

be made in accordance with the methods described in the applicable sections of "Standard Methods for the Examination of Water and Wastewater," 20th Ed., which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of "Standard Methods for the Examination of Water and Wastewater," 20th Ed., may be obtained from the American Public Health Association, 1015 15th St. NW., Washington, DC 20005. Copies of the methods incorporated by reference in this paragraph (b)(5)(ii) may also be examined at the Office of the **Federal Register**, 800 North Capital St. NW., suite 700, Washington, DC, or at the Center for Food Safety and Applied Nutrition's Library, 5100 Paint Branch Pkwy., College Park, MD.

(A) Combined radium-226/-228 shall be measured using the following methods:

(1) Method 7500—Ra B—"Precipitation Method," which is contained in "Standard Methods for the Examination of Water and Wastewater," 20th Ed., which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. The availability of this incorporation by reference is given in the introductory text of paragraph (b)(5)(ii) of this section.

(2) Method 7500—Ra D—"Sequential Precipitation Method," which is contained in "Standard Methods for the Examination of Water and Wastewater," 20th Ed., which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. The availability of this incorporation by reference is given in the introductory text of paragraph (b)(5)(ii) of this section.

(B) Gross alpha particle radioactivity shall be measured using the following method: Method 7110 C—"Cociprecipitation Method for Gross Alpha Radioactivity in Drinking Water," which is contained in "Standard Methods for the Examination of Water and Wastewater," 20th Ed., which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. The availability of this incorporation by reference is given in the introductory text of paragraph (b)(5)(ii) of this section.

(C) Beta particle and photon radioactivity shall be measured using the following methods:

(1) Method 7500—Sr B—"Precipitation Method," which is contained in "Standard Methods for the Examination of Water and Wastewater," 20th Ed., which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. The availability of this

incorporation by reference is given in the introductory text of paragraph (b)(5)(ii) of this section.

(2) Method 7500—<sup>3</sup>H B—"Liquid Scintillation Spectrometric Method," which is contained in "Standard Methods for the Examination of Water and Wastewater," 20th Ed., which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. The availability of this incorporation by reference is given in the introductory text of paragraph (b)(5)(ii) of this section.

(3) Method 7120 B—"Gamma Spectroscopic Method," which is contained in "Standard Methods for the Examination of Water and Wastewater," 20th Ed., which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. The availability of this incorporation by reference is given in the introductory text of paragraph (b)(5)(ii) of this section.

(D) Uranium shall be measured using the following methods:

(1) Method 7500—U B—"Radiochemical Method" which is contained in "Standard Methods for the Examination of Water and Wastewater," 20th Ed., which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. The availability of this incorporation by reference is given in the introductory text of paragraph (b)(5)(ii) of this section.

(2) Method 7500—U C—"Isotopic Method" which is contained in "Standard Methods for the Examination of Water and Wastewater," 20th Ed., which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. The availability of this incorporation by reference is given in the introductory text of paragraph (b)(5)(ii) of this section.

\* \* \* \* \*

Dated: February 26, 2003.

**William K. Hubbard,**

*Associate Commissioner for Policy and Planning.*

[FR Doc. 03-4971 Filed 2-27-03; 11:42 am]

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## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### 33 CFR Part 52

[OST Docket No. 2002-13439; Notice 2002-1]

RIN-2105-AD19

#### Coast Guard Board for Correction of Military Records; Procedural Regulation

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Final rule.

**SUMMARY:** The Department is revising and reissuing the procedural regulations of the Coast Guard Board for Correction of Military Records (Board) in order to clarify application procedures; to explain applicants' legal rights and burden of proof; to provide more time and flexibility for applicants to improve their applications; and to facilitate timely decision making by the Board.

**EFFECTIVE DATE:** April 2, 2003.

**FOR FURTHER INFORMATION CONTACT:** Dorothy J. Ulmer, Chair, Board for Correction of Military Records of the Coast Guard, C-60, Office of the General Counsel, U.S. Department of Transportation, 400 7th Street SW.; Washington, DC 20590. Telephone: (202) 366-9335.

