M.J. (T.M.A. 1987) and Military Rule of Evidence 405, which is that his military record and reputation, proven by the numerous awards he had received, made it "more probable than not that [he] was incapable of a deliberate offense as a matter of habit and character." However, he alleged, he was convinced to accept mast and plead guilty instead of defending himself based on his CO's statement that "ignorance of the law is no excuse" and his mistaken belief that his CO would be fair. Instead, he was "thrown under the bus."

In support of his allegations, the applicant submitted the following documents, as well as copies of many official documents that are included in the Summary of the Record below. He stated that although he requested the documentation of his mast from the Coast Guard, the Coast Guard failed to produce it and, when he requested his military records, sent him only 32 pages even though he was in the Service for almost 40 years and had received numerous commendations that are not among those 32 pages. The copy of his record that the Board received from the Coast Guard likewise lacks some of the official documentation of awards and accolades.

- On April 8, 2013, the lieutenant commander (LCDR D), now retired, who represented the applicant at mast stated that during the mitigation phase he read aloud six letters from retired master chiefs on behalf of the applicant, who served for about 30 years, had a good performance record, and had never before been taken to mast. He thought the applicant's punishment would be extra duty and a negative Page 7, and the reduction in rate awarded was "overly severe, given the charge and considering the mitigating factors presented." During the mast, LCDR D stated, the CO frequently consulted a District attorney in hushed tones. He believed the attorney was present to ensure that the CO conducted the mast properly, but he thought that since the CO had an attorney, the applicant should have been provided one as well. LCDR D noted that he is not an attorney and had no experience with representing members at mast.

- A retired master chief petty officer, BMCM B, submitted three statements on the applicant's behalf. He wrote that he had been the applicant's supervisor "through several command's and detachments" and had always found his "performance to be exemplary" and recommended positive marks on the applicant's evaluations. When the applicant was taken to mast in 2005, BMCM B was a civilian employee of the Coast Guard and a shop steward for their local union. The civilian employees were having great difficulties with the newly adopted travel system and the use of the credit cards was subject to not only the contract provisions but to "a variety of related Coast Guard specific rules that were difficult to locate and often simply unworkable at the member/employee level where fronting hundreds of dollars' worth of travel expenses was a financial hardship." He explained that the employees had to pay the credit card bill as soon as it arrived and frequently before they were reimbursed by the Coast Guard. "As shop steward I sensed that the system was about to throw someone under the bus to make an example and see if the non-compliant members/employees could be frightened into prompter payment without management/officers having to do anything to actually speed up the repayment process." Therefore, he wrote a letter on the applicant's behalf for his mast and attended the mast as a witness.

  BMCM B stated that he attended the applicant's mast and was shocked that the CO consulted a Coast Guard District attorney throughout the applicant's mast because he had previously attended nine masts with no lawyer present for the CO to consult. The applicant pled guilty "on the technicality that a contraindicative order did exist somewhere in the system. His 'direct disobedience of orders' was a rather inadvertent and technical violation directly attributable to some pretty slipshod management/leadership at the levels above him. None of us could have imagined that the mast would award him a reduction in grade." He stated that the CO's punishment "was out of all proportion with the offense" but it pleased the District's attorney, who "appeared to me to be acting as a sort of prosecutor." BMCM B stated that he was shocked when the CO announced the reduction in rate and assumed that the applicant would prevail on appeal. The applicant's punishment was "far beyond any reasonable standard for his unintentional and minor transgression."

  BMCM B also argued that when the applicant enlisted and up until September 1988, 10 U.S.C. § 1401a(f) provided that a member's retired pay would be "calculated on the basis of the pay voted in effect and applicable to him at any point in time after he became

eligible to retire. A member receives the benefit of this law even if he is reduced in grade, following his eligibility to retire, for disciplinary reasons including a reduction in grade pursuant to a court-martial sentence." BMCM B argued that this statute should apply to the applicant and result in the correction of his retired pay rate to E-6 because it was in effect for many years of his service.

- In a statement dated April 24, 2013, another retired master chief, MKCM L, who was the District's Reserve Command Master Chief at the time of the applicant's mast, stated that he recalls that the applicant told him before the mast that he was going to plead guilty because "ignorance of the law is no excuse" but that given the extenuating and mitigating circumstances, he did not expect to receive punishment beyond extra duty, and MKCM L agreed with him. MKCM L did not attend the mast but was shocked to hear that the applicant was reduced in rate, especially because the applicant's error was unintentional and harmless and particularly because he had never heard of an E-6 "with an excellent to good record spanning over 30 years being reduced in rank a full pay grade on a first offense in an NJP proceeding." MKCM L stated that he has worked with the applicant and found him "to be a diligent and dedicated member of 'Team Coast Guard' who is probably incapable of intentional or willful disobedience." He noted that the travel system was "a troublesome system as first implemented" and stated that he and many others in the retired community believe that the applicant's sentence was excessive.

