

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-086

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXX, YN3 (Ret.)

FINAL DECISION

Author: Ulmer, D.

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on March 30, 2005, upon receipt of the applicant's completed application and military records.

This final decision, dated December 8, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his military record to show that he retired as a YN1 (pay grade E-6) the highest grade he held in the Coast Guard, rather than as a YN3 (pay grade E-4).

APPLICANT'S ALLEGATIONS

The applicant alleged that he satisfactorily performed the duties of a YN1 for 36 months and should have been retired in that grade. He stated that Article 12.C.15.e. of the Personnel Manual states that "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 [Coast Guard Personnel Command (CGPC)] or the Commandant, as appropriate, determines he or she performed duty satisfactorily, but not lower than his or permanent grade or rate with retired pay of the grade or rate at which retired." The applicant further alleged that although CGPC

convened a rate determination board to determine the highest held, he was not notified in writing of the Board or its decision, as he should have been. He also alleged that he was denied the opportunity to consult with counsel and present evidence to the determination board. He stated that he feels that he is being punished twice for the same offenses.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on February 5, 1980. After approximately 24 years of active service, the applicant requested voluntary retirement. He was scheduled to retire on July 1, 2005. However, on December 27, 2004, prior to his scheduled retirement, the applicant's urine tested positive for cocaine. On January 24, 2005, he was found guilty of illegal use of cocaine at a non-judicial punishment ((NJP) also known as captain's mast) under Article 15 of the Uniform Code of Military Justice (UCMJ). The commanding officer (CO) punished the applicant by reducing him in rank from YN1 to YN2, fining him \$800, and by restricting him and assigning him extra duties.

On January 25, 2005, the applicant requested to be retired in lieu of being discharged by reason of misconduct due to drug abuse.

In a February 3, 2005, letter to CGPC, the applicant's CO recommended that the applicant be allowed to retire instead of being discharged by reason of misconduct. He also recommended that the applicant be retired in pay grade E-5. The CO noted that the applicant's urine had tested positive for a second time on January 11, 2005 and that he anticipated punishing the applicant at NJP for this violation of the UCMJ.

The CO stated in his letter to CGPC that for several years the applicant's performance had been far below that expected of a journeyman petty officer. He informed CGPC that the applicant had been placed on performance probation on April 6, 2004 and had failed to show improvement during the first few months of probation. The CO stated that the applicant was habitually tardy, failed to communicate with his supervisor, and was inept in his rating and lacked good judgment. The CO also noted that from 1982 through 1992, the applicant had been to NJP for disrespect and unauthorized absences, and that he had been counseled extensively on his poor performance as well his financial irresponsibility. The CO concluded his letter to CGPC by stating the following:

I recommend that [the applicant] be retired as soon as possible, hopefully no later than 1 April 2005 . . . Because of his dismal performance as a YN1/E6, I recommend that [the applicant] receive permanent retirement as a YN2/E5. He will very likely be discharged as a YN3/E-4 in the wake of his pending NJP! Additionally, because of his repeated misconduct, I recommend that

[the applicant] surrender all uniforms and be given a reenlistment code that prevents future military service.

On February 17, 2005, the applicant was taken to NJP for his second drug violation. The CO ordered the applicant to forfeit \$250 per month for two months, to be reduced to pay grade E-4, to be restricted for 30 days, and to perform extra duties for 30 days.

On February 23, 2005, Headquarters Enlisted Division personnel informed the applicant that he would be discharged no later than April 1, 2005 and that based upon an administrative review of his service record he would be retired in pay grade E-4. On March 31, 2005, the applicant was retired in pay grade E-4.

APPLICABLE REGULATION

Article 12.C.15.g. (Procedure to Certify Highest Grade or Rate on Retirement) of the Personnel Manual provides the following, in pertinent part:

"1. Commander, (CGPC-epm) or (CGPC-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. 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 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.

* * *

4. If the administrative review described in subparagraph 1. 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 September 6, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant alternative relief to the applicant by returning the record to the Coast Guard and directing it to convene a special board of officers, in accordance with Article 12.C.15.g. of the Personnel Manual.

The JAG stated that CGPC reviewed applicant's record in accordance with Article 12.C.15.g.1 of the Personnel Manual and found that YN3/E-4 was the highest rank satisfactorily held by the applicant and ordered the applicant to be honorably retired as an E-4. The JAG admitted, however, that the Coast Guard did not refer the matter to a special board of officers to review the applicant's record and make a recommendation to the Commandant on whether the applicant should be retired in a higher grade, as required by Article 12.C.15.g.4. of the Personnel Manual.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 7, 2005, a copy of the Coast Guard views was mailed to the applicant with 30 days allotted for him to respond. The BCMR did not receive a response from the applicant.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of 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 section 1552 of title 10 of the United States Code. The application was timely.
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.
3. The Coast Guard admitted, and the Board finds, that an error was committed when the Coast Guard retired the applicant in pay grade E-4 without convening a special board of officers to review the applicant's record and to make a recommendation to the commandant on whether the applicant should be retired in a higher grade. The Coast Guard's failure in this regard violated Article 12.C.15.g.4. of the Personnel Manual, which states, "If the administrative review [of a member's record] . . . 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."

4. To remedy this error, the Coast Guard asked the Board to direct it to convene a special board of officers to review the applicant's military service and to recommend to the Commandant the grade in which the applicant should be retired. The Board concurs in the Coast Guard's recommendation and notes the absence of any objection from the applicant. The Board further finds the Coast Guard's recommendation to be an equitable remedy under the circumstances of this case. The Coast Guard is reminded to provide the applicant with any due process rights to which he may be entitled under this procedure.

5. If the applicant is not satisfied with the special board review and final decision by the Commandant, he has the option of reapplying to the BCMR.

6. Accordingly, the applicant is entitled to the alternative relief set out in the order below.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of YN3 xxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted as follows. Pursuant to Article 12.C.15.g.4. of the Personnel Manual, the Coast Guard shall convene a special Board of officers to review the applicant's military record and to recommend to the Commandant whether the applicant should be retired in the highest grade held while on active service. The Coast Guard is directed to provide the applicant with any due process rights to which he may be entitled during this administrative process. The special board shall be convened within 60 days from the date of this final decision. If the Commandant directs the applicant's retirement in a grade higher than YN3/E-4, the Coast Guard shall correct the applicant's record in this regard and pay him any sum due as a result of the correction.

All other requests are denied.

Charles P. Kielkopf

William R. Kraus

Thomas H. Van Horn