

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-073



FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the completed application on March 9, 2016, and assigned it to staff attorney [REDACTED] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated March 23, 2017, 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 placed on Retired Reserve Without Pay status as a [REDACTED] on [REDACTED]. He asked the Board to correct his record to change his retired pay grade from E-7 (chief petty officer) back to E-8 (senior chief), and to award him back pay and allowances from [REDACTED] when he turned 60 years old and so was eligible to receive retired pay. The applicant stated that he served two extended periods of active duty from September 2001 to December 2002 and from February 2003 to January 2004 and was honorably discharged from the Reserve in 2007 as an [REDACTED] E-8 with 33 years of service to the Coast Guard, having received many medals, badges, citations, and awards. In his application, he stated that the alleged error occurred on December 4, 2007, but that he discovered the error on [REDACTED].

In support of his application, the applicant submitted various letters of appreciation and recognition, including a letter recalling him onto active duty after September 11, 2001. He submitted a discharge form DD-214 dated September 30, 2002, which denotes a pay grade of E-8. The DD-214 lists the following medals and awards: Meritorious Service Medal; Coast Guard Meritorious Unit Commendation Ribbon with Gold Star; Armed Forces Reserved Medal with "M" Device and bronze numeral four and silver hourglass; Humanitarian Service Medal; Bicentennial Unit Commendation; National Defense Service Medal with Bronze Star; Department of Transportation Secretary's Outstanding Unit Award; Coast Guard Sea Service Ribbon; first Coast Guard Good Conduct Award for period ending November 11, 1978; Coast Guard Meritorious Team Commendation; and Eighth Coast Guard Reserve Good Conduct

Award for period ending July 2, 2002. The applicant submitted a Leave and Earning Statement for the period of February 1 through 28, 2006, which also denotes a pay grade of E-8. He submitted a Retirement Point Statement printed on February 24, 2006, which stated that the applicant had 27 years of total satisfactory service.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard Delayed Entry Program on October 1, 1974. He began a four-year period of active duty on November 4, 1974, after which he served in the Reserve. He served continuously in the Reserve following his release from active duty in 1978 until he was transferred to retired status. He received three DD-214s during this period. The first was for a period from September 16, 2001, to September 30, 2002.¹ His second DD-214 is for a period from November 8, 2002, to December 18, 2002. He received an honorable discharge, with the narrative reason for separation being "completion of required active service," and an RE-1 reentry code. His last DD-214 covers the period from February 3, 2003, to January 29, 2004. He again received an honorable discharge, with the narrative reason for separation being "completion of required active service," and an RE-1 reentry code. His DD 214s show that his pay grade was E-8. While not on active duty, the applicant served primarily in the Selected Reserve but he was transferred to the Individual Ready Reserve (IRR) on October 1, 2004, and returned to a drilling status on October 25, 2005. The applicant was transferred to Retired Reserve Without Pay on [REDACTED] He became eligible for retired pay on [REDACTED] when he turned 60 years of age, but according to the Coast Guard, he had not [REDACTED] documents that shed light on his reduction in grade at court-martial in 2007:

On January 7, 2004, the applicant received a negative "Page 7" (form CG-3307) administrative entry in his record for "unsatisfactory [REDACTED] nonconformance to military rules, regulations, and standards." The Page 7 states that the applicant failed to properly use his chain of command when requesting a deviation from his assigned duty on multiple occasions, despite having been told to use his chain of command to request scheduling changes. The form further states that "several Petty Officers have approached the command during the past week about your personal conversations with them during duty hours. They felt the subject matter was inappropriate and made them feel uncomfortable. Your inappropriate conduct shows poor judgment, questionable senior petty office behavior, and a total lack of adherence to the Coast Guard's core values." Lastly, the Page 7 states that this episode was considered the applicant's first incident for documentation purposes, and that any further incident could result in disciplinary actions including non-judicial punishment (NJP). At the bottom of the Page 7 is a handwritten note stating that the applicant had refused to sign the Page 7, with the signature of two witnesses.

On June 23, 2004, the applicant received another negative Page 7 placing him on probation for his behavior and conduct for the prior six months. The applicant was again counseled for not properly following his chain of command. In addition, the Page 7 states the following:

¹ The bottom portion of this DD-214, which contains information such as the reentry and separation codes, is completely redacted.

You were also placed on report...because you made numerous inappropriate comments of a sexual nature to both men and women, most junior to you, that made them uncomfortable. While assigned to base...you will not engage in any conduct that could be perceived by any one as sexually harassing. You are to review the COMDT's statement on sexual harassment as well as the Coast Guard Equal Opportunity Program Manual, COMDTINST M5350.4 (series) for guidance on what types of behaviors are considered harassing. They include: unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature that unreasonably interferes with work performance or creates an intimidating or hostile work environment. If you chose to engage in sexually harassing behavior and it is brought to the command's attention, I will recommend to the CO and to CGPC that you be discharged for misconduct, as per PERSMAN, 12.B.18.b (12), for conduct demonstrating an established pattern of sexual harassment by crude or offensive behavior. Be advised that the commanding officer is authorized to recommend discharge at any time during this probation if you make no effort to correct your behavior and conduct.