- In a statement dated April 26, 2013, a retired officer, LCDR B, stated that he has known the applicant during most of his 38 years in the Reserve and had interacted with the applicant while serving as President of the Reserve Coxswain Board, as an Assistant Training Officer, Training Officer, and Executive Officer of the applicant's Reserve unit. LCDR B stated that he never witnessed any "infractions or disobedience" by the applicant, and from what he has heard, believes that the applicant was "caught between a rock and a hard place" in that he could either use his card to get a cash advance over the weekend or fail to show up to conduct training on Monday and be counted as AWOL.

- In a statement dated April 15, 2013, a retired Army major who used to be a lieutenant in the Coast Guard Reserve and was the Operations Officer of the applicant's Reserve unit, stated that the applicant "exhibited a high level of competence and professionalism as a coxswain and boat crew team leader. He was also an effective 'hands on' trainer." He stated that the applicant's performance evaluations "were consistently high," and he does not believe that the applicant would ever deliberately disobey an order. He noted that there were many problems "during the early days of the implementation of the credit card-based travel reimbursement system," that he believes that the applicant's misuse of the card was inadvertent, and that his punishment was "excessively harsh, unprecedented, even arbitrary and capricious." He stated that the consensus of the Coast Guard's retired community is that the applicant was a victim of injustice.

- In a statement dated April 12, 2013, another retired master chief, MECM C, who served with the applicant at the same unit for many years, stated that he had never known the applicant to deliberately disobey an order and does not believe the applicant would do so. He stated that the results of the mast upset many members in the District because of the severity of the sentence, which was "clearly all out of proportion to the offense leveled at

a senior petty officer with more than 30 years of service." MECM C stated that he believes the overly harsh sentence was imposed to send a message about the importance of complying with the rules of the then new travel system, which had caused a lot of problems. Even junior members were expected to front the money for their government travel and be reimbursed later, which they often could not afford. MECM C stated that the applicant's punishment was an "ill-conceived and unfair attempt to enforce the impossible by creating a horrifying example."

- In a statement dated April 9, 2013, a retired officer, LCDR R, stated that he was the applicant's CO from June 1983 through July 1985 and that the applicant had "been an able and cooperative team member over the years and I cannot imagine him being involved in any incident of disobedience of orders that would be deliberate or defiant." He stated that from experience he knows that everyone has "inadvertently disobeyed 'standing orders' from time to time without being formally charged." He stated that the applicant's punishment, which not only reduced him in rate but prevented his promotion to chief, was unduly harsh, especially on a first offense, and should be corrected.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard Reserve on December 15, 1972; attended boot camp and BM/PS "A" School from June 15, 1973, to January 24, 1974; advanced to BM3; and drilled regularly thereafter accumulating unbroken years of satisfactory service for retirement purposes. He advanced to BM2 in 1979 and qualified as a coxswain in 1980.

On February 15, 1987, the District Commander sent the applicant, a BM2/E-5, a Letter of Appreciation for his performance as a coxswain for a Reserve unit engaged in an experimental joint training exercise with the Navy from February to June 1986. The training had involved considerable physical conditioning, including long-distance running, which the applicant had fully completed with a willing attitude despite having to wear a knee brace. The applicant also received Certificate of Appreciation and an Achievement Medal for this service. The citation for the medal notes that the Navy reported that he had performed excellently and assimilated all of the training in an outstanding manner.

On February 11, 1991, the District Commander presented the applicant with his fourth Good Conduct Award, denoting conscientious drill attendance and completion of active duty training requirements during the three-year period ending on December 14, 1987.

On July 28, 1992, the Officer in Charge of a boat station sent the applicant another Letter of Appreciation via the District Commander, in which he commended the applicant for his performance during a two-week field exercise. He noted that the applicant had "virtually conducted this unit's response to the exercise alone. Had it not been for your ability and can-do attitude, this unit would not have successfully completed the exercise and its actual missions too." The District Commander endorsed the letter and thanked the applicant for "go[ing] the extra mile" to promote the Reserve.

On December 14, 1992, the applicant, still a BM2/E-5, completed 20 years of satisfactory service and qualified for retirement. He was advised that he could accrue points toward retirement until he reached age 60 on March 23, 2012, when he would be eligible for retired pay.

On January 1, 1994, the applicant advanced to BM1/E-6. On April 9, 1994, his CO sent him a letter acknowledging his personal efforts, enthusiasm, dedication, and professionalism as a coxswain that had reflected positively on his Reserve unit and resulted in the District Commander sending the CO a letter praising the unit's boat crew for its participation a multi-command event on February 21, 1994. On his first performance evaluation as a BM1, the applicant received all standard and above-standard marks of 4 and 5 (out of 7) for the various performance categories and was recommended for advancement to chief petty officer/E-7.

