

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-074


SK2 ()

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 February 19, 2020, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated December 17, 2021, 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, a former Storekeeper second class (SK2/E-5) who was honorably discharged from active duty on September 1, 2019, and entered the Selected Reserve the following day, asked the Board to remove his involuntary separation and instead allow him to retire with sixteen years and nine months of service. The applicant's involuntary separation was the result of the Coast Guard's High Year Tenure (HYT) policy.¹

The applicant argued that his separation is erroneous because his record clearly demonstrates preparation and motivation to advance at the "expected pace" outlined by the HYT program. The applicant stated that before he enlisted, he was given the Pseudoisochromatic Plate (PIP) test to determine whether he had red-green colorblindness. Although he received a failing score of 04/14, the processor indicated that the applicant had passed the test.² About five years later, on October 29, 2007, the applicant graduated from SK "A" School. He served in the SK

¹ Military Separations Manual, COMDTINST M1000.4, Article 3.A. ("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.")

² According to the Coast Guard Medical Manual, COMDTINST M6000.1B, qualification of the PIP test was ascertained as follows: a) 20 plate test set. Examinee must correctly read at least 17, excluding demonstration plates; b) 18 plate test set. Examinee must correctly read at least 14, excluding demonstration plates; c) 15 plate test set. Examinee must correctly read 10 plates.

rating for approximately two years. Then, on January 1, 2010, the applicant lateralled to the Maritime Law Enforcement Specialist (ME) rating as an ME3.

In August 2015, when the applicant was an ME2, he decided to apply for Officer Candidate School. As part of the process, the applicant received a physical examination which included the PIP test. While his numerical score was identical to his earlier score, 04/14, the processor properly indicated that the applicant had failed the test. Due to his color vision deficiency, the applicant was rejected from Officer Candidate School and disqualified from the ME rating. At the time the applicant was disqualified from the ME rating, he argued that he had four Servicewide Examinations remaining for advancement to ME1 before falling out of range and becoming a HYT candidate.

The applicant also argued that his separation is unjust because the Coast Guard's original interpretation of his color vision results forced him into a condensed timeframe in which to advance. The applicant stated that he was allowed to enter the ME rating because the Coast Guard erroneously indicated that he had passed the PIP test in 2002. Then, when the Coast Guard properly identified the applicant's color vision deficiency in 2015, he was disqualified from the ME rating. At that time, he was allowed to enter any rating that did not require "normal" color vision. On December 16, 2015, the applicant reentered the SK rating. According to the applicant, a member's expected pace of advancement from E-5 to E-6 is six years. However, the applicant only had three years to advance to SK1 before becoming a HYT candidate. The applicant argued that when he switched ratings from an ME to an SK, he only had half the normal time to advance.

The applicant concluded by stating that had he not applied for Officer Candidate School, his color vision deficiency would never have been detected. As such, he argued that he would have been allowed to remain in the ME rating and he would have easily advanced to E-6. The applicant argued that an equitable outcome in this case would be to allow him to retire with sixteen years and nine months of service since he has already begun transitioning to civilian life.

SUMMARY OF THE RECORD

On September 20, 2002, before enlisting in the Coast Guard, the applicant received a medical examination. The results show that he received a score of 4/14 for the PIP test. Despite receiving a failing score, the processor noted that the applicant had passed the test.

The applicant enlisted in the Coast Guard on December 17, 2002. After recruit training, the applicant served in an unrated position until February 11, 2005, when he advanced to Food Service Specialist (FS) third class.

On December 1, 2003, the applicant received an alcohol incident when his abuse of alcohol was determined to be a significant and/or contributing factor in his arrest for operating a motor vehicle while under the influence of alcohol. The applicant was given a Blood Alcohol Content (BAC) test by a local police officer and he was found to have a BAC of .107. The applicant was notified that any future incidents would result in him being processed for separation.

On October 29, 2007, the applicant graduated from SK "A" school. He served as an SK3 until December 31, 2009.

On January 1, 2010, the applicant lateralled to an ME3. On April 1, 2010, he advanced to ME2, in which he continued to serve until December 15, 2015.

On April 14, 2010, the applicant received a negative Administrative Remarks form ("Page 7")³ to document his disenrollment from Boarding Officer School. The disenrollment occurred because the applicant used a classmate's Boarding Officer Job Aid Kit during one of his required examinations to receive a passing grade. The applicant was given a failing grade, removed from the course, and returned to his permanent unit. The applicant was notified that his actions and lack of judgment violated the Coast Guard's Core Value of Honor and brought embarrassment to himself and his command.

