Homeland Security

Office of the General Counsel
General Law Division

Board for Correction of Military Records of the Coast Guard

- Chair,
- Deputy Chair (vacant)
- Paralegal Specialist,
- Voting Board members—civilian DHS attorneys—who volunteer to serve in panels of three

BCMR Jurisdiction—10 U.S.C. § 1552

"The Secretary of a military department may correct <u>any military record</u> of the Secretary's department when the Secretary considers it necessary <u>to correct an error or remove an injustice</u>. … [S]uch corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. The Secretary of Homeland Security may in the same manner correct any military record of the Coast Guard." § 1552(a).

- "Any military record" means a document or other record that pertains to an individual member or former member of the Coast Guard or any other military matter affecting a member or former member. § 1552(g).
- With respect to a court-martial, the Board may only grant clemency on a sentence or correct a record to reflect actions taken by reviewing authorities. § 1552(f).
- "The 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." 41 Op. Att'y Gen. 94 (1952), 1952 WL 2907.

Exhaustion of Administrative Remedies

- Before applying to the BCMR, an applicant must exhaust "all effective administrative remedies" and "such legal remedies as the Board may determine are practical, appropriate, and available to the applicant." 33 C.F.R. § 52.13(b).
- The Discharge Review Board (DRB) has a 15-year statute of limitations under 10 U.S.C. § 1553.
- The Personnel Records Review Board (PRRB) has a 1-year limitation and the member must be on active duty.
- The Board interprets 33 C.F.R. § 52.13(b) to mean that lapsed remedies do not remove jurisdiction.

3-Year Statute of Limitations

- An application must be filed within 3 years after the applicant discovers the error or injustice, but the Board may excuse any untimeliness "in the interest of justice." 10 U.S.C. § 1552(b).
- Before denying a case based on the statute of limitations, the Board must assess "the interest of justice" by (1) considering the length and reason for the delay and (2) conducting a cursory review of the merits. *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), *cited in Dickson v. Sec'y of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).
- The Soldiers' and Sailors' Civil Relief Act of 1940 tolls members' claims until the date of discharge or release from active duty. *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994). However, the doctrine of laches may apply if evidence has become unavailable in interim.
- A timely application to the Discharge Review Board (DRB), which has a 15-year statute of limitations, tolls the BCMR's statute of limitations until the DRB issues its decision. *Ortiz v. Sec'y of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994).

Decision Timeliness—14 U.S.C. § 425

Final action must be taken within 10 months of receipt of a “completed application.” If not,

- any recommended decision of the Board that is awaiting review by the delegate of the Secretary becomes final agency action; or
- the applicant is entitled to (1) a court order directing that final action be taken within 30 days and (2) the costs of obtaining the order, including a reasonable attorney's fee, from the Department.

33 C.F.R. § 52.26 in effect tolls the 10-month deadline—

- if the Chair grants the applicant an extension to seek counsel or additional evidence or to reply to the Coast Guard’s advisory opinion
- if the applicant significantly amends the request for relief or submits significant new evidence after the case has been docketed; or
- if the Chair finds that the applicant has unreasonably delayed responding to a request for further information or evidence.

Timing & Whistleblower Protection

- 33 C.F.R. part 53.
- The applicant alleges reprisal in accordance with the Military Whistleblower Protection Act, 10 U.S.C. § 1034.
- The Inspector General investigates and issues a report with a recommended disposition and possible corrective action.
- The Board must take final action on such an application within 6 months, instead of 10 months. Therefore, the 135-day rule for AOs will not apply.

General Procedures

- BCMR regulations at 33 C.F.R. part 52.
- *Ex parte* rules do not apply. (10 U.S.C. § 1556 applies to DOD boards only.) But by policy, the BCMR staff will not discuss the merits of a case that is to be decided by the Board with the Coast Guard.
- An application is not docketed until the Chair determines that it is complete. Under 33 C.F.R. § 52.21, a completed application includes
  - an application form, DD 149, properly filled out;
  - the applicant's military records and, if applicable, medical records; and
  - substantial evidence or information.
- Hearings are granted at the discretion of the Chair.
- BCMR application does not act as a stay of proceedings. 33 C.F.R. § 52.28. (The Coast Guard need not delay taking action.)

Advisory Opinion (AO) of the Coast Guard

- The Board submits a copy of the application to the Coast Guard, which has 135 days to submit an AO for each case. 33 C.F.R. § 52.42(c). The AO is optional under the rules.
- The Chair may grant an extension for an AO, but it does not extend the 10-month deadline. In the absence of a timely AO, the Chair may take the case to the Board without one.
- The AO usually includes memoranda from the JAG and PSC, which may recommend administratively closing a case, denying relief, or granting whole, partial, or alternative relief.
- The AO should include all relevant evidence in PSC's possession, including applicable policies, reports of investigations, database printouts, and any other record or information that the PSC or the JAG reviews or relies on to prepare the AO.
- BCMR procedures are non-adversarial, and so the AO should include all relevant evidence and information whether or not it supports the Coast Guard's recommendation.

AO of the Coast Guard (continued)

- Any medical AO for an applicant who was diagnosed while serving in the Armed Forces as experiencing a mental health disorder must include the opinion of a clinical psychologist or psychiatrist if the application concerns a mental health disorder. 10 U.S.C. § 1552(g).
- The AO should include redacted copies of investigations and redact other members' PII from evidence. Applicants may see documents available to them under the Privacy Act, 5 U.S.C. § 552a(d), and FOIA, 5 U.S.C. § 552. Redaction is the Coast Guard's responsibility. 33 C.F.R. § 52.43(c).
- The Board is entitled to unredacted copies of evidence and investigations, which should be submitted to the Board clearly labeled as unredacted documents. 33 C.F.R. § 52.43(c).
- The BCMR staff mails a copy of the AO to the applicant, who has 30 days to submit a written response for the Board's consideration. 33 C.F.R. § 52.42(d). If the Chair grants the applicant an extension of the 30-day period for responding to the AO, the 10-month deadline is extended by an equal number of days. 33 C.F.R. § 52.26(b).