On December 11, 1994, the applicant's CO selected him as the Reserve unit's "Reservist of the Year" for 1994 based on his hard work that had resulted in his advancement to BM1, his qualification as an Officer of the Day for the station while also maintaining his coxswain certification, and his dedication to the Reserve.

On March 25, 1995, the applicant was awarded a Commandant's Letter of Commendation for his performance as the coxswain of a small boat he "immediately dispatched" to search for a missing windsurfer on September 15, 1994, when the weather was deteriorating. His crew found and rescued the windsurfer, who was exhausted from being in the water for two hours with no flotation device. The letter states that the applicant's "expeditious and decisive actions in assessing the situation and evaluating all the risks in delaying your initial response were instrumental in saving a person's life."

On his annual performance evaluations dated May 31st in 1995, 1996, 1997, and 1998 as a BM1, the applicant received all standard and above-standard marks of 4, 5, and 6 (out of 7) in the various performance categories and was recommended for advancement to chief petty officer.

In 1998, the Group Commander awarded the applicant's unit a Meritorious Team Commendation for exceptionally meritorious service "in the extraordinary execution of National Safe Boating Week activities" on May 16 and 17, 1998. The citation notes that the unit had made a noteworthy extra effort in educating the public on boating and water safety.

Beginning in August 1999, the applicant began to serve lengthy periods of active duty each year. In 2000, he was awarded another Commandant's Letter of Commendation for his work as "an instrumental member of the Year 2000 (Y2K) staff and Incident Management Team" for the District from August 1999 to January 2000. The letter notes that the applicant had taken leave from his civilian job to help the District prepare a contingency plan and conduct exercises for continuing operations in the event of disruptions.

On August 2, 2000, the applicant was awarded another Meritorious Team Commendation for providing port security during a large banking conference from March 22 to 29, 2000.

On April 7, 2001, the applicant was awarded a Coast Guard Unit Commendation for "exceptionally meritorious service from August 1999 through November 2000, in providing

flawless stewardship of Coast Guard responsibilities for an extraordinary series of high profile oil spill events."

On February 1, 2002, the applicant began serving on an extended active duty contract. On a Page 7 dated June 24, 2002, the applicant's CO counseled him about not properly managing his personal finances because a review had shown that he was "heavily in debt and unable to meet [his] monthly financial obligations." The CO advised him to seek financial counseling and warned him about the consequences of failing to meet his financial obligations.

On his annual performance evaluations dated May 31st in 1999, 2000, 2001, and 2002 as a BM1, the applicant received all standard and above-standard marks of 4, 5, and 6 (out of 7) for the various performance categories and was recommended for advancement to chief petty officer.

On a Page 7 dated July 19, 2002, the applicant was counseled about responding rudely over the phone to [redacted]. The Page 7 states that the applicant was "permanently relieved of his phone duties" because he "was unable to comprehend why his behavior was inappropriate" and indicated that his conduct was justified by [redacted] own impatience and rudeness and the unmanageable volume of calls.

On September 9, 2002, the applicant received another Meritorious Team Commendation for "exceptionally meritorious service from October 2001 to August 2002" as a member of a surge team helping to reduce a backlog of 5,000 [redacted].

On a semi-annual evaluation dated November 30, 2002, the applicant received mostly standard marks of 4 with some above-standard marks of 5 and 6, but one below-standard mark of 3. He was still recommended for advancement to chief petty officer/E-7, however.

On a semi-annual evaluation dated May 31, 2003, the applicant received almost all marks of 5 and 6 in the various performance categories and no below-standard marks, and he was recommended for advancement.

On July 31, 2003, the applicant's CO issued him a Bravo Zulu letter acknowledging his performance of duty from March to July 2003 in helping to identify numerous "high interest" vessels and arrange for their boarding and in enforcing measures "to prevent the spread of the deadly Severe Acute Respiratory Syndrome or SARS virus from reaching our local shores."

On September 1, 2003, the applicant began serving on a two-year extended active duty contract as a trainer at a [redacted]. He successfully completed basic boarding officer training for [redacted] on September 19, 2003, and on September 22nd, he successfully completed a class in course design.

On December 15, 2003, the applicant received another Meritorious Team Commendation for his service from November 12 to 14, 2003, in the "planning, management, and execution of all activities in preparation and support of" a children's book distribution program.

A Page 7 dated May 26, 2004, states that the applicant had self-referred for alcohol screening. On a Page 7 dated May 27, 2004, he was counseled for having failed to report for duty on three occasions while on temporary duty assignments to train members at three different units. His chief advised him that any further tardiness or absence would result in further administrative action or NJP.

On his annual performance evaluation dated May 31, 2004, the applicant received below-standard marks of 3 in two of the twenty-two performance categories and, for the first time, a mark of not recommended for advancement. His other twenty numerical marks were all standard or above-standard marks of 4, 5, and 6.

