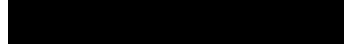


**DEPARTMENT OF HOMELAND SECURITY  
BOARD FOR CORRECTION OF MILITARY RECORDS**

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2019-114**

  
LTJG (Retired)

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**FINAL DECISION**

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. After receiving the completed application on May 1, 2019, 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 July 24, 2020, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST AND ALLEGATIONS**

The applicant, who was honorably retired from the Coast Guard on May 31, 2018, asked the Board to correct his pay grade in retirement from E-5 (second class petty officer) to O-2E (lieutenant junior grade with prior enlisted service). He stated that he served as an officer for almost four years before he was reduced in rank to E-5, and his pay should be based on his "High-3." He stated that his pay slips properly show that he is an officer, but the amount he is being paid is for an E-5. The applicant stated that he understands that it can take time for the Coast Guard to make a highest rate held determination, but it has been over a year since he retired, and his pay rate remains E-5. To support his claim, the applicant submitted the following documents:

- The applicant's Separation Authorization, issued on March 26, 2018, shows that he is an E-5 and authorizes his retirement as of May 31, 2018. It also states, "Your official record has been reviewed. IAW [in accordance with] MILSEP 1.C.12.e and/or 1.C.12.g, and pursuant to 14 USC 362 and 14 USC 423, a determination has been made that your highest grade held satisfactorily is O-2E."
- A DD 214 dated June 27, 2012, shows that the applicant entered active duty on April 7, 1998, as an enlisted member and was discharged as an O-2. There is no narrative reason for separation or separation code shown on the copy of this DD 214 in the applicant's record.
- A DD 214 dated May 31, 2018, shows that the applicant was honorably retired and that his pay grade at the time was E-5. The dates of entry and separation on this DD 214

include the period of service covered by the DD 214 dated May 31, 2018, but the line for “Net Active Service This Period” shows only the 5 years, 11 months, and 3 days he had served since receiving the first DD 214 and the amount of “Total Prior Active Service” shown is zero.

- A print-out of the applicant’s rank history shows that he began service as an enlisted member; advanced to E-6; served as an ensign from February 7, 2007, to August 7, 2008; and served as an LTJG from August 7, 2008 to June 28, 2012 (noted as 3.88 years) before reverting to enlisted status.
- A pay slip for the month of February 2019 shows that the applicant is entitled to \$1,685 in retired pay and \$1,685 in combined disability retired pay (CDRP) each month; that his total entitlement is \$3,370 per month; that \$1,685 is deducted due to offset by VA benefits; and that after other allotments and deductions, his monthly retired pay from the Coast Guard is \$1,205.23.
- A Uniformed Service Card shows the applicant’s rank as LTJG/O-2.
- An identity card issued by the Department of Veterans’ Affairs shows that the applicant has a service-connected disability.
- And a copy of Article 1.C.12. of the Military Separations Manual states, “The Coast Guard must make a grade determination to certify the retired grade of every officer and enlisted member prior to retirement. The retirement approving authority will administratively review the record of each member scheduled to retire to certify the highest grade or rate satisfactorily held during their Coast Guard service.”

### SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on April 7, 1998, and advanced to E-6 on July 1, 2003. He attended Officer Candidate School and was made a temporary regular officer on February 7, 2007. On August 7, 2008, he was promoted to LTJG and his pay grade was O-2E, instead of O-2, because of his prior enlisted service.

On June 28, 2012, the applicant was discharged from the service as a temporary officer because he had twice been non-selected for promotion to lieutenant.<sup>1</sup> At his request, he reverted to enlisted status in pay grade E-6.

On a CG-3307 (“Page 7”) dated April 29, 2014, the applicant was counseled about incurring his second “alcohol incident” on April 25, 2014, when after drinking alcohol, he had been verbally abusive to a subordinate and combative and aggressive toward a senior member of his command.<sup>2</sup>

On June 26, 2014, the applicant was punished at mast and reduced in rate to pay grade E-5 as a result his misconduct on April 25, 2014. The Court Memorandum documenting the mast states that he had violated Articles 134 (Drunk and Disorderly) and 117 (Provoking

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<sup>1</sup> Although the documentation is not before the Board, the applicant apparently incurred an “alcohol incident” as a junior officer.

