

**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. 2021-082**

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MK1 (Retired)

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**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 May 28, 2021, and assigned the case to a staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated December 1, 2023, 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 retired Machinery Technician, First Class (MK1/E-6), who received a General—Under Honorable Conditions<sup>1</sup> discharge on November 1, 2021, asked the Board to correct his record by reinstating his rank of E-7 and recalculating his retirement pay based off his previously held rank of E-7. The applicant also requested that his characterization of service be upgraded from General to Honorable.

The applicant explained that in June 2019, almost three years after he advanced to E-7, he and a fellow shipmate were falsely accused of assault and, despite a lack of evidence, they were formally charged in January 2020. The applicant alleged that the Coast Guard could not even provide specific dates the alleged assaults took place. During this time, the applicant stated, his wife was accepted into Officer Candidate School (OCS), and then due to the COVID-19 pandemic, his court dates continued to be pushed back. The applicant explained that this left him as the sole caregiver of his children while his wife attended OCS. The applicant stated that travelling from his duty station to another state for trial was not a realistic option for him, so to alleviate the stress on his family, he signed a pretrial agreement. However, the applicant alleged, the shipmate who had

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<sup>1</sup> There are five types of discharge: three administrative and two punitive. The three administrative discharges are honorable, general under honorable conditions, and under other than honorable (OTH) conditions. The two punitive discharges may be awarded only as part of the sentence of a conviction by a special or general court-martial. A special court-martial may award a bad conduct discharge (BCD), and a general court-martial may award a BCD or a dishonorable discharge.

been accused with him waited through the COVID-19 delays, went to trial, and was found not guilty of all charges.

According to the applicant, in July 2020, as part of the pretrial agreement, he requested a voluntary reduction in rank to E-6, which resulted in his retired pay being calculated under the final pay rule even though he had previously served as an E-7 for almost four years. In addition, the applicant stated, he was given a General—Under Honorable Conditions characterization of service, which prevents him from transferring his educational benefits to his children. The applicant alleged that during his nearly twenty years of honorable service, he never received any punitive or disciplinary actions, and was awarded a Good Conduct Medal for every three years of service.

Therefore, due to his shipmate being found not guilty of all charges and his own inability to wait for a fair trial because of his family's circumstances, the applicant respectfully requested that his retired pay be recalculated under the high 36-month system at the rank of E-7, and that his character of service be upgraded to Honorable.

### **SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard on October 16, 2001. He trained as a Machinery Technician and advanced to MKC/E-7 on September 1, 2016.

On July 1, 2017, the applicant reported for duty aboard a cutter. On May 29, 2020, the applicant and his counsel signed a pre-trial Memorandum of Agreement (MOA) with the Convening Authority, which states that the applicant had been accused of and charged with unlawfully touching the buttocks, thigh, and leg of an Ensign on divers occasions from approximately October 2018 through approximately December 2018. During this same period, the applicant allegedly became drunk, and his conduct "was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces."<sup>2</sup>

The MOA required that the applicant request a reduction in rank and, in exchange for this reduction, the Convening Authority agreed to withdraw and dismiss, without prejudice, all charges and specifications that had been referred for trial by a Special Court Martial convened by the applicant's Sector Commander. The MOA also provided that the applicant would be retained on active duty until voluntarily retired upon attaining 20 years of service. The applicant, represented by two attorneys, signed and agreed to the terms of the MOA.

Also on May 29, 2020, the applicant submitted a memorandum in which he asked to be voluntarily retired on October 16, 2019, in accordance with the Military Separations Manual, COMDTINST M1000.4. The applicant further requested that he be voluntarily reduced in rank from E-7 to E-6 in accordance with Article 3.A.32.d. of the Enlisted Accessions, Evaluations, and Advancements Manual, COMDTINST M1000.2, due to his misconduct. The applicant acknowledged his understanding that in accordance with 10 U.S.C. § 1407(f), his voluntary reduction in rank would affect the manner in which his retired pay is calculated. The applicant

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<sup>2</sup> Memorandum of Agreement, Page 3, Charge II, Specification 1, Violation of the Uniform Code of Military Justice, Article 134.

specifically stated that he understood that he would be retired as an E-6, and that as a result his retired pay would be calculated in accordance with 10 U.S.C. § 1406, under the “final pay” rules. Finally, the applicant stated that he understood that if his voluntary retirement request was approved, he would receive no worse than a General—Under Honorable Conditions characterization of service. The applicant further acknowledged the consequences of receiving such a characterization of service.

On June 10, 2020, all of the charges against the applicant were withdrawn and dismissed without prejudice by the direction of the Convening Authority.

On July 16, 2020, the applicant was demoted from E-7 to E-6.

On October 31, 2021, the applicant was separated from the Coast Guard and provided a DD-214 reflecting a General—Under Honorable Conditions characterization of service, a separation code of RBD,<sup>3</sup> and a Narrative Reason for Separation of “Sufficient Service for Retirement.”