On January 17, 2012, the applicant received a negative Page 7 due to his sustained pattern of inaptitude within his rate and conduct that was considered to be unsatisfactory when compared to that of his peers. The Page 7 noted four separate events that contributed to his sustained pattern of inaptitude. First, on June 30, 2011, the applicant failed a Boarding Officer certification board. Second, on September 30, 2011, the applicant expressed frustration in managing his stress levels. The applicant's command decided to remove his collateral duties until after his qualification board for Boarding Officer was completed. Third, the applicant received a "Not Recommended for Advancement" mark on his regular evaluation review for the period ending on October 31, 2011, due in large part to his inaptitude in his chosen rate. Finally, on December 31, 2011, the applicant was 40 minutes late in a unit movement. The applicant's delay jeopardized the successful and safe completion of a high interest vessel boarding. The applicant was notified of several conditions that needed to be met in order to avoid being placed on performance probation.

From May 1, 2014, to May 1, 2015, the applicant competed for the Servicewide Examination (SWE) for advancement to ME1 three times. The first time he placed eighty-fourth on the list of ninety-nine, the second time he placed forty-second on the list of eighty-six, and the third time he placed forty-seventh on the list of eighty-one. The cutoffs for the examinations are unknown.⁴

On August 20, 2015, the applicant had a medical examination which revealed that he did not have normal color vision. The applicant received a 5/9 for the Farnsworth Lantern (FALANT) test⁵ and a 4/14 for the PIP test. He failed both tests. The applicant was notified that he would not

³ An Administrative Remarks record entry, form CG-3307, better known as a "Page 7," is used to document a member's notification of important information, achievements, or counseling about positive or negative aspects of a member's performance in the member's military record.

⁴ According to Article 3.A.3.e. of the Enlisted Accessions, Evaluations, and Advancements manual, COMDTINST M1000.2A, a cutoff point is established for each rating based upon vacancies during each period of eligibility. Only members whose names appear at or above this cutoff point are guaranteed advancement if they remain eligible through their advancement date. The manual denotes that members who are below the cutoff point are encouraged to participate in future SWEs to maintain eligibility.

⁵ According to the Coast Guard Medical Manual, COMDTINST M6000.1F, a passing score is at least 16 out of 18 correct.

be permitted to continue in the ME rating and that his defective color vision would prevent him from attending Officer Candidate School.

On November 1, 2015, the applicant competed for the SWE for advancement to ME1. He placed sixty-ninth on the list of eighty-four. The cutoff for the examination is unknown.

On December 16, 2015, the applicant returned to the SK rate and served as an SK2 for the remainder of his career.

From May 1, 2017, to May 1, 2018, the applicant competed for the SWE for advancement to SK1 three times. The first time he placed one hundred and sixtieth on the list of two hundred and eighty-two, the second time he placed one hundred and seventy-seventh on the list of two hundred and ten, and the third time he placed one hundred and sixty-eighth on the list of two hundred and fifty-eight. The cutoffs for the examinations are unknown.

On October 17, 2018, the applicant requested a HYT Professional Growth Point waiver from the Personnel Service Center (PSC). He stated that he understood that if he did not receive a waiver he would be separated no later than September 1, 2019, because he was not eligible for retirement. The applicant explained that in 2005, he completed FS "A" School. Shortly thereafter, he realized that his desire to support the Coast Guard extended beyond the FS rating. In October 2007, the applicant attended SK "A" School. Two years later, in May 2009, he competed for SK2 and placed above the cut. However, that same year, the solicitation for the establishment of the ME rating came out. He stated that he jumped at the challenge. In April 2010, he advanced to ME2. Then, in 2015, while closing in on ME1, he sought to further challenge himself and he applied to Officer Candidate School. However, during his medical screening, it was discovered that he had a color vision deficiency, and he was no longer allowed to perform in the ME rating. In 2016, the applicant transitioned back into the SK rate as an SK2. He stated that he remained fully committed to his role and sought every opportunity available. He concluded by stating that the best years of his life have been dedicated to the Coast Guard, and he would appreciate the opportunity to finish what he started.

