DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-007

[redacted] ET2/E-5 (former)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on October 19, 2018, and assigned it to staff member [redacted] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated July 26, 2019, 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, an Electronics Technician, Second Class (paygrade E-5) who was honorably discharged from the Coast Guard on August 1, 2017, as a result of High Year Tenure (HYT) policy,[1] asked the Board to correct his record by allowing him to retire at the E-6 paygrade so that he is eligible to collect E-6 retired pay.

The applicant stated that in 2013 he was reduced in rate from E-6 to E-5 as the result of a Captain's Mast after 14 years of service. He stated that after his reduction in rate, he was not able to advance to E-6 in time to avoid being discharged under HYT policy, but that he still performed his duties in an outstanding manner and received recommendations from his command to remain on active duty to collect retirement. He alleged that the HYT policy is inconsistent with 10 U.S.C. § 1176, and that he will lose retirement benefits in excess of $418,000 as a result of his inability to collect retirement. He claimed that this punishment is "disproportionate" to the offense he was received non-judicial punishment (NJP) for at mast in 2013.

[1] HYT policy is explained in Article 3.A. of COMDTINST M1000.4 as follows:

> High year tenure (HYT) is a workforce management tool that establishes limits on the active military service time an active duty enlisted member can complete based on their pay grade. HYT is designed to increase personnel flow, compel members to advance in their rating, and allow more consistent training and advancement opportunities for the enlisted workforce.

In a legal brief, the applicant's attorney stated that the result of the NJP was a reduction in rate and a loss of points needed for advancement. He argued that as a result of the NJP, it was impossible for the applicant to reach E-6 in time to avoid discharge under HYT. He also alleged that the applicant's statements as part of a separate investigation were used against him without warning. He then noted that the applicant's request for an extension of the time to appeal his NJP in July 2013 was not granted and argued that as a result of the unjust denial of the applicant's request to extend the time, his appeal was.

The attorney next highlighted that the applicant received favorable commendations to restore his rank from the command that reduced his rank at mast, but the endorsements did not result in the restoration of his rank. He noted that the applicant received similar favorable remarks from his command when he requested a waiver for HYT and to remain on active duty, both in 2017, but he still received neither form of relief. He argued that restorations in rate are permitted under Article 3.A.27.b. of COMDTINST M1000.2A and that the Coast Guard violated that policy by refusing to restore his rate.[2] The attorney enclosed copies of these favorable endorsements, and the applicant's final DD 214 showing that the applicant completed 17 years, 11 months, and 1 day on active duty before being released into the Reserve.

The attorney noted the HYT panel that considered the applicant's waiver request only had access to his personnel file, which included negative information, such as his NJP and EER. They were not allowed to see the reports of the investigations, which, the attorney argued, would have given them "the full picture" so that they would "appreciate the injustice of the mast." He reiterated that the applicant has lost over $418,000 in retirement benefits as a result of this discharge.

The applicant's attorney next analyzed 10 U.S.C. § 1176,[3] arguing that it should apply to the Coast Guard even if it is not specifically mentioned in the statute. He stated that the statute

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[2] Article 3.A.27.b. of COMDTINST M1000.2A states the following:

> (1) Advancement after Reduction. Members who have been reduced in rate, except those who fall within the provisions of Articles 15(d) and 15(e) of the Uniform Code of Military Justice [concerning suspension of NJP and appeal], are subject to the normal advancement system, unless they are considered by their commanding officers to be deserving of special advancement.
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> (2) Recommendation for Restoration/Advancement. Commanding officers who consider enlisted members to be deserving of restoration to a formerly held rate, or deserving of advancement, but to a rate lower than formerly held, may recommend such restoration or advancement by letter to Commander (CG PSC-EPM) or (CG PSC-RPM). …

[3] 10 U.S.C. § 1176(a) 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 7314 or 9314 of this title, or of qualifying for transfer to the Fleet Reserve or Fleet Marine Corps Reserve under section 8330 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.