<sup>2</sup> A phrase about relieving himself on the subordinate’s lawn was later removed from this Page 7 pursuant to an earlier BCMR decision.

Speeches or Gestures) on April 25, 2014, when he was verbally abusive to an immediate subordinate outside the subordinate's home, relieved himself on the subordinate's lawn in front of a female resident,<sup>3</sup> and was combative and aggressive toward a senior member of his command.

Because he had incurred a second alcohol incident, the applicant was processed for separation and appeared before an Administrative Separation Board. On a "Page 7" dated September 11, 2015, he was advised that the Administrative Separation Board held on October 22, 2014, had determined that he should be discharged for alcohol abuse because he had incurred two alcohol incidents. However, he was advised, his discharge would be suspended for the remainder of his career as long as he met the following conditions, which the applicant acknowledged and accepted:

- If the applicant incurred a third alcohol incident, he would be discharged with no right to another Administrative Separation Board.
- The applicant had to waive his right to another Administrative Separation Board if his discharge was ever initiated because of either unsuitability (including alcohol abuse) or misconduct.
- The applicant had to abstain from consuming alcohol for the remainder of his military career.

In a decision dated February 12, 2016, the BCMR directed the Coast Guard to remove the phrase about the applicant relieving himself on the subordinate's lawn from the Page 7 dated April 29, 2014, and from the Court Memorandum. The Board also directed the Coast Guard to remove the Report of Offense and Disposition from his record. The applicant's record currently does not contain the Report of Offense and Disposition. The phrase about relieving himself on the lawn has been redacted from the Page 7 but not from the Court Memorandum.

On October 19, 2016, the applicant was counseled on a Page 7 about his treatment of another member's home and personal property from April 17 to 30, 2016, when he was house- and dog-sitting for another member while she was out of town. Upon her return, a rug and a painting were missing; other property had been removed from drawers; there were several empty alcohol containers; and the amount of dog food remaining indicated that the dog may not have been properly fed. In addition, upon return, the member saw a bottle of rum that she had not purchased, and the applicant took it with him. The applicant acknowledged the Page 7 but wrote that it was "hurtful and unfortunately only two of us know the truth. This is a complete deformation of my character." Nevertheless, the applicant's commanding officer concluded that he could not "find that a preponderance of the evidence proves you consumed alcohol during the aforementioned time period" and reminded him that any consumption of alcohol would vacate the suspension of his discharge.

On May 31, 2018, the applicant was honorably retired from the Coast Guard under High Year Tenure policy. As noted above, his DD 214 shows that his pay grade at the time was E-5. The dates of entry and separation erroneously include the period of service covered by the DD 214 dated May 31, 2018, while the line for "Net Active Service This Period" shows only the

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<sup>3</sup> This phrase about relieving himself on the lawn should have been removed from the Court Memorandum pursuant to the previous order of the BCMR but was not.

5 years, 11 months, and 3 days he had served since his discharge from the officer corps and the amount of “Total Prior Active Service” shown is zero.

### APPLICABLE LAW AND POLICY

Title 14 U.S.C. § 2144, “Regular Coast Guard; officers serving under temporary appointments,” states the following:

(a) Each officer of the Regular Coast Guard appointed under section 2104 of this title who is serving in the grade of lieutenant (junior grade) or lieutenant and who has failed of selection for promotion to the grade of lieutenant or lieutenant commander, respectively, for the second time shall:

(1) be honorably discharged on June 30 of the promotion year in which his second failure of selection occurs; or

(2) if he so requests, be honorably discharged at an earlier date without loss of benefits that would accrue if he were discharged on that date under clause (1); or

(3) if on the date specified for his discharge in this section he is eligible for retirement under any law, be retired under that law on that date.

(b) Each officer subject to discharge or retirement under subsection (a) may elect to revert to his permanent grade.

Title 14 U.S.C. § 2306 states, “Any enlisted member who has completed twenty years’ service may, upon his own application, in the discretion of the Commandant, be retired from active service.”