### VIEWS OF THE COAST GUARD

On December 16, 2021, a judge advocate (JAG) of the Coast Guard submitted a memorandum in which he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC) and recommended that the Board deny relief.

The JAG argued that the applicant failed to carry his burden to show that the Coast Guard committed an error or injustice. The JAG stated that the applicant does not allege that an error took place, but instead implies an injustice based on various factors surrounding his MOA. According to the JAG, the applicant implied that he was pressured into entering into an agreement with the Convening Authority “to alleviate the stress put on [his] family” due to their circumstances and the logistics of trial. The JAG claimed that the applicant also implied that because another shipmate, who was also allegedly charged in the crime, was found not guilty when that shipmate went to trial, an injustice had taken place in the applicant’s case. However, the JAG argued that the applicant’s claims are unsupported and without merit. The JAG stated that the fact that another shipmate, who was charged in the same crime, was found not guilty is not evidence of the applicant’s innocence. The JAG argued that the applicant cannot base his innocence off of the results of the trial of another shipmate because a finding of not guilty for one individual is not transferrable to another. Regarding the applicant’s claim that he was pressured into entering the MOA, the JAG argued that the applicant failed to present any evidence that casts doubt on the voluntariness or validity of his agreement with the Convening Authority. The JAG claimed that all of the available evidence indicates that the agreement was entered into voluntarily by the applicant as expressly indicated by the first clause of the MOA stating that the agreement was made freely and voluntarily and signed by the applicant. Furthermore, the JAG stated that the applicant was represented and advised by counsel further ensuring that the applicant would not be pressured or coerced into signing the MOA. The JAG explained that the applicant received the benefit of not having to go to trial and risk an uncertain outcome, and in return agreed to a reduction

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<sup>3</sup> An RPD separation code represents a voluntary retirement.

in rank, retirement, and a discharge with a characterization of service no worse than a General—Under Honorable Conditions.

The JAG argued that under 14 U.S.C. § 2404(b), the retired pay of a member of the Coast Guard retired after September 7, 1980, is determined by multiplying (a) the member’s retired pay base determined under 10 U.S.C. § 1407 by (b) the multiplier determined under 10 U.S.C. § 1409, which is based on the member’s time in service. According to the JAG, 10 U.S.C. § 1407 applies the “High-36” rule for determining a member’s retired pay unless the exception in §1407(f) applies, which states the exception applies to “enlisted members reduced in grade and officers who do not serve satisfactorily in highest grade held.” The JAG argued that for § 1407(f) to apply to an enlisted member, the member must have been “reduced in grade” and qualify as an “affected member” under §1407(f)(2).<sup>4</sup> The JAG stated that although the applicant voluntarily requested the reduction in rate and was not reduced in rate due to a court-martial or non-judicial punishment, the Coast Guard did take “administrative action” to reduce him in rate because of his alleged misconduct and pursuant to the MOA. Accordingly, the JAG argued that the 10 U.S.C. §1407(f) exception applies to the applicant and because the exception applies to the applicant, his retired pay must be calculated pursuant to 10 U.S.C. § 1406, as stated in §1407(f)(1). In addition, the JAG explained that 10 U.S.C. § 1406(f) states that for all members retired under Title 14—the Coast Guard—a member’s retired pay shall be computed in accordance with 14 U.S.C. § 423(a), which has been renumbered and is now 14 U.S.C. § 2504(a). The JAG further explained that § 2504(a) does not apply the “High-3” rule and instead calculates the member’s retired pay by multiplying the sum of the basic pay of the member’s retired grade or rate, and all permanent additions thereto, including longevity credit to which the member was entitled at the time of retirement, and then by the retired pay multiplier determined under § 1409 of Title 10. The JAG stated that this is the same rule that was cited by the applicant in his application and his voluntary reduction in rank memorandum.

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

On February 8, 2022, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within thirty days. The Chair received the applicant’s response on July 26, 2022.

The applicant stated that he served his country honorably for 20 years, without a single UCMJ infraction or disciplinary incident. The applicant argued his time served is equal to 5 honorable 4 year enlistments and that any service member that completes a 4 year commitment

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<sup>4</sup> 10 U.S.C. §1407(f)(2) states, “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 pursuant to [section 1370](#) or [1370a](#) of this title that the officer served on active duty satisfactorily in that grade.

and receives an honorable discharge walks away with a GI Bill that they are able to pass on to their children. The applicant stated that he fulfilled this commitment 5 times over, and that it is a great injustice that his children are deprived of an education that he paid for by serving 5 consecutive enlistments, all of which he received Good Conduct awards for. The applicant argued that he still maintains his innocence and regrets every day that he signed his pretrial agreement. He respectfully requested that this Board upgrade his character of discharge from General to Honorable. He pleaded with this Board not to make his children suffer for actions he did not do. Regarding the restoration of his rank and recalculation of his retirement pay, the applicant stated that all he cares about is providing for his children's future and giving them an education they deserve.