On August 6, 2004, the captain of a cutter sent the applicant a Letter of Appreciation for his hard work, professionalism, and dedication while serving aboard the cutter from July 26 to 29, 2004, as a trainer from a regional [redacted] center. He noted that the applicant's expert knowledge of regulations "led to the successful boarding of eight [redacted]." On Wednesday, August 31, 2004, the applicant conducted more [redacted] on the same cutter.

On a Page 7 dated September 2, 2004, the applicant's CO noted that as a result of his alcohol screening, the applicant was being referred for outpatient treatment.

On a Page 7 dated September 26, 2004, the applicant was counseled by his CO about having misused his government vehicle during travel from September 20 to 24, 2004. He had left cigarette ashes "strewn about" and parked it overnight in a handicapped parking space. In addition, the applicant had not shown up to train a class on time on September 22, 2004, and the supervisor had had to call him. Finally, the Page 7 states, at 2:25 a.m. on September 23, 2004, the applicant's supervisor had received a phone call stating that the applicant had been pulled over by police while driving his government vehicle. The police reported that the applicant had driven away from a "drinking establishment" and was pulled over in a parking lot while circling a restaurant that was closed because he was "searching for an early morning meal." The CO wrote that "[t]aking your prior situation into consideration this shows a serious lack of judgment." The applicant had reported to work late that same morning and had "been previously counseled on your habitual inability to be on time." Finally, the CO noted that despite counseling, the applicant had "made insufficient progress in your instructor qualifications" and placed the applicant on performance probation. The CO stated that future problems could result in NJP or the applicant's release from active duty.

On a Page 7 dated October 1, 2004, the applicant was counseled about being "on unauthorized leave" on September 28 and 29, 2004. Although the applicant had emailed his supervisor a leave request, his supervisor had not authorized the leave verbally or in writing, and the applicant had not responded to several phone calls asking him to return to work.

On December 20, 2004, BMCM B, the retired master chief serving as a union shop steward for civilian Coast Guard employees, responded to an inquiry from the applicant about "the union's view of the government credit card travel program." BMCM B stated that the union could not represent the applicant but was following his case with interest as it "illustrates a number of points that we have been trying to make over the years as the various computerized 'self service' personnel administrative systems have evolved within the Coast Guard." BMCM B

stated that employees' grievances about delayed reimbursements had been averted only by the intervention of one astute administrator who had stepped in and to get the employees reimbursed in the "nick of time." He noted that the fact that the program was governed by both a contract with the credit card company and Coast Guard policy had been a "constant problem." Everyone received the company's contract, but employees had received widely varying amounts of training and information about Coast Guard policies, which "resulted in misunderstandings that have gone to the verge of adverse personnel actions or employee grievances." BMCM B also noted that the problems were "still manifesting themselves" and that the Coast Guard "is still addressing and discovering the issues."

In a memorandum to his CO dated January 4, 2005, the applicant described the following factors in mitigation. He stated that his discussion of the charge with the XO had been his "first clear information that such advances, absent the issuance of travel orders are impermissible under Coast Guard policy" although allowed by the credit card company. The applicant stated that because cash advances are allowed once travel orders are in hand when expense reimbursement is expected to lag, it "seemed only logical that cash advances in the aftermath of unexpected lagged payments would also be allowed." He was "unaware that Coast Guard policy was more restrictive than the [credit card] contract" and argued that violating a counterintuitive policy that contradicts the contract that was readily available to him "is a far cry from the willful or negligent disobedience of orders." The applicant also made the following points:

- He had repaid the cash advance promptly and was never in arrears.
- He had never before been awarded NJP in his 32-year career.
- The imposition of any NJP at all would prevent him from advancing to chief petty officer before he retired.
- He was trying to become expert on the credit card rules so that he could advise others so they would not make similar mistakes.
- The new credit card system had shifted the administrative work from travel specialists to the individual members, many of whom "'of a certain age' are the least trained or experienced in computer applications," and "the new self-service administrative systems are not easy to master."
- The "policy guidance for the new 'self-service' personnel functions systems are not neatly located in a single place."

On a Page 7 dated January 4, 2005, the applicant's CO advised him that his eligibility period for another Good Conduct Medal had terminated as a result of his NJP. The applicant also received a disciplinary performance evaluation, on which he received three low marks of 2, six below-standard marks of 3, and thirteen standard marks of 4 in the various performance categories, an unsatisfactory conduct mark, and a mark of not recommended for advancement. Therefore, the applicant would not be eligible to compete for advancement to regain his E-6 rate until he was recommended for advancement on a performance evaluation.

On a Page 7 dated January 5, 2005, the applicant's CO ordered him to obtain indebtedness training through the Employee Assistance Program within 30 days because the applicant had revealed at mast that he had "a gambling addiction and requested Coast Guard assistance from this command." He noted that the applicant had been reduced in rate to E-5.