Title 14 U.S.C. § 2311, “Retirement in cases where higher grade or rating has been held,” states, “Any enlisted member who is retired under any provision of section 2304, 2305, 2306, or 2307 of this title shall be retired from active service with the highest grade or rating held by him while on active duty in which, as determined by the Secretary, his performance of duty was satisfactory, but not lower than his permanent grade or rating.”

Title 10 U.S.C. § 1407, “Retired pay base for members who first became members after September 7, 1980: high-36 month average,” provides the following computation for determining the amount of the retired pay of a regular member who entered the military after September 7, 1980:

**(a) Use of retired pay base in computing retired pay.**--The retired pay or retainer pay of any person entitled to that pay who first became a member of a uniformed service after September 7, 1980, is computed using the retired pay base or retainer pay base determined under this section.

**(b) High-three average.**--Except as provided in subsection (f), the retired pay base or retainer pay base of a person under this section is the person's high-three average determined under subsection (c) or (d).

**(c) Computation of high-three average for members entitled to retired or retainer pay for regular service.**--

(1) General rule.--The high-three average of a member entitled to retired or retainer pay under any provision of law other than section 1204 or 1205 or section 12731 of this title is the amount equal to--

(A) the total amount of monthly basic pay to which the member was entitled for the 36 months (whether or not consecutive) out of all the months of active service of the member for which the monthly basic pay to which the member was entitled was the highest, divided by

(B) 36.

Title 10 U.S.C. § 1407(f), “Exception for enlisted members reduced in grade and officers who do not serve satisfactorily in highest grade held,” states the following:

**(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; and

(B) in the case of an officer, is retired in a grade lower than the highest grade in which served by reason of denial of a determination or certification under section 1370 of this title that the officer served on active duty satisfactorily in that grade.

Title 10 U.S.C. § 1406, “Retired pay base for members who first became members before September 8, 1980: final basic pay,” states in paragraph (a) that the “general rule” is that the retired pay base is the monthly basic pay of the member’s retired grade. But paragraph (f) states that the retired pay of a member retired under any section of Title 14 is computed under 14 U.S.C. § 423(a), which has been renumbered as § 2504.

Title 14 U.S.C. § 2504, “Computation of retired pay,” states the following in pertinent part:

(a)(1) The retired pay of a member who first became a member of a uniformed service (as defined in section 101 of title 10) before September 8, 1980, is determined by multiplying--

(A) the sum of--

(i) the basic pay of the member’s retired grade or rate, and

(ii) all permanent additions thereto including longevity credit to which the member was entitled at the time of retirement; by

(B) the retired pay multiplier determined under section 1409 of title 10 for the number of years of service that may be credited to the member under section 1405 of such title.

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(b) The retired pay of a member who first became a member of a uniformed service (as defined in section 101 of title 10) on or after September 8, 1980, is determined by multiplying--

(1) the retired pay base determined under section 1407 of title 10; by

(2) the retired pay multiplier determined under section 1409 of title 10 for the number of years of service that may be credited to the member under section 1405 of such title.

Title 14 U.S.C. § 2504 does not have any special provision for members reduced in pay grade due to misconduct.

Article 1.C.12.e. of the Military Separations Manual, COMDTINST M1000.4, states the following:

(1) Any enlisted member who retires under any provision of 14 U.S.C. retires from active service with the highest grade or rate he or she held while on active duty in which, as Commander (CG PSC-EPM-1) or the Commandant, as appropriate, determines he or she performed duty satisfactorily, but not lower than his or her permanent grade or rate with retired pay of the grade or rate at which retired (14 U.S.C. § 362). [renumbered as § 2311]

(2) In cases where a member has been reduced in grade by a Special Court-Martial (SPCM) or General Court-Martial (GCM), the highest grade satisfactorily held shall be no higher than the grade to which the member was reduced after the court-martial conviction becomes final, unless the member subsequently advances or is again reduced. Where a member subsequently advances or is again reduced following a reduction by a SPCM or GCM, the highest grade satisfactorily held shall be no higher than the pay grade to which the member advanced or was reduced to following the court-martial.

