DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2022-058

[redacted]
EM1 (Retired)

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 June 8, 2022, 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 May 17, 2024, 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 Electrician's Mate, First Class (EM1/E-6), asked the Board to correct his record by requiring the Coast Guard to calculate his retirement using his highest three year pay average. The applicant alleged that he was told by various Yeomen that his retirement pay should be based off of his rank as an E-7 not E-6. The applicant explained that prior to his separation he was reduced in rank from E-7 to E-6, but his understanding was that despite this reduction, his retirement pay would still be based off of his highest three years of earnings as an E-7. The applicant stated that at the time of his reduction, he had been an E-7 for 8 years. The applicant argued that after serving for almost 22 years, he deserves to be paid at his highest rank achieved. The applicant further stated that he is entitled to this correction and that it will help stabilize his finances because his civilian work is very unstable.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on January 26, 1993, where he trained as a Electrician's Mate and advanced to EMC/E-7 on October 1, 2005.

On December 1, 2013, charges were preferred to a Special Court-Martial against the applicant for four violations of Article 92—Failure to Obey Order or Regulation of the Uniform

Code of the Military Justice (UCMJ), five violations of Article 107—False Official Statement, and six violations of Article 134—General Article.

On March 13, 2014, the applicant entered into a Pre-Trial Agreement which included a stipulation that the applicant's charges would be referred to a Summary Court-Martial. At the Summary Court-Martial the applicant pled guilty and was found guilty of three violations of Article 92, three violations of Article 107, and three violations of Article 134. He was sentenced to reduction to the rank of E-6. In addition to pleading guilty to the aforementioned violations, the Summary Court-Martial also required that the applicant submit a request for voluntary retirement in lieu of administrative separation at least 5 days prior to pleading guilty. Paragraph 19 of the Summary Court-Martial stated:

> Further, I agree that, should I be reduced in rank/grade by the Summary Court-Martial, I expressly waive any right provided for in paragraph 1.c.12.g of the Military Separations Manual, COMDTINST M1000.4, to a special board to determine satisfactory service or highest paygrade for retirement purposes. I further understand that any reduction in rank/grade adjudged will, per Coast Guard policy and 10 U.S.C. 1407(f), affect the manner in which my retirement pay is calculated.

On April 24, 2014, Coast Guard Personnel Service Center (PSC) issued the applicant's Separation Authorization. Within this authorization, PSC stated the following:

> Your official record has been reviewed. IAW MILSEP 1.C.12.e and/or 1.C.12.g, and pursuant to 14USC362, 14USC423, and 10USC1407(f)(2)(A), a determination has been made that your highest grade held satisfactorily is E6.

The applicant was retired on May 1, 2014, with an Honorable characterization of service.

VIEWS OF THE COAST GUARD

On December 21, 2022, 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 in this case.

The JAG argued that not only is the applicant's request for relief untimely, but his retirement was also consistent with laws and regulations, due to his reduction to E-6 at Summary Court-Martial, and consistent with language in his pre-trial agreement, the applicant was properly retired as an E-6 and his retired pay properly calculated pursuant to 10 U.S.C. § 1407(f). According to the JAG, the available evidence directly contradicts the applicant's claims that he did not understand that his retirement pay would be calculated as an E-6. The JAG argued that the applicant was specifically informed of, and he agreed to, how his retirement pay would be affected in his pre-trial agreement. The JAG explained that the applicant was given the benefits of the pre-trial agreement, which included referral to a Summary Court-Martial instead of the increased punishments that he could have received at a Special Court-Martial, but now he seeks to set aside his agreed upon reduction. For these reasons, the JAG argued that the Board should deny the applicant's request for relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 31, 2023, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. As of the date of this decision no response was received.

APPLICABLE LAW AND POLICY

Federal Regulations

14 U.S.C. § 1406 provides the following guidance on regular service members' retirement computation:

> **(a) Use of retired pay base in computing retired pay.**
>
> > **(1) General rule.** The retired pay or retainer pay of any person entitled to that pay who first became a member of a uniformed service before September 8, 1980, is computed using the retired pay base or retainer pay base determined under this section.
> >
> > . . .
>
> **(f) Coast Guard.**--In the case of a member who is retired under any section of title 14, the member's retired pay is computed under section 423(a) of title 14[1] in the manner provided in that section.
>
> . . .