The applicant was released from active duty when his extended active duty contract ended in August 2005. He continued to drill and received all marks of 4 and 5 and was recommended for advancement on his final performance evaluation dated April 30, 2006. In addition, he was recalled to active duty for substantial periods in 2006 and 2007, but was then involuntarily transferred to the Inactive Status List.

On April 1, 2011, the applicant was transferred to the Retired Reserve as a BM2 in a non-pay status because he was not yet 60 years old. He had served in the Reserve since December 15, 1972, and accumulated 35 years of satisfactory service for retirement purposes. On March 23, 2012, his 60th birthday, he attained pay status in the Retired Reserve "with pay as a BM2."

VIEWS OF THE COAST GUARD

On May 7, 2014, a Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion and recommended that the Board deny the applicant's request to remove his NJP from his record. (No input from the Personnel Service Center was received in this case.)

The JAG stated that the applicant request for the removal of his NJP should be denied because it is untimely. The applicant was awarded NJP on January 4, 2005, and more than three years of time when the applicant was not on active duty elapsed before he submitted his application to the Board. Regarding the merits of the case, the JAG noted that the applicant failed to appeal his NJP within five days of the mast as he was entitled to. Because the applicant failed to avail himself of this administrative remedy, the JAG argued, the Board lacks jurisdiction over the case pursuant to 33 C.F.R. § 52.13. The JAG argued that the applicant has not justified his failure to appeal the NJP because, even if his CO was angry about his appeal as he alleged, the appeal would have been acted on by the next superior CO—the District Commander—not by the CO who awarded the NJP. In addition, the JAG argued, even if, as he alleged, the applicant believed that he would be retired as an E-6 despite his reduction in rate, this belief does not excuse his prolonged delay in challenging the NJP.

The JAG alleged that the applicant's allegations that the NJP was conducted improperly are without merit. The JAG stated that masts are non-adversarial proceedings open to the public and that it was appropriate for a District legal officer to attend and confer with the CO. The JAG argued that "[e]ven if applicant's commanding officer had some involvement in applicant's case, as applicant alleges, this would not have disqualified him from imposing NJP upon applicant" because Article 1.A.3.e. of the Military Justice Manual states that "a commanding officer is not disqualified from imposing NJP because of a personal interest or involvement in the case." The JAG noted that the applicant's CO had legal authority to impose the reduction in rate, and his judgment is entitled to the presumption of regularity. The JAG also noted that the CO could have reasonably concluded that a lesser punishment would be ineffective because, contrary to the applicant's allegation that his record was excellent apart from the NJP, the applicant had received four negative Page 7s documenting poor performance from 2002 to 2004, as well as one for not properly managing his finances.

Regarding the applicant's retired pay grade, the JAG noted that the request is timely because the applicant received his retirement orders on May 16, 2012. However, the JAG rec-

ommended that the applicant's request to be retired in pay grade E-6 be denied because his retirement orders state that he would retire as an E-5 and reference Chapter 8.C. of the Reserve Policy Manual, one provision of which states that retired pay for a Reserve member who entered the military before September 8, 1980, "is computed based on the highest grade satisfactorily held at any time in the Armed Forces and the Commandant's determination that the member's performance in that grade was satisfactory (10 U.S.C. 1406)." The JAG argued that the reference to the manual on the orders proves that the Coast Guard "applied the correct policy in determining the highest grade held satisfactorily by applicant for retirement purposes." Therefore, the JAG recommended that the Board deny this request also.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 17, 2014, the applicant submitted his response to the JAG's advisory opinion. The applicant repeated many of his allegations and argued that the JAG had failed to address or refute any of his allegations of injustice, prosecutorial misconduct, appearance of impropriety, or legal arguments. The applicant stated that because the Report of Offense is not in the record, the Board should accept his and his witnesses' claims about the charge against him. He pointed out that there are statements in the record from three people who were present at the mast: himself, his representative, LCDR D, and BMCM B, all of whom state that there was only one charge presented and it related solely to travel card usage. Moreover, he argued, there is no proof in the record before the Board that he committed the charged offense, and the Page 7 does not state the charge and contains only vague and unproven allegations, so the NJP should be expunged.

Regarding the JAG's argument that the applicant's request regarding his NJP is untimely, the applicant argued that this issue is moot since the case has been docketed for many months. He also objected to the JAG's argument that the Board has no jurisdiction because he failed to appeal his NJP. The applicant argued that the interest of justice requires the Board to consider his case on the merits, and he noted that the JAG did not deny that he "was abusively discouraged" from filing his appeal. The applicant also argued that the Board should consider his claims on the merits because his request for the restoration of his rank upon retirement is timely.

Regarding the JAG's statement that the applicant had received four negative Page 7s from 2002 through 2004, the applicant alleged that the Coast Guard "cooked the books." As evidence, he pointed out that his CO entered two negative Page 7s documenting the NJP in his record, which could have been combined into one Page 7. He also alleged that his prior CO had unjustly given him a Page 7 for mismanaging his personal finances after he requested a Mutual Assistance grant to help him through a financial hardship related to his divorce; that the Page 7 about his rudeness on the phone reflects "one bad day" when he lost his temper because the person was repeatedly asking for something he was not entitled to; and that the Coast Guard retained only neutral or negative documentation in his record and omitted his commendations, letters of appreciation, and medal citations.