Article 1.C.12.g. states the following about certifying the highest grade held:

(1) Commander (CG PSC-EPM) or (CG PSC-OPM) will administratively review the record of each individual scheduled to retire to determine the highest grade or rate in which his or her Coast Guard service is satisfactory.

(2) In 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.

(3) When an officer reverts from a higher grade due to approval of a board which recommended such reversion, his or her service in the higher grade will not be considered satisfactory unless he or she was later promoted again to the higher grade and meets the requirements of Article 1.C.12.g.(2) of this Manual.

(4) If the administrative review described in Article 1.C.12.g.(1) of this Manual does not result in a determination of satisfactory service, the determination will be referred to a special board of officers who will review the member's official records and make its recommendation to the Commandant. The board acts in an advisory capacity and its recommendation shall be considered as such. The Commandant makes the final determination of satisfactory service.

## **VIEWS OF THE COAST GUARD**

On November 13, 2019, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion and recommended that the Board grant relief in this case.

The JAG concluded that the Coast Guard has erred by paying the applicant as an E-5 in retirement because under 14 U.S.C. § 2311, he was entitled to be retired in the highest grade satisfactorily held by him while on active duty, and his Separation Authorization, issued on March 26, 2018, states that in accordance with "MILSEP 1.C.12.e and/or 1.C.12.g, and pursuant to 14 USC 362 and 14 USC 423, a determination has been made that your highest grade held satisfactorily is O-2E."

The JAG stated that because the applicant entered service after September 8, 1980, his retired pay would normally be calculated based on his "High-3" as a prior O-2E pursuant to 14 U.S.C. § 2504(b) even though he reverted to enlisted status in 2012. But 10 U.S.C. § 1407(f)(2)(A) provides an exception to the "High-3" rule "for enlisted members reduced in grade," as the applicant was in 2014. For enlisted members reduced in grade 10 U.S.C. § 1406 applies, instead of § 1407. And under § 1406, retired pay is normally based on the monthly basic

pay of the member at the time of retirement, instead of the “high-3” rule. However, paragraph (f) of § 1406 states that the retired pay of anyone retired under Title 14—the Coast Guard title—is computed under 14 U.S.C. § 423(a), which has been renumbered as § 2504(a). And under 14 U.S.C. § 2504(a), the JAG stated, the applicant’s retired pay should be based upon “the basic pay of the member’s retired grade or rate,” which was O-2E.<sup>4</sup>

The JAG stated that the result of this case is anomalous because the exception for enlisted members reduced in rate in 10 U.S.C. § 1407(f)(2)(A) would normally result in lower retired pay under 10 U.S.C. § 1406, which is appropriate when a member has been reduced in rate for misconduct. However, the applicant served satisfactorily as an O-2E even though due to earlier misconduct,<sup>5</sup> he was not selected for promotion and then did not serve satisfactorily as an E-6. The JAG stated, “The Coast Guard believes the recommended result reached in this case may be contrary to the intent of 10 U.S.C. § 1407(f)(2)(A) but could not identify a legal justification to ignore application of the plain terms of the statute requiring calculation of retired pay at the rate of the retired rank.” Therefore, the JAG recommended that the Board correct the applicant’s retired grade to O-2E.

### APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 18, 2019, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a written response within thirty days. No response was received.

### FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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 filed within three years of the applicant’s retirement.<sup>6</sup>

2. The applicant alleged that his retired pay grade 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 records is correct as it appears in the military record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>7</sup> 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.”<sup>8</sup>

3. The applicant has proven by a preponderance of the evidence that he was retired in grade O-2E, instead of E-5. As a member of the Coast Guard with 20 years of service, he was

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<sup>4</sup> The JAG referred to this pay grade as O2-E, but according to the Defense Finance and Accounting Service (DFAS) and past BCMR decisions, the pay grade is denoted as O-2E.

<sup>5</sup> The JAG is presumably referring to the applicant’s first alcohol incident.

<sup>6</sup> 10 U.S.C. § 1552(b).

<sup>7</sup> 33 C.F.R. § 52.24(b).