10 U.S.C. § 7314 authorizes the retirement of Army enlisted personnel with 20 to 30 years of active duty.

10 U.S.C. § 9314 authorizes the retirement of Air Force enlisted personnel with 20 to 30 years of active duty.

10 U.S.C. § 8330 authorizes "retainer pay" and transfer to the Fleet Reserve or Fleet Marine Corps Reserve for Naval or Marine Corps enlisted personnel with at least 20 years of active duty.

14 U.S.C. § 2306 authorizes the retirement of Coast Guard enlisted personnel with 20 or more years of active duty.

says that no member can be involuntarily discharged once he or she reaches 18 years of service in the military. The attorney alleged that this should apply to the applicant because he was contracted to complete 18 years of service in the Coast Guard before his demotion to E-5 and HYT discharge ended his active duty service. He also argued that the applicant's inability to retire after performing almost 18 years of active duty is a worse situation than that of service members who commit serious misconduct and are subject to an Other than Honorable (OTH) discharge. He explained that under the Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1, if members who commit misconduct and have more than 18 years of service are being processed for an administrative separation through an Administrative Separation Board, they are allowed to waive their right to the board and can condition their waiver on being allowed to remain on active duty until eligible to retire.

To support his claims, the applicant submitted numerous documents, which are included in the Summary of the Record below.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on August 30, 1999. By the summer of 2012, when he reported for duty aboard cutter, the applicant had advanced to ET1/E-6.

Disciplinary Action

In fall 2012, a male MK2/E-5 and a female Fireman (FN/E-3) on the applicant's cutter accused each other of sexual assault and harassment at a bar on September 12, 2013. The applicant was not the subject of the investigation, but he was interviewed as a witness, since he was at the bar where the alleged incident took place. He admitted that he was "pretty tipsy" that night; that the FN got "flirty" with him; and that he bought her two drinks. As a result of other witnesses' statements, however, an investigation began into the applicant's own interactions with the FN. Although the applicant alleged that the FN was the aggressor, other witnesses at the bar told a different story. They indicated that the applicant was more aggressive in pursuing the FN than he admitted. They reported that he was intoxicated and leaned forward as if to kiss the FN a few times; that one time she put his head on her chest and another member tapped the applicant on the shoulder to stop him; that the applicant and the FN were acting like a couple; and that the applicant continued to sit with the FN despite crewmates' attempts to separate them.

At mast on July 12, 2013, the applicant was found in violation of Article 134 of the Uniform Code of Military Justice (UCMJ) for general conduct that discredits the Coast Guard and Article 92 of the UCMJ for failure to obey a lawful order or regulation by having an inappropriate relationship with a crewmate. The CO also determined that the applicant had incurred an "alcohol incident." As a result of the mast, the applicant was reduced in rate from E-6 to E-5 and sentenced to 45 days of restriction with extra duties. At the mast, the applicant was advised that he had five days to appeal the punishment on the basis that it was unjust or disproportional.

The applicant requested an extension of the time to appeal his NJP in a memorandum titled "Appeal of Imposition of Nonjudicial Punishment" on July 17, 2013, but this request was denied on July 26, 2013. The Rear Admiral who denied the appeal wrote that the applicant had requested

an extension to consult with counsel, but, since there is no right to consult with civilian or military counsel for NJP appeals, such a request could not be granted. The Rear Admiral noted that while the applicant's request did not specifically address the unjustness or the disproportionate nature of the punishment—the only two grounds for appealing an NJP—he had looked at the circumstances and concluded the following:

> An "unjust" punishment means that the punishment was illegal. The punishment awarded is within the limits provided by references (b-d). The term "disproportionate" means that although your punishment was legal it was excessive or too severe considering all the circumstances. In your case, the Commanding Officer carefully considered your prior performance, your lack of a prior disciplinary record, and the facts surrounding the conduct charged, including your admission that you were drinking heavily during the incident. Your punishment is proportionate considering all these factors.

First Restoration in Rank Attempt

On March 6, 2014, the applicant's CO asked the Personnel Service Center (PSC) to restore his rate to E-6 via a Recommendation for Restoration in Rate (RIR) memorandum. The CO stated that the applicant had "demonstrated the professionalism and dedication necessary for advancement" and that he was filling "a role normally held by a First Class Petty Officer." PSC denied this request on May 27, 2014, saying that the applicant should compete for advancement through the regular Servicewide Examination (SWE) advancement process rather than through a Restoration in Rate (RIR) process, since "special advancement outside of the Servicewide Examination (SWE) process would displace other members (without NJP) that are waiting to advance off the current advancement list."