Finally, the applicant stated that even assuming the Commandant's staff made a highest rank held determination, the unfavorable determination may have been due to the fact that most of the applicant's commendations, letters of appreciation, and medal citations were omitted from his Headquarters record.

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. Although the JAG argued that the Board does not have jurisdiction because the applicant failed to appeal his NJP within five days in 2005, the Board's rules at 33 C.F.R. § 52.13(b) do not state that the Board lacks jurisdiction unless the applicant has exhausted every remedy ever made available to him; instead, they state that the Board should not consider an application *until* an applicant has exhausted all effective, practical, appropriate, and *available* administrative remedies. The JAG did not identify any administrative remedy currently available to the applicant that prevents the Board from exercising jurisdiction over this case. The Board notes, however, that an applicant's failure to exhaust an administrative remedy when it is available may be considered evidence of the applicant's state of mind with regard to the matter at the time.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.[1]

3. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice in his record.[2] The applicant alleged that he discovered the error in his record in 2012 because that is when someone told him he could challenge his NJP by applying to the Board. The Board finds, however, that he knew about his NJP in January 2005, so that claim is untimely, while his claim regarding his retired rate and pay is timely because he applied to the Board within three years of his retirement.

4. The Board may excuse the untimeliness of a claim if it is in the interest of justice to do so.[3] In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without "analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review"[4] to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted 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."[5]

5. The applicant alleged that he did not apply to the Board to set aside his NJP sooner because he did not know he could do so. However, the existence and authority of the Board were published in the Coast Guard's Personnel Manual and on the Coast Guard's website, among other places, in 2005 and thereafter. The Board finds that the applicant's argument is not compelling because he has failed to show that anything prevented him from seeking correction of the alleged error or injustice more promptly.

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[1] *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).
[2] 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.
[3] 10 U.S.C. § 1552(b).
[4] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).
[5] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405 n14, 1407 n19 (D.C. Cir. 1995).

6. A cursory review of the record shows that the applicant's claims about his NJP cannot prevail. Little official documentation of his NJP is available, and what remains—a Page 7 noting that the applicant had admitted to having a gambling addiction at mast and was being ordered to attend counseling and seek financial planning as well as being reduced in rate—is somewhat inconsistent with the applicant's and BMCM B's claims about the accusation and evidence against him. The only other witness to the mast who submitted a statement, LCDR D, did not describe the charge(s) and evidence against the applicant. If the applicant had challenged his NJP timely, the Report of Offense and the report of the investigation would presumably have been available for the Board to review, and so the Board finds that the doctrine of laches must bar this claim.[6] Even if it did not bar this claim, the evidence of the witnesses who attended the mast—LCDR D and a retired member and civilian employee (BMCM B)[7]—that the applicant's punishment was unduly severe and that a District legal officer might have exerted undue influence on the CO are insufficient to overcome the presumption of regularity accorded his CO.[8] In this regard, the Board notes that nothing in the rules for NJP in Chapter 1 of the Military Justice Manual, COMDTINST M5810.1D, prevented the CO from having a legal officer on hand to consult while he conducted the mast.

7. Given the lack of a compelling reason for the applicant's delay in challenging his NJP and the lack of potential success on the merits, the Board will not excuse the application's untimeliness or waive the statute of limitations for this claim.[9]

8. The applicant's claim that he should receive the retired pay of a BM1/E-6 is both timely and meritorious, however. Although he was a BM2/E-5 on the date he retired, the retired pay of a Reserve enlisted member is supposed to be based on the monthly basic pay of the highest rate in which the member served satisfactorily "at any time in the armed forces."[10] The JAG officer argued that a proper "highest rate held" determination must have been made for the applicant based on a citation on his retirement orders, and the retired rate shown on the applicant's orders must be accorded a presumption of regularity.[11] There is overwhelming evidence, however, that the applicant did, in fact, serve satisfactorily as a BM1/E-6 for many years:

a) The applicant advanced to BM1/E-6 in 1994 and served in that rate for eleven years before being reduced in rate at mast by his CO, a lieutenant/O-3, in 2005.

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[6] *Detweiler v. Pena*, 38 F.3d 591, 595 (D.C. Cir. 1994) ("the doctrine of laches remains available to the government to protect itself from stale claims"); *Bliss v. Bliss*, 50 F.2d 1002, 1004-05 (D.C. Cir. 1931) ("Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights, and shows no excuse for his laches in asserting them.").

[7] The Board notes that while the applicant submitted statements from other retired members stating that they thought his punishment was unduly severe and unjust, the other members were not present at the mast and so did not personally hear the charge(s) and evidence against the applicant.