At the bottom of the Page 7 is handwritten that the applicant had refused to sign it in acknowledgement, with the signature of three witnesses.

VIEWS OF THE COAST GUARD

On August 10, 2016, a Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion and recommended that the Board deny the applicant's request to be retired as an E-8 and provided back pay.

██████████ stated that the applicant was convicted at a Summary Court Martial on ██████████. His sentence was to be reduced from an E-8 to an E-7 and to receive a letter of reprimand. Both the conviction and sentence were approved by the JAG on ██████████ after the applicant requested review. The JAG stated that as a result of the applicant's misconduct, he was transferred to Retired Reserve status as an E-7 on ██████████.

Reserve retirement and retired pay laws state that Coast Guard enlisted reservists who retire based upon years of service receive the same rights and benefits as an enlisted member in the regular Coast Guard.² For enlisted members who began service prior to September 8, 1980, computation of retired pay is based on "final-pay" rules.³ Under the "final-pay" system, retired pay is calculated based on the member's final basic pay at the time of retirement. These rules are applicable to the applicant, who began service in 1974. The JAG argued that the applicant was lawfully reduced in rate to an E-7 at court-martial proceedings, and he retired shortly thereafter. Therefore, his retired pay must be calculated pursuant to his final pay as an E-7, and he will receive any back pay due to him dating to his 60th birthday when he applies for it.

Regarding the timeliness of the application, the JAG noted while the applicant is over 60 years of age and is eligible to receive retired pay, he has not yet applied to receive Reserve retired pay. His request for back pay is therefore not yet ripe for the Board. The JAG, however, stated that the Coast Guard does not object to the Board's determination of the applicant's request.

² 14 U.S.C. 705(e).

³ 14 U.S.C. 423(a)(1).

The JAG further argued that the applicant did not provide any evidence of error or injustice in the conduct of his court-martial case or in the processing of his retirement. The Coast Guard therefore recommended that his request be denied.

In support of the advisory opinion, the JAG submitted documents pertaining to the summary court-martial and some of the applicant's retirement paperwork. The summary court-martial states that the applicant was charged and found guilty of two specifications of maltreatment. The prosecution's evidence included the following:

[REDACTED]

The defense's evidence submitted a statement from a Coast Guard Reserve member who had known the applicant since 2002. She stated that was she "surprised at the charges" and stated she did not believe the applicant was "that type of person." She also stated that she understood that the applicant had some lawsuits or EEO complaints against the Coast Guard unrelated to the maltreatment accusations. The defense submitted a statement from another Coast Guard member who had been stationed with the applicant for approximately eight months. He stated that he saw the applicant roughly every day and that he was also "surprised at the charges." He stated that the applicant was easy going and very professional and noted that the applicant volunteered at a state aquarium. The summary court-martial ultimately found the applicant guilty and awarded the applicant a reduction to pay grade E-7 and a reprimand.

The JAG's written review of the summary court-martial states there is no basis for modification of the findings or sentence based on a review of the record. It was noted that the applicant did not make a written allegation of legal error in his case. The applicant had argued that the convening authority could not have been impartial because he was a named defendant in a pending lawsuit the applicant had against the Coast Guard. The JAG's response to the applicant noted the following: "The convening authority, however, was sued in his official capacity and was one of thirty-eight Coast Guard members...named as defendants. Moreover, the lawsuit was dismissed with prejudice over one month before the convening authority referred the charges to a court-martial for trial. Finally, it is significant that neither you nor your counsel raised any concerns regarding the convening authority's impartiality either during trial or in your post trial submissions."

On October 2, 2007, the applicant received a punitive letter of reprimand. The letter restates the proceedings of the summary court-martial and the applicant's sentence. In addition, the letter stated the following:

I am appalled by your conduct. As a senior enlisted member of the Coast Guard you are responsible to set an example for appropriate workplace conduct and lead junior enlisted personnel. Your behavior was destructively contrary to these senior chief petty officer responsibilities. Your misconduct negatively impacted the workplace and victimized a junior service member. The multiple acts of misconduct you committed directly conflict with the Coast Guard's core values of honor, respect, and devotion to duty and you are hereby reprimanded for engaging in them.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 30, 2016, the applicant's response to JAG's advisory opinion was received. The applicant discussed the laws and Supreme Court precedent surrounding anti-retaliation laws, particularly laws that protect an employee from retaliation after filing a discrimination claim against his employer. At the conclusion of his letter, the applicant requested that the findings and sentence of the summary court-martial be vacated and that any record of the court-martial be removed from his military record. The applicant alleged that he was unable to receive a fair and impartial disposition due to the pending lawsuits he had against the Coast Guard. He argued that the convening authority was a named party in one of the lawsuits, so he could not have fairly and impartially made a determination. The applicant claimed that the "absence of impartiality resulted in prejudice to [his] substantial rights...because of the lawsuits."