BCMR Application

The applicant applied to the BCMR regarding his NJP and reduction in rate on December 5, 2015. He asked for the Board to remove the NJP, the negative Enlisted Evaluation Report (EER) that references the incident, and the documentation of an "alcohol incident" from his record. He and his attorney alleged that the applicant was never informed of his rights before he was questioned for the initial investigation, and as such, any statements from that interview were unfairly used against him. They added that the applicant was not properly informed of the charges against him once notified of the mast, that his punishment was disproportionate especially since other members present at the bar that evening had only received warnings, and that he was unfairly denied an opportunity to appeal the NJP.

In BCMR Docket No. 2015-058, the BCMR denied his request for relief in a final decision dated December 30, 2016, saying that he had not proved any of his claims by a preponderance of the evidence (see enclosed). With respect to not being read his rights when interviewed as a witness in the first investigation and not being granted an extension of the time to appeal the NJP, the Board made the following findings:

> 4. The applicant alleged that his NJP was unjust because he was not advised of his rights pursuant to Article 31(b) of the UCMJ during the CGIS investigation and so incriminated himself not knowing that he would be charged, but the Board disagrees. Whether or not the CGIS agents should have advised him of his rights pursuant to Article 31(b) is arguable since he admitted

only that he got "pretty tipsy" that night; that the FN got "flirty," told him he was cute, and touched his arm; and that he bought her two drinks—none of which is, by itself, an offense. However, as the JAG noted, Article 1.D.1.g. of the MJM states that "[j]udicial exclusionary rules involving rights warnings … do not apply at mast, and the [CO] may consider evidence that would be inadmissible at court-martial." Therefore, the fact that the applicant was not advised of his Article 31(b) rights during his interview with the CGIS agents, because they considered him only a witness, did not prohibit his CO from considering his statement to the CGIS agents at mast. The Board notes that the PIO advised the applicant of his rights on July 10, 2013, two days before the mast.

5. Although the applicant argued that the consideration of his statements was not "fundamentally fair," as required by Article 1.D.1.g. of the MJM, the Board is not persuaded that it was fundamentally unfair in light of the inapplicability of the exclusionary rules at mast and the fact that the applicant did not expressly admit to committing an offense to the CGIS agents even if some of his statements corroborate other evidence supporting some of the elements of the charges against him, such as his consumption of alcohol at the bar. In addition, the Board is not persuaded that the applicant would not have received NJP even if the CO had not considered the applicant's statement to the CGIS agents. The record shows that the written and verbal testimony of the other witnesses at mast could have provided the CO with sufficient evidence to conclude that the preponderance of the evidence showed that the applicant had committed the offenses.

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11. The Board finds that the applicant has not proven by a preponderance of the evidence that he was entitled to an extension of the five-day period for appealing his mast, that his command and the Acting Area Commander abused their discretion in refusing to grant him an extension, or that his command erred in failing to produce copies of the evidence for the applicant's attorney to review. There is no provision for requesting and granting an extension of the five-day appeal period to consult counsel in the MJM; nor is there a provision for document production during the appeal process. Article 1.F.1. of the MJM states that an "appeal must be submitted in writing within 5 calendar days of the imposition of the punishment, or the right to appeal shall be waived in the absence of good cause shown." Although the applicant argued that his desire to consult an attorney constituted "good cause," the Board in not persuaded that the command and the Area Commander abused their discretion in this case. The applicant has not shown that his command committed any procedural error or denied the applicant a legal right pursuant to the mast that his attorney could have identified and addressed for him in the appeal. (Although he has made many allegations of procedural errors in this BCMR application, he has not actually shown that the command committed any errors in conducting the mast.)