[8] 33 C.F.R. § 52.24(b); *see Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

[9] *Allen*, 799 F. Supp. at 164, 165; *Dickson*, 68 F.3d at 1405 n14, 1407 n19.

[10] 10 U.S.C. § 1406(b)(2); *see* 10 U.S.C. §§ 12731, 12739; U.S. Coast Guard Reserve Policy Manual, COMDTINST M1001.28A, Chap. 8.C.8.b.

[11] 33 C.F.R. § 52.24(b).

b) During his eleven years as a BM1, the applicant's level of participation was more than satisfactory as he drilled regularly while serving in the Selected Reserve, consistently receiving far more than 50 points per year, and was otherwise serving on active duty.

c) During his eleven years as a BM1, the applicant received consistently good marks on his performance evaluations and was recommended for advancement to chief petty officer until his performance problems began in 2004 following his divorce and, apparently, problems with alcohol and gambling.

d) During his eleven years as a BM1, the applicant received many awards and accolades:

- A letter of appreciation from his CO dated April 9, 1994, acknowledging his personal efforts, enthusiasm, dedication, and professionalism as a coxswain, which had reflected positively on his Reserve unit and resulted in the District Commander sending the CO a letter praising the his boat crew's performance;✹[12]
- A "Reservist of the Year" award on December 11, 1994, based on his dedication to the Reserve and his hard work that had resulted his qualification as an Officer of the Day for the station while also maintaining his coxswain certification; ✹
- A Commandant's Letter of Commendation dated March 25, 1995, for his performance as a coxswain in a search and rescue mission in which his decisive actions and risk assessment "were instrumental in saving a person's life";
- A Meritorious Team Commendation from his Group Commander for making "a noteworthy extra effort in educating the public on boating and water safety" while executing National Safe Boating Week activities on May 16 and 17, 1998;
- A second Commandant's Letter of Commendation for his work as "an instrumental member of the Year 2000 (Y2K) staff and Incident Management Team" for the District from August 1999 to January 2000;
- A second Meritorious Team Commendation, dated August 2, 2000, for exceptionally meritorious service providing port security during a large banking conference from March 22 to 29, 2000; ✹
- A Coast Guard Unit Commendation dated April 7, 2001, for "exceptionally meritorious service from August 1999 through November 2000, in providing flawless stewardship of Coast Guard responsibilities for an extraordinary series of high profile oil spill events"; ✹
- A third Meritorious Team Commendation, dated September 9, 2002, for "exceptionally meritorious service from October 2001 to August 2002" as a member of a surge team helping to reduce a backlog of 5,000 [redacted]; ✹
- A letter of appreciation from his CO, dated July 31, 2003, acknowledging his performance of duty from March to July 2003 in helping to identify numerous "high interest" vessels and arrange for their boarding and in enforcing measures "to prevent the spread of the deadly Severe Acute Respiratory Syndrome or SARS virus from reaching our local shores"; ✹

[12] This symbol (✹) indicates that the documentation was submitted by the applicant but does not appear in the Headquarters copy of his personnel file received by the Board from the Personnel Service Center.

- A fourth Meritorious Team Commendation, dated December 15, 2003, for his service from November 12 to 14, 2003, in the "planning, management, and execution of all activities in preparation and support of" the Group's participation in a children's book distribution program; ✹ and
- A letter of appreciation from the CO of a cutter, dated August 6, 2004, praising his hard work, expertise, professionalism, and dedication as a [redacted] from July 26 to 29, 2004, which had "led to the successful boarding of eight [redacted]." ✹

e) During his eleven years as a BM1, the Coast Guard repeatedly offered the applicant extended active duty contracts and orders allowing him to serve long periods on active duty, and he was recalled to active duty even after he was reduced in rate at mast.

9. The JAG did not cite any law or policy with criteria for how a "highest rate held" determination is made, and the Board can find none for Reserve enlisted members. For active duty members, however, Article 1.C.12.g. of the Military Separations Manual requires an administrative review to determine a member's highest rate satisfactorily held and states that "[i]n the absence of a reduction in grade by a Special Court-Martial or General Court-Martial, service will be considered satisfactory and the member will be certified to the highest grade if he or she served on active duty for at least six months in a commissioned officer grade or 31 days in a chief warrant officer or enlisted grade and his or her official records indicate overall satisfactory performance for the entire period served in the higher grade." (Emphasis added.) In comparison, the applicant served satisfactorily as an E-6 for more than ten years before he was reduced in rate by a lieutenant at mast—not by a Special or General Court-Martial. Therefore, pursuant to this policy, the highest rate the applicant satisfactorily held was clearly E-6, and his E-5 retired pay is both erroneous and unjust.