In support of his response, the applicant provided many documents regarding his lawsuits and his complaints to various Department employees, as well as members of the Senate and House of Representatives.

The applicant's evidence shows that he has sued both the Coast Guard and the Bureau of Prisons (BOP), his employer while he was not drilling or on active duty with the Coast Guard, multiple times. His main claim against the BOP was that his employer placed the applicant in AWOL status while he was on active duty with the Coast Guard, and as a result the applicant allegedly lost benefits and paid time off. He later sued them for retaliating against him due to his original lawsuit(s).

The applicant's main claims against the Coast Guard are that the Coast Guard discriminated against him on the basis of his sex when he was ordered to complete two psychiatric evaluations, when his command refused to forward the applicant's request for a waiver of Reserve policies,⁴ when the Coast Guard removed him from active duty, and when he was not allowed to park his car on base while he was on a cruise. In some of his claims, he also

⁴ On or around September 13, 2004, the applicant received notice that he would be placed in IRR because he would reach 30 years of service on October 1, 2004. The applicant wished to submit a waiver request so that he could continue to serve in active reserve status and to take the SWE that year. The applicant also filed an application with the BCMR regarding an issue related to this, and he was denied relief because the applicant failed to prove an error or injustice had occurred.

alleged a hostile work environment due to his gender. The DHS Office of Civil Rights and Civil Liberties and the Coast Guard Equal Employment Opportunity office reviewed his claims on multiple occasions and found them all to be without merit and found no discrimination based on gender or retaliation for protected EEO activities.

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. The applicant requested a regional or local hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, informed the applicant that the Board does not hold regional hearings, and denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.⁵
3. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice in his record.⁶ The decision of the applicant's summary court-martial was issued on [REDACTED], after a hearing on [REDACTED]. The applicant received notice of his sentence, which included a reduction in grade from E-8 to E-7 and a punitive letter of reprimand, on [REDACTED]. The applicant requested review of his sentence by the JAG, which was completed and the sentence upheld on [REDACTED]. Despite the fact that the applicant stated he discovered the alleged error on [REDACTED] his 60th birthday, the Board finds that he knew about his reduction in pay grade and retirement as an E-7—which is the error he wants the Board to correct—in [REDACTED]. His application is therefore untimely.
4. The Board may excuse the untimeliness of a claim if it is in the interest of justice to do so.⁷ 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”⁸ 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.”⁹
5. The applicant asked the Board to return his retired pay grade from E-7 to E-8 and to award him back pay from [REDACTED] when he was eligible to receive retired pay. A cursory review of the record shows that the applicant's claim cannot prevail. The applicant was convicted at a summary court-martial for two specifications of sexually-related maltreatment in [REDACTED]. The

⁵ *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).

⁶ 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

⁷ 10 U.S.C. § 1552(b).

⁸ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁹ *Id.* at 164, 165; see also *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405 n14, 1407 n19 (D.C. Cir. 1995).

applicant exercised his rights and had the sentence reviewed by the JAG, and it was approved. By statute, a member is not entitled to retire at the highest grade held when his grade has been reduced as a result of a court-martial sentence unless he has re-advanced to the higher grade.¹⁰ The record contains no evidence that substantiates the applicant's allegations of error or injustice in his official military record, which is presumptively correct.¹¹

6. In the applicant's response to the JAG's advisory opinion, he requested that his summary court-martial conviction be vacated. This request also cannot prevail on the merits. With respect to courts-martial, the Board may not overturn a conviction and may only grant clemency on a sentence.¹² The applicant has not shown that clemency is warranted. The record shows that based on his many years of service, the applicant was granted a retirement despite his misconduct, and 10 U.S.C. § 1406 mandates his retirement as an E-7, the grade he held after the court-martial and at the time of his transfer to the Retired Reserve.

7. Therefore, the Board will not excuse the untimeliness of the request or waive the statute of limitations. The applicant's requests to have his pay grade raised from an E-7 to an E-8 and to vacate the summary court-martial should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹⁰ 10 U.S.C. § 1406 (i)(2)(A).

¹¹ 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.").

¹² 10 U.S.C. § 1552(f).

ORDER

The application of [REDACTED] USCGR (Retired), for correction of his military record is denied.

March 23, 2017

