

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-246

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on August 18, 2017, 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 July 20, 2018, 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 retired as an [REDACTED] E-4 on August 31, 2015, asked the Board to correct his record to show that he was retired for pay purposes as an E-6 instead of an E-4. The applicant explained that he had served for over three years as an [REDACTED] First Class/E-6 "which should have entitled [him] to receive Higher Tenure Retirement Pay as an E-6." However, he stated, he took a voluntary reduction in paygrade to an E-5 at his penultimate duty station and then, at his last duty station, he was reduced again at Captain's Mast to an E-4. The applicant claimed that he was "never notified that [he] would lose [his] Higher Tenure as an E-6" and that he never signed anything indicating this change. He argued that he "should be allowed to receive [his] retirement as an E-6 and not as an E-4 due to achieving Higher Tenure Status."

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on December 6, 1999, after serving more than five years in the Navy. The applicant received many negative administrative entries in his record, including entries for failing to complete required qualifications, inability to follow proper procedures, non-compliance with weight standards, and ineffectively directing subordinates.

On October 20, 2011, the Personnel Service Center (PSC) sent the applicant's Sector a memorandum regarding his voluntary reduction in rank. PSC stated that according to the Enlisted Accessions, Evaluations, and Advancements Manual, Article 3.A.30.d., a Commanding Officer

may authorize a reduction in rank of enlisted members at the member's written request. Based on the applicant's memorandum dated October 5, 2011, PSC concurred with the voluntary reduction of the applicant to [REDACTED] E-5.

On July 14, 2015, the applicant received non-judicial punishment (NJP) for making a false official statement and for dereliction in the performance of his duty. He was reduced to E-4 and required to forfeit half of his pay for two months.

The applicant was honorably retired on August 31, 2015, for "maximum service or time in grade."

VIEWS OF THE COAST GUARD

On February 8, 2018, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. The JAG stated that under 10 U.S.C. § 1407(f), enlisted members who are reduced in grade as a result of an administrative action are not entitled to receive retired pay under the high-three year average rules. The JAG argued that the applicant was administratively reduced in grade and therefore was not entitled to retired pay under the high-three year rules as an E-6. In making this recommendation, he adopted the findings and analysis provided in a memorandum prepared by PSC.

PSC stated that the application is timely and therefore should be considered on the merits. PSC noted that there is an exception to the high-three year average retired pay rule for enlisted members when a member is voluntarily reduced in rank under 10 U.S.C. § 1407(f). The applicant was voluntarily reduced in rank to an E-5 on October 20, 2011, and was later awarded NJP on July 14, 2015, and was reduced in rank again to an E-4. PSC noted that the applicant had served as an E-6 for seven years and two months before being voluntarily reduced in rank. However, PSC recommended that the Board deny relief due to the exception for high-three year tenure for enlisted members who are administratively reduced in rank.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 12, 2018, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. No response was received.

APPLICABLE LAW AND REGULATIONS

Title 10 U.S.C. § 1407(b) states "High-three average – Except as provided in subsection (f), the retired base or retained pay base of a person under this section is the persons' high-three average determined under subsection (c) or (d)." Subsection (f) states:

(f) Exception for enlisted members reduced in grade and officers who do not serve satisfactorily in highest grade held.--

(1) Computation based on pre-high-three rules.--In the case of a member or former member described in paragraph (2), the retired pay base or retainer pay base is determined under section

1406 of this title in the same manner as if the member or former member first became a member of a uniformed service before September 8, 1980.

(2) Affected members.--A member or former member referred to in paragraph (1) is a member or former member who by reason of conduct occurring after October 30, 2000--

(A) in the case of a member retired in an enlisted grade or transferred to the Fleet Reserve or Fleet Marine Corps Reserve, was at any time reduced in grade as the result of a court-martial sentence, nonjudicial punishment, or an administrative action, unless the member was subsequently promoted to a higher enlisted grade or appointed to a commissioned or warrant grade; ...

(3) Special rule for enlisted members.--In the case of a member who retires within three years after having been reduced in grade as described in paragraph (2)(A), who retires in an enlisted grade that is lower than the grade from which reduced, and who would be subject to paragraph (1) but for a subsequent promotion to a higher enlisted grade or a subsequent appointment to a warrant or commissioned grade, the rates of basic pay used in the computation of the member's high-36 average for the period of the member's service in a grade higher than the grade in which retired shall be the rates of pay that would apply if the member had been serving for that period in the grade in which retired.

Enlisted Accessions, Evaluations, and Advancements Manual, COMDTINST M1000.2, Article 3.A.30.d., states that a Commanding Officer “may authorize and effect a reduction in rate of any enlisted member in their command in the first six pay grades (E-1 through E-6) at the member’s own written request.” The member’s written request with the reason must be forwarded to PSC with the action taken noted.

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. The application was timely.

2. The applicant alleged that his retired pay is erroneous and unjust because he should be receiving payment at the rate of an E-6 instead of an E-4. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant’s military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.¹ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”²

¹ 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the “clear and convincing” evidence standard recommended by the Coast Guard and adopting the “preponderance of the evidence” standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

² *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

3. The applicant argued that because he had served for over three years as an E-6, he should be entitled to E-6 retired pay, despite the fact that he was retired as an E-4. However, 10 U.S.C. § 1407 states that members who are reduced in grade as a result of NJP or administrative action are not entitled to receive retired pay under the high-36 month average rules. According to the record before the Board, the applicant's rank was voluntarily reduced from an E-6 to and E-5 on October 20, 2011, and it was reduced to E-4 as the result of NJP on July 14, 2015. The applicant alleged that he was not notified of the provisions of § 1407(f) before he requested the voluntary reduction in grade from E-6 to E-5 on October 5, 2011, but he did not submit a copy of the letter by which he requested the reduction in grade and he was not eligible for retirement at the time. Nor has he proven by a preponderance of the evidence that his reduction in rate for making a false official statement and dereliction of duty in July 2015 was erroneous or unjust. The Board therefore finds that 10 U.S.C. § 1407(f) applies here and that the applicant is not eligible for high-36 month average retired pay under the statute.

4. The applicant has failed to prove by a preponderance of the evidence that an error or injustice exists in his record. Therefore, his request for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

July 20, 2018