<sup>8</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

retired pursuant to 14 U.S.C. § 2306. Therefore, under 14 U.S.C. § 2311, he was entitled to be retired “with the highest grade or rating held by him while on active duty in which, as determined by the Secretary, his performance of duty was satisfactory.” The applicant’s Separation Authorization shows that although he had incurred his first alcohol incident as an officer, his service as an LTJG in grade O-2E was deemed satisfactory. Therefore, the applicant’s retired grade should be corrected to O-2E.

4. The JAG argued that in determining the applicant’s retired pay base pursuant to 10 U.S.C. § 1407, the exception to “High-3” in paragraph (f) of § 1407 applies because as an enlisted member, the applicant had been reduced in rate from E-6 to E-5 in 2014 for conduct occurring after October 30, 2000. The Board disagrees. Although the applicant had been reduced in grade as an enlisted member for misconduct in 2014, he does not qualify as an “affected member” under subparagraph (f)(2)(A) or (B) of § 1407, as explained below:

a. Subparagraph (f)(2)(A) states that “affected members” include a member who “in the case of a member *retired in an enlisted grade* ... 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.” (Emphasis added.) The applicant is not an “affected member” under this subparagraph because, as the JAG admitted and the Board has found above, he was retired in an officer grade, O-2E.

b. Subparagraph (f)(2)(B) provides that “affected members” include a member who “in the case of an officer, *is retired in a grade lower than the highest grade in which served* by reason of denial of a determination or certification under section 1370 of this title that the officer served on active duty satisfactorily in that grade.” (Emphasis added.) The applicant was retired in an officer grade but he was being retired in the highest grade in which he had served—O-2E—rather than a lower grade.

5. Because the applicant does not meet the definition of an “affected member” under 10 U.S.C. § 1407(f)(2)(A) or (B), the exception to the “High-3” rule in § 1407(f) does not apply to him. Instead, the “High-3” rule explained in § 1407(b) and (c) applies: His retired pay base should be his “High-3” average, which is “the total amount of monthly basic pay to which [the applicant] was entitled for the 36 months (whether or not consecutive) out of all the months of active service ... for which the monthly basic pay to which [he] was entitled was the highest, divided by ... 36.” Therefore, the Board finds that the applicant’s proper retired pay base is his “High-3” average as determined under 10 U.S.C. § 1407(c).

6. The applicant pointed out that his DD 214 states that his pay grade is E-5. He did not expressly request the correction of his pay grade on his DD 214, and the Board finds that it is already correct. The Commandant’s instruction for completing a DD 214 states that the rank and pay grade shown should be the member’s rank and pay grade on his date of separation from active duty, which was May 31, 2018. On that date, the applicant was still on active duty and still an E-5. The applicant was not placed on the retired list as an O-2E until June 1, 2018.

7. The Board’s review of the record has revealed that the Board’s prior order in the decision for BCMR Docket No. 2015-088 was not fully implemented. Specifically, the phrase “to have relieved himself on his subordinates [sic] lawn in front of a female resident” remains



unredacted on page 2 of the Court Memorandum in his record. Therefore, the Board will remind the Coast Guard to make this correction.

8. Accordingly, relief should be granted by directing the Coast Guard to correct the applicant's retired grade (highest grade held satisfactorily) to LTJG/O-2E and to determine his retired pay base by his "High-3" average in accordance with 10 U.S.C. § 1407(c). In addition, the Board will remind the Coast Guard to complete the corrections ordered in BCMR Docket No. 2015-088.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

**ORDER**

The application of LTJG [REDACTED] USCG (Retired), for correction of his military record is granted as follows:

The Coast Guard shall correct his retired grade (highest grade held satisfactorily) to LTJG (O-2E).

The Coast Guard shall determine his retired pay base by his “High-3” average in accordance with 10 U.S.C. § 1407(c).

The Coast Guard shall complete the corrections ordered in BCMR Docket No. 2015-088 by redacting the phrase “to have relieved himself on his subordinates lawn in front of a female resident,” from page 2 of the Court Memorandum in his record.

July 24, 2020