10. No similar provision appears in the Reserve Policy Manual, but statutes provide that a Reserve officer must have served satisfactorily in a grade for "not less than six months" for those in grades O-1 through O-4, for "not less than three years" for grades O-5 and above,[13] and for just "more than 30 days" for Reserve warrant officers to be entitled to retire at the higher grade.[14] These periods are far shorter than the ten years that the applicant served satisfactorily as an E-6 before his rate was reduced. Nor did the Coast Guard claim to have convened a special board to carefully consider and determine the applicant's highest rate held satisfactorily, as provided for active duty members under Article 1.C.12.g.(4) of the Military Separations Manual. The inclusion of a standard reference to a chapter of the Reserve Policy Manual, which has no provisions for how highest rate held determinations are made, on the applicant's retirement orders does not persuade the Board that the Coast Guard carefully considered the applicant's highest rate held. Moreover, even if it did, as the applicant pointed out, several of the awards and accolades he received as a BM1/E-6 were missing from his personnel file at Headquarters,[15] which is what was or should have been reviewed to determine his highest rate held.

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[13] 10 U.S.C. § 1370(d).

[14] 10 U.S.C. § 1371.

[15] The applicant's Headquarters personnel file includes two Commandant's Letters of Commendation and one Meritorious Team Commendation that he received as a BM1/E-6 but lacks the following awards and accolades he also received as a BM1/E-6: three other Meritorious Team Commendations, a Coast Guard Unit Commendation Medal, three COs' letters of appreciation, and a unit Reservist of the Year award.

11. The applicant was reduced from E-6 to E-5 as a result of misconduct, but a reduction in rate by a lieutenant at mast—rather than by Special or General Court-Martial—does not render a member's service unsatisfactory for the purposes of determining his retired rate because Article 1.C.12.g.(2) of the Military Separations Manual states that "[i]n the absence of a reduction in grade by a Special Court-Martial or General Court-Martial, service will be considered satisfactory." Although this rule is provided for active duty members, there is no reason to apply a harsher rule to reservists. The exact charge against the applicant is unknown because the Coast Guard has lost the Record of Offense documenting his NJP, but it apparently involved misuse of his travel card, which he used frequently as a traveling [redacted]. A Page 7 states that the applicant admitted to a gambling addiction at mast, and he admitted to the Board that he used the card to get cash from an ATM in a casino on a weekend between training trips. Thus, it is possible that his CO reduced him in rate because he concluded that the applicant had intentionally used his travel card to get money for gambling or other entertainment when he was not on travel. The applicant alleged that he used an ATM at a casino because it was secure, got the cash advance because he knew he would be traveling on Monday, did not have enough money to travel without the cash advance, and used the cash only for his travel expenses, but he has not proven these claims.

12. The JAG did not argue, or cite any policy or regulation stating, that a reduction in rate at mast constitutes a bar to retiring a reservist at his prior, higher rate,[16] and the Board is persuaded that it should not under the circumstances of this case. The applicant's reduction in rate was his first ever punishment, and it was imposed by a lieutenant at a time so close to the applicant's transfer to the Inactive Status List and retirement that he had no chance to regain his rate. The NJP was imposed at the end of one bad year, when the applicant was apparently struggling with a recent divorce, gambling addiction, and alcohol abuse, near the end of a very long and successful military career, including ten years as a BM1/E-6 full of accolades and awards. In light of these circumstances, the Board finds that the applicant has proven by a preponderance of the evidence that the calculation of his retired pay based on his final E-5 pay rate is erroneous and "shocks the sense of justice"[17] and that his record should be corrected so that he will receive his retired pay based on a highest rate satisfactorily held of E-6.

13. The applicant made numerous allegations with respect to the actions and attitudes of various officers involved in his counseling and punishment. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity and/or are not dispositive of the case.[18]

14. Accordingly, the applicant's request to have his NJP expunged should be denied, but his record should be corrected so that his retired pay will be calculated based on his highest rate held satisfactorily in the Coast Guard Reserve, which was clearly E-6.

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[16] In fact, the omission of a reduction in rate *at mast* from Article 1.C.12.g.(2) of the Military Separations Manual shows that such reductions are not supposed to be dispositive in their effect in a highest rate held determination.

[17] *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (stating that for the purposes of the BCMRs, "injustice" may be defined as "treatment by the military authorities that shocks the sense of justice but is not technically illegal."); *but see* 41 Op. Att'y Gen. 94 (1952), 1952 WL 2907 (finding that "[t]he words 'error' and 'injustice' as used in this section do not have a limited or technical meaning").

[18] 33 C.F.R. § 52.24(b); *see Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that "appear frivolous on their face and could [not] affect the Board's ultimate disposition").

ORDER

The application of [redacted] USCGR (Retired), for correction of his military record is granted in part. The Coast Guard shall correct his record to show that his highest rate satisfactorily held for the purpose of calculating his retired pay is BM1/E-6 and shall pay him any amount due as a result of this correction. No other relief is granted.

August 1, 2014

[redacted]