Title 10 U.S.C. § 1407 provides the following guidance on members' retirement who first enlisted after September 8, 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).
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> . . .
>
> **(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

[1] Title 14 U.S.C. § 423(a) was redesignated as 14 U.S.C. § 2504 in 2018. Pertinent to the applicant's claims, 14 U.S.C. § 2504(b)(1) states that for members who enlisted in the armed forces after September 8, 1980, that member's retirement pay will be computed under 10 U.S.C. § 1407.

> 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 …

Coast Guard Manuals and Instructions

Article 3 of the Coast Guard's Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2B, provides the following guidance on reduction in rate of an enlisted member:

> **3.A.31. Reduction in Rate.**
>
> a. General Provisions. Reasons for Reduction in Permanent Rate. Reduction in a permanent rate may result from any one of five reasons:
>
> 1. Punishment in accordance with Uniform Code of Military Justice,
>
> . . .
>
> b. Reduction in Rate as a Punishment.
>
> . . .
>
> (2) Reduction by Reason of NJP. Under the authority of Article 15 of the Uniform Code of Military Justice, a commanding officer may reduce an enlisted member in pay grades E-2 through E-6 to the next inferior pay grade as a result of NJP if the member concerned was previously advanced or promoted to the pay grade from which demoted by the commanding officer concerned or by an equivalent or lower command. Commanding officers of all commands in the Coast Guard have equivalent authority to effect the authorized advancement of enlisted members and will exercise promotion authority within the meaning of Article 15(b)(2)(D), Uniform Code of Military Justice. Accordingly, commanding officers who have authority to impose NJP under the provision of Article 15 may reduce an enlisted member, except a chief petty officer under their command, to the next inferior pay grade for disciplinary purposes.

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 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.[2]

3. The application filed by the applicant was not timely. To be timely, an application for the correction of a military record must be submitted to the Board within three years after the alleged error or injustice was discovered or should have been discovered.[3] The record shows that the applicant signed and received his DD-214 on May 1, 2014, and although the applicant alleged in his application to this Board that he did not discover the error until April 15, 2021, the record shows that the applicant began receiving his retirement pay in 2014 and therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record in March 2014, and his application is untimely.

4. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.[4] In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without "analyzing both the reasons for the delay and the potential merits of the claim based on a cursory review"[5] to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted that "the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review."[6] Pursuant to these requirements, the Board finds the following:

a. Regarding his delay in filing his application, the applicant failed to explain what caused his delay in applying to the Board for relief. The Board finds that the applicant's request for consideration is not persuasive because he has failed to show that anything prevented him from seeking correction of the alleged error or injustice more promptly.

b. A cursory review of the merits of this case shows that the applicant's claim lacks potential merit. Pursuant to Title 10 U.S.C. § 1407 service members who first enlisted after September 8, 1980, will have their retirement pay is based on the member's high three year average, except for those enlisted members who have been reduced in rank. In the case of a service member who has been reduced in rank, like the applicant here, the member's retirement is calculated pursuant to 10 U.S.C. § 1406, which is for members who enlisted prior to September 8, 1980. Under 10 U.S.C. § 1406, a member's retirement is not based on the member's high three year average but on the service member's final pay rate, multiplied by 2.5 percent for each year the member served. Accordingly, because of the applicant's reduction in rate as a result of a Summary Court-Martial, he was not entitled to have his retirement pay calculated under the high three year average rule. Therefore, his retirement was calculated in accordance with policy and pursuant to 10 U.S.C. § 1406, which does not include a high three year average calculation but instead calculates a

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[2] *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).

[3] 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

[4] 10 U.S.C. § 1552(b).

[5] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

[6] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

member's retirement based on his final rate of pay multiplied by 2.5 percent for each year served.

5. Accordingly, the Board will not excuse the applicant's untimeliness or waive the statute of limitations to conduct a more thorough review of the merits. The applicant's request should therefore be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of EM1 [redacted] USCG (Retired), for the correction of his military record is denied.

May 17, 2024

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