Subsequent RIR Request

The applicant's attorney submitted a second RIR memorandum dated June 30, 2016, in which the applicant's new CO also requested that the applicant be restored to E-6. He noted that since the NJP in July 2013, the applicant had been recommended for promotion on six consecutive performance evaluations. The CO stated that the applicant's EER marks for the past three years had been outstanding and that the incident had not "derail[ed] him from executing his duties and responsibilities." The applicant did not submit PSC's response to this RIR request, but it was presumably negative.

HYT Waiver Request

On November 4, 2016, the applicant applied for a waiver of HYT policy, asking to remain on active duty until he reached 20 years of service for retirement. The applicant noted that under HYT, he would be discharged no later than September 1, 2017, unless he received a waiver. He noted that he would have 18 years of service by August 30, 2017, and that he had consistently

taken the SWE to try to advance and had applied for RIR four times with his CO's endorsement.[4] The applicant's CO endorsed his request for a waiver, praised his "distinguished performance since 12 July 2013," and said, "I firmly believe that the event that resulted in [applicant's] NJP is an isolated incident and is not indicative of this member's dedication and commitment to our service."

PSC denied the applicant's HYT waiver request on December 13, 2016, saying that he did not meet the HYT waiver selection standards. The memorandum stated that the applicant would be separated from the Coast Guard no later than September 1, 2017, with an honorable character of service; this would be just after he reached 18 years of service.

Request to Remain on Active Duty

The applicant submitted a Request to Remain on Active Duty on June 5, 2017, asking to remain on active duty until he became service qualified for retirement on August 30, 2019. In his memorandum, he cited 10 U.S.C. § 1176 and argued that § 1176(a) allows service members being involuntarily separated from the service within two years of retirement eligibility to remain on active duty. He argued that this statute should apply to him because it does not expressly exclude members of the Coast Guard. He argued that the Coast Guard's HYT policy is authorized under 10 U.S.C. § 1169, and so 10 U.S.C. § 1176(a) should apply because if the Coast Guard uses one section of Title 10, then all sections of Title 10 should apply. He argued that Title 10 applies to the Armed Forces, and 14 U.S.C. § 1 states that the Coast Guard is one of the Armed Forces and that nothing in Title 14 prohibits the Coast Guard from applying the sanctuary rule in 10 U.S.C. § 1176(a).

This Request to Remain on Active Duty was endorsed by the applicant's Executive Officer (XO) and CO. In the first one, dated June 16, 2017, the XO discussed the applicant's outstanding service to his unit and stated that the unit lacked sufficient ETs and that, if the applicant left, there would be no petty officers on the unit's electronics team. The CO's endorsement, also dated June 16, 2017, reiterated the applicant's successful work on multiple specific operations and noted that he was the only petty officer assigned to those duties.

PSC denied the applicant's Request to Remain on Active Duty in an undated memorandum. It stated that the previous HYT determination was final and that he would be discharged from the service no later than September 1, 2017, with an honorable character of service.

The applicant was honorably discharged from the Coast Guard on August 1, 2017, according to his DD 214. He had completed 17 years, 11 months, and 1 day of active duty.

VIEWS OF THE COAST GUARD

On May 15, 2019, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

[4] The applicant submitted two of the four RIR memoranda signed by his COs.

The JAG wrote that the applicant's HYT policy is authorized under 10 U.S.C. § 1169, and the applicant was properly discharged under that policy. She stated that the Coast Guard's HYT policy is not impacted by 10 U.S.C. § 1176 because that statute does not provide a "safe harbor" for Coast Guard members. She noted that the statute does not refer to the Armed Forces and instead references the retirement statutes applicable to enlisted members of the Army, Air Force, Navy, and Marine Corps but not the statute authorizing retirement for members of the Coast Guard. She also noted that § 1167 was enacted under the National Defense Authorization Act for Fiscal Year 1993, and the provisions of that act "generally do not apply to the Coast Guard absent explicit inclusion by its terms." She stated that there is no law or policy requiring the Coast Guard to provide a "safe harbor" or "sanctuary" for enlisted members with more than 18 years of active duty, and even if there were, the applicant had not completed 18 years of active duty when he was discharged.