On October 30, 2018, the applicant's Sector positively endorsed his HYT waiver request. His CO stated that the applicant was an invaluable asset to the Sector. He stated that the applicant's drive and aptitude have been exceptional. Specifically, he stated that the applicant was a key contributor to the development of the Sector's Active Shooter Response Bill and was active in their Force Protection Training program. The CO stated that the current HYT review has placed two of the Sector's most experienced SK2s at risk of separation. He stated that their simultaneous loss would significantly impact the entire District by removing two experienced technicians from the Coast Guard Enterprise. He concluded by stating that the applicant is an asset well worth retaining.

On November 1, 2018, the applicant competed for the SWE for advancement to SK1. He placed seventy-ninth on the list of two hundred and sixty-eight. The cutoff for the examination is unknown.

On January 2, 2019, PSC denied the applicant's request for waiver of his HYT Professional Growth Point. The applicant was honorably discharged from active duty on September 1, 2019, the date required by HYT policy.⁶

After the applicant was discharged from active duty, he was immediately transferred to the Coast Guard Selected Reserve. On a Page 7, the applicant was notified that he must earn 50 points per anniversary year to count towards a Reserve retirement.

VIEWS OF THE COAST GUARD

On July 22, 2020, 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).

PSC argued that the applicant failed to show that the Coast Guard committed an error or injustice. First, PSC argued that the Coast Guard did not commit an error in discharging him. PSC stated that HYT waivers are granted based on the needs of the Service and the applicant's waiver request was denied because there was not a need to retain SK2s. Further, PSC argued that the Coast Guard did not commit an error in denying the applicant a retirement. PSC stated that the applicant was ineligible to retire because service members must complete twenty years of service to become retirement eligible.

The JAG argued that the applicant failed to show that his separation due to HYT was unjust. The JAG acknowledged that the Coast Guard placed the applicant at a disadvantage by failing to identify his color vision deficiency earlier in his career. However, the JAG argued that the applicant's separation was not unjust because he had nine years to advance to E-6. The JAG stated that for his first six years as an ME2, the applicant failed to advance to ME1. Then, in the three years after the applicant changed ratings, he failed to advance from SK2 to an SK1. The JAG noted that when the applicant returned to the SK rating in 2015, he was not starting over. In fact, the JAG stated that the applicant had previously graduated from SK "A" School and worked as an SK for three years. Further, the JAG argued that the applicant did not provide any evidence that the Coast Guard rendered him unable to advance. For example, the JAG argued that the Coast Guard did not deny him vital training opportunities or prevent him for studying for the SWE.

The JAG also argued that the applicant's separation due to HYT was not unjust because his record supports the Coast Guard's denial of his HYT waiver. Specifically, the JAG stated that the applicant's record contains several negative Page 7s. First, in 2003, the applicant received an alcohol incident following an arrest for driving while under the influence of alcohol. The JAG noted that under current Coast Guard policy, the applicant's conduct would not only limit his ability to gain a favorable endorsement for reenlistment, but it would also trigger mandatory processing for administrative discharge. Then, in 2010, the applicant received a negative Page 7 after he was disenrolled from Boarding Officer School because he used a classmate's Boarding Officer Job Aid Kit during one of his required examinations. Finally, in 2012, the applicant

⁶ Military Separations Manual, COMDTINST M1000.4, Article 3.G.1.a. ("All 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.").

received a negative Page 7 documenting several performance issues spanning a seven-month period.

Finally, the JAG argued that the applicant's separation due to HYT was not unjust because he remains eligible for a military retirement in the Reserves. Following his separation from active duty, the applicant was permitted to affiliate into the Selected Reserves. The JAG stated that if he completes his required service, the applicant will be eligible for a Reserve retirement.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 6, 2020, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. No response was received.

APPLICABLE LAW AND POLICY

ALCOAST 167/13, issued in April 2013, announced the reactivation of the HYT process. The HYT process identifies those personnel who have not reached specific milestones called Professional Growth Points. If members have not reached Professional Growth Points, they are subject to separation from service or retirement, if eligible. The ALCOAST announced that the HYT process would be implemented in a phased approach, starting with those personnel who were retirement eligible. However, the ALCOAST announced that Professional Growth Points would become more stringent and beginning in 2015, would include personnel who may not be retirement eligible.

Article 1.C.10.a. of the Coast Guard Separations Manual, COMDTINST M1000.4, states that enlisted members who have completed 20 years of service may retire from active service.

Article 3.B.3.b. of the manual discusses HYT candidates that are in the pay grade E-3 to E-8 as follows:

A member whose 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.C. of the manual states that the Professional Growth Points for an E-5 is sixteen years of active military service.