### APPLICABLE LAW AND POLICY

The Rules for Courts-Martial, in the Manual for Courts-Martial, provides the following guidance for plea agreements:

Rule 705. Plea Agreements.

(a) *In general.* Subject to such limitations as the Secretary concerned may prescribe, an accused and the convening authority may enter into a plea agreement in accordance with this rule.

(b) *Nature of agreement.* A plea agreement may include:

(1) A promise by the accused to plead guilty to, or to enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions that may be included in the agreement and that are not prohibited under this rule; and

(2) A promise by the convening authority to do one or more of the following:

(A) Refer the charges to a certain type of court-martial;

(B) Refer a capital offense as noncapital;

(C) Withdraw one or more charges or specifications from the court-martial;

(D) Have trial counsel present no evidence as to one or more specifications or portions thereof; and

(E) Limit the sentence that may be adjudged by the court-martial for one or more charges and specifications in accordance with subsection (d).

(c) *Terms and conditions.*

(1) *Prohibited terms and conditions.*

(A) *Not voluntary.* A term or condition in a plea agreement shall not be enforced if the accused did not freely and voluntarily agree to it.

### ***United States Code***

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."

14 U.S.C. § 2311. Retirement in cases where higher grade or rating has been held. 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.

14 U.S.C. § 1407. Retired pay base for members who first became members after September 7, 1980: high-36 month average.

(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.

...

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

(1) Computation based on pre-high-three rules.--In the case of a member or former member described in paragraph (2), the retired pay base or retainer pay base is determined under section 1406 of this title in the same manner as if the member or former member first became a member of a uniformed service before September 8, 1980.

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

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

(B) in the case of an officer, is retired in a grade lower than the highest grade in which served pursuant to section 1370 or 1370a of this title that the officer served on active duty satisfactorily in that grade.

### 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 over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

2. The application was 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.<sup>5</sup>

4. The applicant alleged that the Coast Guard committed an error and injustice when it separated him with a General—Under Honorable Conditions characterization of service and when it calculated his retired pay under the "Final Pay Rule." 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.<sup>6</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>7</sup>

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<sup>5</sup> *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).

<sup>6</sup> 33 C.F.R. § 52.24(b).

<sup>7</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).

5. The record shows that in 2019, the applicant was accused of and charged with touching the buttocks, leg, and thigh of an Ensign on divers occasions from October 2018 to December 2018. According to the applicant, a shipmate was subject to the same or similar charges. The record further shows that on May 29, 2020, instead of enduring a trial, the applicant elected instead to enter into a Memorandum of Agreement (MOA) with the Coast Guard. In the MOA, he agreed to request a reduction in rank and the Coast Guard agreed to dismiss all of the charges against the applicant and to retain him on active duty until he became eligible to retire in October 2021. This same day, May 29, 2020, in fulfillment of the terms set out in the MOA, the applicant submitted a memorandum wherein he requested to be voluntarily retired and reduced in rank from an E-7 to and E-6. Within this voluntary request, the applicant acknowledged the consequences that would flow from his request, including the General characterization of service and the calculation of his retired pay pursuant to 10 U.S.C. § 1406.

6. The applicant has alleged that he felt pressured to enter into the MOA and contends that he was innocent, as evidenced by the acquittal of his shipmate. But the applicant has failed to prove, by a preponderance of the evidence, that he was coerced into signing the MOA, that the charges and evidence against him were identical to those in his shipmate's case, or that he was innocent of the charges. The preponderance of the evidence shows that the applicant received the benefit of the MOA in that he was not required to endure a trial and risk punishment and he was permitted to remain on active duty until eligible to voluntarily retire. Moreover, the applicant was represented by not one, but two defense attorneys who advised him on the pros and cons of the MOA, and the applicant affirmed in the MOA that he was satisfied with his counsel. The Board appreciates that the applicant regrets entering into the MOA because his General discharge makes him ineligible for educational benefits from the VA and thus ineligible to transfer those benefits to his children, but the consequence of his informed decision in the MOA to accept the General discharge to avoid trial does not persuade the Board that the MOA created an error or injustice in his record. The MOA and the applicant's rank and General discharge are presumptively correct, and the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard committed an error or injustice in the pretrial proceedings or in awarding the applicant a General, Under Honorable Conditions characterization of service. Accordingly, the applicant's request for relief should be denied.

7. In both the MOA and the memorandum in which the applicant asked to retire, the applicant acknowledged that his decisions were voluntarily. The applicant further acknowledged the consequences the MOA and his voluntary retirement would have on his retired pay and veterans benefits, including that his pay would be calculated pursuant to 10 U.S.C. § 1406, known as the "Final Pay Rule." The record shows that the applicant's retired pay is being calculated within this policy, and the applicant has failed to prove, by a preponderance of the evidence that the Coast Guard erred in this regard. Therefore, the applicant's requests for relief should be denied.

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



**ORDER**

The application of MK1 [REDACTED] [REDACTED] USCG (Retired), for the correction of his military record is denied.

December 1, 2023

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