The JAG stated that although the applicant argued that the HYT policy was unjustly applied because he had been reduced in rate, the policy provides a three-year grace period for members who have been reduced in rate, regardless of their PGP, and the applicant was accorded that grace period. She explained that when the applicant was reduced to E-5 on July 12, 2013, he had almost 14 years of service and the PGP for an E-5 is 16 years. Because of the three-year grace period, however, the applicant had until July 12, 2016, to re-advance to E-6 to avoid being discharged under HYT. Although the applicant competed for advancement by taking the SWEs, he did not advance to E-6 by that date. She added that while it is difficult to advance from E-5 to E-6 after a demotion like the one the applicant received in the 36-month time frame, it was still possible for him to advance based on his points and high SWE scores. She noted that members receive points for their EER marks, time in service, time in paygrade, medals and awards, and amount of sea or surf duty and are placed in order on the advancement list based on their total points and SWE scores. She concluded that the applicant had not advanced within the grace period because during those three years, the combination of his points and SWE scores had not placed him high enough on the advancement list to advance.

With regard to the applicant's claim that the Coast Guard violated Article 3.A.27.b. of COMDTINST M1000.2A because his rate was not restored even though his COs requested it, the JAG stated that the policy permits a member to apply to PSC for restoration of rate with positive command endorsements but does not require PSC to restore the member's rate. The JAG noted that in the applicant's case, the JAG declined to restore his rate because there were E-5s who had not received NJP who were on the list waiting for advancement to E-6. The JAG argued that the applicant failed to show that this decision was erroneous or unjust.

The JAG noted that the applicant complained that the HYT panel was not to review the report of the investigation and stated that even if the panel had seen the report, "there is still no guarantee that the waiver would have been approved." The JAG stated that HYT panels look at the entire professional development record to determine if a member is a good candidate for retention, and the needs of the Service dictate who is offered a waiver.

With regards to the applicant's claim that he should have been granted an extension of the time to appeal the NJP, the JAG stated that the Area Commander who denied the request for

extension did so because members have not right to consult counsel with regard to NJP appeals and the applicant has not shown that determination was erroneous or unjust.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 15, 2019, the Chair sent the applicant and his attorney a copy of the Coast Guard's views and invited him to respond within thirty days. No response was received.

APPLICABLE LAW AND POLICY

Statute

Title 10 U.S.C. § 1169 states that "[n]o regular enlisted member of an armed force may be discharged before his term of service expires, except--(1) as prescribed by the Secretary concerned; (2) by sentence of a general or special court martial; or (3) as otherwise provided by law."

Military Separations Manual, COMDTINST M1000.4

HYT policy appears in Article 3 of the Military Separations Manual and includes the following provisions:

Article 3.B.2. defines "professional growth point" (PGP) as "[t]he maximum amount of active military service a member can have for their current pay grade." Article 3.C. states that the PGP for an E-5 is 16 years, while the PGP for an E-6 is twenty years.

Article 3.B.3.b. states that a petty officer is an "HYT candidate" if the member's "active military service time is greater or equal to their PGP each year on 31 December, beginning 2015. Regardless of the exact date a member passes their PGP during a calendar year, 31 December will be the cut-off that determines whether or not a member is a HYT candidate. The member shall become a candidate on 31 December. Members are responsible for knowing their ADBD and understanding when they become a HYT candidate."

Article 3.D.2.a. provides the following for members who have been reduced in rate:

> (1) Members reduced from pay grade E-6 and below shall maintain the PGP of one pay grade above the pay grade to which they are reduced.
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> (2) Members shall keep the PGP in accordance with (1) of this section for 36 months from the date of reduction. At the end of the 36 months, the member shall assume the PGP of their existing pay-grade, regardless of their previous pay-grade.

Article 3.G. states that "Commander (CG PSC-EPM) will separate, or retire if requested and retirement eligible, HYT candidates who do not receive a HYT PGP waiver or other exemption."

Article 3.G.1.a. states that "[a]ll HYT candidates (E-3 to E-8) will separate, or retire if requested and retirement eligible, no later than 1 September of the year following the year their active military service time exceeds their PGP, unless granted a HYT PGP waiver."

Article 3.G.3. states that a member may request an earlier separation date.