Article 3.D.2.b. of the manual discusses change in rate limitations as follows:

Members who request a change in rate must adhere to HYT requirements. Commander (CG-PSC-EPM) will normally deny requests if the member is unlikely to advance before they exceed their new PGP. Requests may be denied for such reasons as Service needs, conduct, performance, or training opportunities.

Article 3.H.1. of the manual discusses HYT Professional Growth Points waivers as follows:

- (1) Commandant (CG-1) shall determine, for each rate (defined in 10 U.S.C. §101):
 - a. The maximum number of HYT PGP waivers to be granted.
 - b. Whether the HYT PGP waivers shall allow advancement. For each year, all members in a rate shall be treated equally with regards to the ability to advance while on a waiver.
- (2) Commander (CG PSC-EPM) is the sole waiver granting authority for HYT PGP waivers.
- (3) Commander (CG PSC-EPM) shall determine the length of each waiver granted. The length of the waiver does not need to be the same for every member in a rate for that year.
- (4) Commander (CG PSC-EPM) shall announce which HYT candidates are eligible to request a waiver at least thirty days before convening a HYT PGP waiver panel.
- (5) HYT candidates who are not named in this announcement shall separate or retire as required by 3.G. of this Manual.
- (6) Commander (CG PSC-EPM) may extend service beyond 30 years for members in pay grade E-9 who are selected for a Gold Badge Command Master Chief (CMC) or Rating Force Master Chief (RFMC) position in accordance with reference (t), Command Senior Enlisted Leader Program, COMDTINST 1306.1 (series).

Article 3.A.11.c. of the Enlisted Accessions, Evaluations, and Advancements Manual discusses changes in rating in relevant part:

- (1) General Policy. The Commandant desires Coast Guard members to serve in the rate or rating for which they have the greatest aptitude and interest. Changes in rating may be authorized based on Service need, position vacancies, and the qualifications and desires of members. A change in rating will normally be considered for members with fewer than five years Coast Guard time in service, unless otherwise approved by Commander (CG PSC EPM) or (CG PSC-RPM).
 - (a) Member Request. At the request of the member concerned submitted to Commander (CG PSC-EPM-1) or (CG PSC-RPM) via the chain of command, or
 - (b) In the best interest of the Coast Guard. When a commanding officer considers a member is no longer qualified to perform all the duties of their rate or rating for reasons other than incompetence, but is qualified, or can within a reasonable time become qualified, for a change to another rate or rating, the commanding officer must inform Commander (CG PSC-EPM) or (CG PSC-RPM) setting forth the reasons in detail. A statement signed by the member concerning the situation will be forwarded as an enclosure. When Commander (CG PSC) considers the proposed change is required in the best interest of the Service, such change will be authorized. The provisions of this Article will not apply when there is any doubt as to the member's fitness for retention in the Service because of mental or physical reasons.

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.

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 alleged that his involuntary separation from the Coast Guard as a result of the Coast Guard's HYT policy 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 of the evidence that the disputed information is erroneous or unjust.⁷ 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."⁸

4. The applicant argued that his involuntary separation was erroneous because his record clearly demonstrates preparation and motivation to advance at the "expected pace" outlined by the HYT program. The Board disagrees. According to Article 3.C. of the Coast Guard Separations Manual, the Professional Growth Points for an E-5 is sixteen years of active military service. In this case, the applicant enlisted in the Coast Guard on December 17, 2002. After serving about eight years, the applicant advanced to E-5 on April 1, 2010. Pursuant to the manual, the applicant had from April 1, 2010, to December 31, 2018, to advance to E-6. However, the applicant failed to further advance. While the applicant changed his rating from ME to SK during that period, which likely disadvantaged his pace of advancement, there are no exceptions to the Professional Growth Points. According to Article 3.D.2.b. of the manual, members who request a change in rate must adhere to HYT requirements. In this case, the applicant requested to change his rating from ME to SK when he was no longer permitted to continue in the ME rating due to his color vision deficiency. While the applicant's request to change his rating was not entirely voluntarily, there is no Coast Guard policy that allows for an exception or exemption to the HYT requirements in such cases. Therefore, the Board finds that the applicant failed to prove by a preponderance of the evidence that he advanced at the "expected pace" outlined by the HYT program.