Staff Preparations for Board Meeting

- The BCMR staff member reviews files and researches applicable law and precedent cases.
- The staff member drafts a decision with summaries of the evidence and arguments and proposed findings and orders.
- The date and time for Board meeting are set by the Chair (usually on a Thursday or Friday at 2:00 p.m.).
- The Board, composed of DHS civilian attorneys acting under the authority of Secretary, is empanelled by emailed invitation to serve until three volunteer.
- Draft decisions (usually 5 to 10) and important case file documents are emailed to the three panel members who have volunteered to serve a few days in advance of the meeting.

Burden of Proof and Decision

- The applicant is responsible for submitting evidence to prove his or her claims. 33 C.F.R. § 52.24(a).
- The "preponderance of the evidence" standard (i.e., 51%) applies in every case. 33 C.F.R. § 52.24(b).
- A presumption of regularity is accorded to Coast Guard officials and records, but <u>not</u> to the AO memoranda or declarations prepared for it.
- The federal rules of evidence do not apply, but the Board may grant little evidentiary weight to evidence it finds unreliable.
- The burden of proof switches to the Coast Guard <u>only</u> when the Board is considering whether to remove an officer's failure of selection for promotion because the applicant has proved that his record was erroneous or incomplete before the selection board. *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).
- The Board members reach a consensus, unanimous decision or may sign concurring or dissenting opinions.

Remedies

- "The decision of the Board shall specify any change, correction, or modification of records to be made by the Coast Guard, and any other action deemed necessary to provide full and effective relief, which may include directing the Coast Guard to convene medical boards." 33 C.F.R. § 52.61(d).

- BCMR policy is to try to put the applicant back in the position he or she would have been in if the error or injustice had not occurred. *See Denton v. United States,* 204 Ct. Cl. 188, 199, *cert. denied,* 421 U.S. 963 (1975).

- The Board has "an abiding moral sanction to determine insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief." *Caddington v. United States*, 178 F. Supp. 604, 607 (Ct. Cl. 1959).

- "Congress conferred broad powers on the Secretaries to remedy errors and injustices. Congress, in so doing, voluntarily and explicitly relinquished its authority in this area … The conjunction of these statutes implies that the Secretaries have a duty as well as the power to afford servicemen proper relief." *Sanders v. United States*, 594 F.2d 804, 814 (Ct. Cl. 1979).

Remedies (continued)

- "Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States." 10 U.S.C. § 1552(a)(4).
- The Coast Guard may ask the Board for a clarification or technical amendment of any order that it finds unclear or incomplete or lacks authority to implement. 33 C.F.R. § 52.73.
- The Coast Guard is now authorized to convene special selection boards to promote officers. 14 U.S.C. § 263.
- The Coast Guard pays any claims due as a result of a correction by the Board from applicable current appropriations. 10 U.S.C. § 1552(c)(1).
- Interest may be awarded when an applicant is owed back pay and allowances when a court-martial conviction is set aside. 10 U.S.C. § 1552(c)(4).

Final Agency Action—33 C.F.R. § 52.64

Under § 52.64(a), unanimous Board decisions constitute final agency action whenever relief is denied or when relief is granted in the following types of cases, unless the AO identifies a "significant issue of Coast Guard policy" at stake:

- reenlistment bonuses
- Survivor Benefit Plan
- reenlistment codes
- character of or reason for discharge
- medals and awards

A Board decision is subject to review by the delegate of the Secretary if

- it is not unanimous; or
- it does not meet the requirements for final agency action under § 52.64(a) and the Coast Guard has not recommended substantially the same relief as that requested by the applicant.

Review by the Delegate of the Secretary

- The Secretary's delegate "may approve, disapprove, or concur in the decision of the Board, either in whole or in part, and amend the order of the Board accordingly, or return the case to the Board for additional consideration." 33 C.F.R. § 52.64(b).
- The Secretary has delegated his authority to "the General Counsel, his or her deputy, or the highest ranking official in the Office." The Principal Deputy General Counsel currently exercises this authority.
- Under 14 U.S.C. § 425, the Board's recommended decision becomes final if the delegate of the Secretary does not take final action within the 10-month deadline.

Reconsideration—33 C.F.R. § 52.67

Cases may be reconsidered if within 2 years of the final decision, the applicant submits either—

(1) evidence or information that supports the allegation of error or injustice in the record and that

- was not previously considered by the Board and
- could not have been presented to the Board prior to its original determination if the applicant had exercised reasonable diligence; or

(2) evidence or information of a legal or factual error in the original determination.

- Different Board members decide the case.
- The Board may waive the 2-year limitation in the interest of justice.

Review of Decisions by Federal Courts

- Federal District Courts or Court of Federal Claims (when >$10,000 is at stake)
- A deferential "arbitrary and capricious" standard of review under APA applies. *Mueller v. Winter*, 485 F.3d 1191, 1198 (D.C. Cir. 2007).
- "[W]hen reasonable minds could reach differing conclusions," the court will not substitute its judgment for that of the BCMR. *Grieg v. United States*, 226 Ct. Cl. 258, 267, *cert. denied*, 455 U.S. 907 (1981).
- "[W]hen a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate." *Roth v. United States,* 378 F.3d 1371, 1381 (Fed. Cir. 2004).
- "When a board does not act to redress clear injustice, its decision is arbitrary and capricious." *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).