Article 3.G.4. states that HYT candidates may be eligible for separation pay under 10 U.S.C. § 1174 if they are not eligible to retire.

Article 3.H. states that Commander, PSC-EPM "is the sole waiver granting authority for HYT PGP waivers" and will announce which HYT candidates are eligible to request a waiver at least 30 days before convening a HYT PGP waiver panel.

Enlisted Accessions, Evaluations, and Advancements Manual, COMDTINST M1000.2A

Article 3.A.3.f. of COMDTINST M1000.2A states that a member's placement on an advancement list is based on the member's total credits/points. The maximum number of credits/ points a member can have is 200, including a maximum of 80 for the member's SWE score; 50 for the member's EER marks during the prior 10-month period; 20 for the member's total time in service, at a rate of 1 per year; 10 for the member's time in present rating (but time in the rating before a reduction in rate is not counted), at a rate of 2 per year and 0.166 for each full month; 10 for medals and awards; and 30 for sea and/or surf duty at a rate of 1 per month but no more than 2 per year. *See* Articles 3.A.7.b., 3.A.14.b.(2)(a) and (5), and 3.A.16.b.

Article 3.A.5.(g) states that a member in paygrade E-5 is ineligible to compete for advancement if the member has received NJP, an unsatisfactory conduct mark on an EER, or a court-martial or civil conviction in the prior 12 months.

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 application is timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

3. 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.[5]

4. The applicant alleged that his discharge as an E-5, in lieu of retirement as an E-6, is erroneous and unjust. 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 the military record, and the applicant bears the burden of proving by a preponderance

[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).

of the evidence that the disputed information is erroneous or unjust.[6] 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."[7]

5. The applicant has not proven by a preponderance of the evidence that he should have been retained on active duty until eligible to retire pursuant to 10 U.S.C. § 1176. That law clearly applies only to enlisted members "within two years of qualifying for retirement" under 10 U.S.C. §§ 7314, 9314, or 8830—the statutes that authorize retirement for enlisted members of the Army, Air Force, Navy, and Marine Corps with at least 20 years of service. The statute that authorizes retirement for enlisted members of the Coast Guard with 20 years of service, 14 U.S.C. § 2306, is not mentioned in 10 U.S.C. § 1176, and the Board knows of no equivalent "safe harbor" statute that applies to Coast Guard enlisted members.

6. The applicant has not proven by a preponderance of the evidence that Commander, PSC-EPM abused his discretion or committed an error or injustice by refusing to restore the applicant's E-6 rate as recommended by his COs pursuant to Article 3.A.27.b. of COMDTINST M1000.2A. Although paragraph (1) of that article states that members who have been reduced in rate are subject to the regular advancement system unless their CO considers them "deserving of special advancement," paragraph (2) provides that a CO who wants a member's prior rate restored may only *recommend* a restoration in rate to Commander, PSC-EPM, who makes the final decision. The record shows that Commander, PSC-EPM declined to restore the applicant's E-6 rate because there were E-5s waiting for advancement on the E-6 advancement list who had not committed misconduct, as the applicant had. This reasoning is not arbitrary, erroneous, or unjust.

7. The applicant alleged that the denial of a restoration to E-6, the denial of an HYT waiver, and his discharge under HYT were unjust because it was "impossible" for him to advance to E-6 before his PGP. Because of the NJP, the applicant's accrued points for his time in rate diminished and he was not eligible to compete for advancement for a year.[8] But the applicant was eligible to compete for advancement in late 2014, 2015, and 2016, and the most significant factors in whether a member can advance are the member's SWE score and EER marks during the prior ten-month period.[9] Therefore, it was not "impossible" for the applicant to advance because his SWE score and EER marks were substantially within his control. And because of the three-year grace period under Article 3.D.2.a. of COMDTINST M1000.4, the applicant's PGP remained that of an E-6 (20 years/2019) until July 12, 2016, when it became that of an E-5 (16 years/2015). Therefore, under Article 3.B.3.b., the applicant became an "HYT candidate" on December 31, 2016, because he had passed his PGP in 2016 and had not re-advanced to E-6. The Board finds that the applicant has not proven by a preponderance of the evidence that the denial of restoration to E-6, the denial of an HYT waiver, or his discharge under HYT were unjust because he did not advance to E-6 through the regular, competitive advancement system.