5. The applicant argued that his involuntary separation was unjust because the Coast Guard's incorrect interpretation of his color vision results forced him into a condensed timeframe in which to advance. Under 10 U.S.C. § 1552, the Board is authorized not only to correct errors but to remove injustices from any Coast Guard military record. For the purposes of the BCMRs, "injustice" is sometimes defined as "treatment by the military authorities that shocks the sense of justice but is not technically illegal."⁹ The Board has authority to determine whether an injustice exists on a "case-by-case basis."¹⁰ Indeed, "when a correction board fails to correct an injustice

⁷ 33 C.F.R. § 52.24(b).

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

⁹ *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); *but see* 41 Op. Att'y Gen. 94 (1952), 1952 WL 2907 (finding that "[t]he words 'error' and 'injustice' as used in this section do not have a limited or technical meaning and, to be made the basis for remedial action, the 'error' or 'injustice' need not have been caused by the service involved.").

¹⁰ Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

clearly presented in the record before it, it is acting in violation of its mandate,”¹¹ and “[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious.”¹²

6. The Board acknowledges that the Coast Guard committed an error in indicating that the applicant had normal color vision at the time he enlisted. However, the Board does not agree that the Coast Guard’s error created a timeframe for the applicant to advance to ME1 that shocks the sense of justice. By the time the applicant was notified of his color vision deficiency on August 20, 2015, he had served as an ME2 for almost six years. While the applicant alleged that the expected pace of advancement from E-5 to E-6 is six years, he did not provide any evidence to support this assertion. Instead, Article 3.A.14.a. of the Enlisted Accessions, Evaluations, and Advancements Manual states that the minimum active service requirement to advance from an E-5 to an E-6 is twelve months. Although the applicant was ineligible to compete for advancement during his first year as an ME2, he also did not compete for advancement for the next three years. As evidenced by the two negative Page 7s in his record, the applicant was likely ineligible to compete for advancement due to his substandard performance. For instance, the applicant received a “Not Recommended for Advancement” mark on his regular evaluation review for the reporting period ending on October 31, 2011, due in large part to his inaptitude in his chosen rate. Then, in his last two years as an ME2, he competed for advancement in the SWE four times. In fact, the Coast Guard allowed the applicant to take the SWE for the fourth time in November 2015, after it was determined that he was color vision deficient. All four times, the applicant placed below the cutoff for advancement. Further, the applicant did not show evidence that his placement in the SWE was improving. In fact, the applicant’s final SWE as an ME2 was his second to worst placement out of his four examinations. Therefore, Board finds that the applicant has not proven by a preponderance of the evidence that the Coast Guard’s error created a timeframe for him to advance to ME1 that shocks the sense of justice.

7. The Board also does not agree that the Coast Guard’s error created a timeframe for the applicant to advance to SK1 that shocks the sense of justice. When the Coast Guard determined that the applicant was color vision deficient, Coast Guard policy prohibited him from continuing in the ME rating. The only option was for the applicant to change ratings. In this case, the Coast Guard allowed the applicant to enter any rating that did not require “normal” color vision. The applicant chose to reenter the SK rating. At the time the applicant reentered the SK rating on December 16, 2015, he had three years to advance to SK1 in accordance with HYT policy. As discussed above, there are no exceptions to the HYT requirements for members who request to change their rating. Further, the applicant was not unfamiliar with the SK rating. In fact, the applicant’s record shows that he graduated from SK “A” School and that he served in the SK rating for more than two years before he entered the ME rating. During the applicant’s three years as an SK2, he competed for the SWE four times. All four times, the applicant placed below the cutoff for advancement. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that the Coast Guard’s error created a timeframe for him to advance to SK1 that shocks the sense of justice.

¹¹ *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)).

¹² *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).

8. The applicant asked the Board to change his separation to a retirement. According to Article 1.C.10.a. of the Military Separations Manual, enlisted members may retire when they have completed twenty years of service. At the time of his separation, the applicant had served sixteen years, eight months, and fifteen days of active service. As such, the applicant was ineligible for retirement at the time of his discharge from active duty. However, as noted by the JAG, the applicant could be eligible for a Reserve retirement. After the applicant was discharged from active duty, he was immediately transferred to the Coast Guard Selected Reserves. On a Page 7 that documented counseling the applicant received regarding the Selected Reserves, he was notified that he would be eligible for Reserve retirement. Therefore, the applicant has not proven by a preponderance of the evidence that he was entitled to a retirement at the time he was separated from active duty.

9. Accordingly, the applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

