

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2022-085


OS2 (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 August 18, 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 June 14, 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 Operations Support Specialist, Second Class (OS2/E-5), asked the Board to correct his record by requiring the Coast Guard to calculate his retirement using his highest three year pay average, which the applicant alleged he was instructed would happen upon his retirement. The applicant claimed that he would have made changes in his career had he been counseled correctly on how his retirement pay would have been calculated as a result of his reduction in rate. The applicant stated that he served for 13 years, 4 months, and 29 days as an E-6 and should therefore receive retirement pay based on his highest three years of pay.

The applicant claimed that after he went to Captain’s Mast on January 30, 2017, and was reduced in rank from E-6 to E-5 because he had taken “a few slices of cheese and a juice from a classmate and was not honest about it.” According to the applicant, after his Captain’s Mast, he never signed anything nor was he instructed on how his pay would be affected following his reduction in rate. The applicant claimed that everyone he asked simply told him he would receive his highest three years of pay upon his retirement. The applicant admitted that he had no evidence to support his claims.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on April 3, 2000, where he trained as an Operations Specialist and advanced to OS2/E-6 on September 1, 2003.

On January 12, 2017, an Investigating Officer (IO) submitted his Investigative Report in response to an order issued by the applicant's commanding officer to investigate allegations of misconduct by the applicant. The investigation revealed that the applicant had taken several items from a fellow crewmember's room, who was also the Officer on Duty (OOD), and had lied about taking the items until confronted with video footage. The IO recommended that the applicant be disciplined for misconduct.

On January 30, 2017, the applicant went before a Captain's Mast and received Non-Judicial Punishment. The Court Memorandum recorded the following:

Code Offenses:

00922 Failure to obey any other lawful order.

01300 Housebreaking.

13400 Other offenses charged under Art 134 not covered.

01212 Wrongful appropriation.

Offense Narrative:

Article 92: Failure to obey and order and/or regulation. Article 121: Larceny & wrongful appropriation. Article 130: Housebreaking. Article 134: General Article Conduct of a nature to bring discredit upon the armed forces (to include all lesser charges).

Sentence Narrative:

Restriction to Base Kodiak for 45 Days- Suspended for 06 Months. Reduction To Pay Grade E-5.

On October 30, 2018, the applicant submitted a memorandum, "Service Retirement Request," wherein he requested a regular retirement and a retirement date prior to exceeding his professional growth points for High Year Tenure (HYT).

The applicant retired on July 31, 2020, as an E-5.

VIEWS OF THE COAST GUARD

On April 12, 2023, 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 the applicant was, or should have been, aware that he would be retired in the grade of E-5 because he submitted a high year tenure retirement request. Stated another way, the JAG claimed that the applicant was aware that he was an E-5 at the time that he requested retirement, and his retirement request contains information that he was aware he was approaching

his professional growth point for high year tenure. The JAG stated that although the applicant claims he was instructed that he would receive his highest three years of earnings, the applicant cited no evidence to support his claims and conceded that he in fact had no evidence to support his claims.

The JAG explained that the calculation of the applicant's retired pay was conducted in accordance with law and regulation. According to the JAG, due to his reduction to E-5, the applicant was retired as an E-5 and his retirement pay was calculated under the final pay rules. The JAG argued that the Coast Guard made no error in the processing and calculation of the applicant's retirement pay. Finally, the JAG explained that the applicant failed to advance back to E-6 in the three and a half years before his retirement. Accordingly, the JAG argued that the applicant's request for relief should be denied.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 1, 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 14¹ 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.

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.

(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).

...

(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.

Coast Guard Manuals and Instructions

Article 3.A. 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.28. Advancement After Reduction.

...

b. After Reduction as Punishment.

1. Advancement After Reduction. Members who have been reduced in rate, except those who fall within the provisions of Articles 15(d) and 15(e) of the Uniform Code of Military Justice, are subject to the normal advancement system, unless they are considered by their commanding officers to be deserving of special advancement.

2. Recommendation for Restoration/Advancement. Commanding officers who consider enlisted members to be deserving of restoration to a formerly held rate, or deserving of advancement, but to a rate lower than formerly held, may recommend such restoration or advancement by letter to Commander (CG PSC-EPM) or (CG PSC-RPM). In making such a recommendation, the present commanding officer will set forth in detail a full justification of the action recommended based on at least five, but not more than 36, months observation of performance of duty by the member concerned since reduction in rate. The observation time need not be totally at the present unit, but must take place within the same period of enlistment. Enlisted members E-7 and above, who have been reduced to E-5 or below, may be recommended for restoration of rate up to and including E-6. However, in order for enlisted members to be advanced to E-7 or above, they must recompile in a SWE only after meeting the eligibility requirements of Articles 3.A.5. and 3.A.6. of this Manual.

...

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 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 alleged that after his Captain's Mast and his reduction in rate, it was explained to him that he would receive retirement pay based on his highest three year average earnings, but his retirement was erroneously calculated based on his E-5 pay instead of his highest earnings as an E-6. 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.² 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."³

4. The applicant has alleged that he is entitled to have retirement pay calculated based on his highest three years of earnings as an E-6. Title 10 U.S.C. § 1407(b) states that for members who first enlisted after September 8, 1980, their retirement pay is based on the member's high

² 33 C.F.R. § 52.24(b).

³ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

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 otherwise applies only to 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 NJP, 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 calculates a member's retirement pay based on his final rate of pay (which for the applicant was E-5) multiplied by 2.5 percent for each year served.

5. For the reasons outlined above, the applicant has not met his burden, as required by 33 C.F.R. § 52.24(b), to overcome the presumption of regularity afforded the Coast Guard that its administrators acted correctly, lawfully, and in good faith.⁴ He has not proven, by a preponderance of the evidence, that the Coast Guard failure calculate his retirement based on his highest three year average salary was erroneous or unjust. Accordingly, the applicant's request for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁴ *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

ORDER

The application of OS2 [REDACTED] [REDACTED] USCG, for the correction of his military record is denied.

June 14, 2024

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