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[6] 33 C.F.R. § 52.24(b).
[7] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).
[8] COMDTINST M1000.2A, Articles 3.A.5.(g) and 3.A.14.b.(2)(a) and (5).
[9] *Id.* at Article 3.A.3.f.

8. The applicant has not proven by a preponderance of the evidence that the denial of his request for an HYT waiver was erroneous and unjust because the HYT panel reviewed only his professional development records and not other documents, such as the reports of the investigations. Under Article 3.H. of COMDTINST M1000.4, Commander, PSC-EPM is the "sole waiver granting authority." The fact that this officer apparently limited the documents reviewed by the HYT panel, which provided him with recommendations about waivers, to the HYT candidates' professional development records is not erroneous or unjust. The role of the HYT panel was not to second-guess NJP decisions made in the past by the candidates' COs, and the Board knows of no law or policy that required the HYT panel or Commander, PSC-EPM to review anything an HYT candidate wanted them to review before deciding whether to grant a waiver.

9. The applicant argued that his 2017 discharge under HYT was unjust because it was caused by his reduction in rate at NJP in 2013 and the NJP itself was unjust because he was not read his rights when interviewed as a witness in the first investigation and was not granted an extension of the time to appeal the NJP. These arguments about the NJP are ones that the Board already considered and rejected in BCMR Docket No. 2015-058, however, and the applicant has not submitted any new material that warrants reconsidering these issues. The mere fact that the applicant was ultimately discharged under HYT and would likely have remained in the Service until retirement eligible if he had not received NJP in 2013 is not material evidence that the NJP itself was erroneous or unjust. The Board finds no reason to revisit or revise its findings on these issues or any of the issues addressed in its decision in BCMR Docket No. 2015-058. The fact that the CGIS agents did not read the applicant his rights when they were interviewing him as a witness (rather than the subject of the investigation) and the fact that he was not granted an extension of the time to appeal his NJP do not make the applicant's discharge under HYT erroneous or unjust.

10. The applicant argued that his discharge under HYT and loss of retirement was a disproportionate "punishment" resulting from the offenses for which he was punished at mast in 2013. But the applicant's discharge under HYT was not a "punishment," and the HYT policy is a separate, administrative procedure, not disciplinary. The fact that in 2012, when the applicant committed the offenses for which he received NJP in 2013, the HYT policy was not in effect,[10] and he could not have predicted when it would recommence or that he would not succeed in re-advancing to E-6 and so would become subject to an HYT discharge in 2017 does not make either the NJP or his discharge under HYT erroneous or unjust.

11. Nor does the fact that under Article 1.C.1.e. of PSCINST M1910.1, a member with more than 18 years of service who is being administratively separated for misconduct can submit a waiver of his right to an Administrative Separation Board that is conditioned on being allowed to retire persuade the Board that the applicant's HYT discharge was erroneous or unjust. Nothing

[10] The HYT policy was published in the Personnel Manual, COMDTINST M1000.6A, in effect during the applicant's service up until September 30, 2011, when it was transferred to the new Military Separations Manual, but the policy is not always in effect. Article 1.F.1. of the Military Separations Manual in effect in 2012 and 2013 stated, "All members are encouraged to attain advancement in accordance with the Professional Growth Points given below. Communicated via ALCOAST, the HYT policy, in whole or in part, can be entered into force with not less than 180 days' notice. HYT policy may be activated for individual pay-grades, individual ratings, or individual pay-grades within individual ratings as needs of the service dictate."

in PSCINST M1910.1 requires the Coast Guard to accept such a condition, and Commander, PSC may reject any conditional waivers of such rights.[11]

12. The applicant has not proven by a preponderance of the evidence that his HYT discharge as an E-5 with almost 18 years of active duty is erroneous or unjust. His request for retirement as an E-6 should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

[11] PSCINST M1910.1, Article 2.E.3.d.(4)

ORDER

The application of former ET2 [redacted], USCG, for correction of his military record is denied.

July 26, 2019

[redacted]