#### SUPPLEMENTARY INFORMATION:

##### Electronic Access

Internet users may download a copy of this final rule at the following Internet addresses: <http://dms.dot.gov>; <http://www.access.gpo.gov>; [http://www.archives.gov/federal\\_register](http://www.archives.gov/federal_register). An electronic copy may also be obtained by using a computer, modem, and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661.

##### Background

The Secretary of Transportation, acting through the Board for Correction of Military Records of the Coast Guard, is authorized by section 1552 of title 10 of the United States Code to correct the military records of active duty, reserve, retired, and discharged Coast Guard military personnel who apply for a correction of an error or injustice in their records.

The Board's current rules at 33 CFR Part 52 have become disorganized over time by amendments and have several shortcomings that may negatively affect the Board's applicants and the timeliness of the Board's decisions. This revision of 33 CFR Part 52 is intended

to better organize the rules, notify applicants of their rights and Board procedures, and remove other shortcomings as described below.

The current rules fail to inform the public of the following important matters: the proper format for briefs in support of an application; the need for a family member or legal representative to submit proof of his or her proper interest before applying on behalf of a deceased or incompetent veteran; the requirement that applicants inform the Board of any change in their mailing address prior to final action by the Board; the fact that applicants whose cases are processed under the Whistleblower Protection Act and who are granted a hearing may be entitled to representation by a Coast Guard law specialist in accordance with 10 U.S.C. 1034(f)(3)(A); the presumption of regularity accorded military records and the burden of proof borne by applicants; the possible actions the Secretary or his or her delegate may take when reviewing a recommended decision of the Board; the possible reduction of monetary awards resulting from record corrections because of setoffs required by law or regulation; and the availability of copies of the Board's final decisions, redacted to protect the privacy of applicants, for review in the Board's reading room and on an Internet site.

Furthermore, the current rule allows an applicant only 15 days to respond to the written views of the Coast Guard on his or her application. § 52.82(d). In light of the underway schedules of some of the Board's active duty applicants assigned to sea duty, 15 days is insufficient time for some applicants to respond. Moreover, no provision addresses applicants' requests for extensions to consult counsel or gather more evidence. The current rule requires members who submit evidence after submitting their applications to waive their right to a final decision within ten months and makes no provision for a new deadline. § 52.61(c). Moreover, no provision addresses the consequences of an applicant's decision to change his or her request for relief.

The current rule states that Board action is required before a member can withdraw an application. § 52.26. It also allows the Chair to deny an application, without prejudice and without action by the Board, if he or she believes that the evidence is insufficient or that the application was untimely and lacks merit. § 52.32.

The current rule does not address or facilitate the Board's access to privileged, classified, and sensitive information, such as reports of investigations, which is occasionally

necessary for the Board to determine whether an error or injustice has been committed. The current rule also permits applicants to inspect the Board's record of proceedings without expressly providing for the protection of privileged, classified, and sensitive information. § 52.66.

The current rule states that the Board shall consider any written recommendation submitted by the Chief Counsel of the Coast Guard before issuing a decision. § 52.82(e). However, it provides no deadline for the Chief Counsel's submission even though the Board must take final action on each application within ten months. 14 U.S.C. 425. Delayed submissions by the Chief Counsel's office can leave the Board with little or no time to receive the applicant's response, issue a decision, and have it reviewed by the delegate of the Secretary before the statutory ten-month deadline has expired. The current rule also does not take into account written views submitted by a delegate of the Commandant of the Coast Guard other than the Chief Counsel. In addition, the current rule fails to require the Coast Guard to describe what "significant issue of Coast Guard policy" is at stake when he or she invokes review of a Board decision by the delegate of the Secretary. § 52.64(a)(2).

The current rule permits the Board to specify any correction of a record in its order and to order the Coast Guard to take "any other action deemed necessary to carry out the Board's recommendation," but it does not expressly permit the Board to order the Coast Guard to convene medical boards to determine an applicant's disability rating so that his or her separation can be corrected. § 52.61(e). The current rule also requires the delegate of the Secretary to review cases in which the Board corrects a record to show that a member is entitled to a medal or award contrary to the Coast Guard's recommendation. In addition, the current rule does not address what the Coast Guard should do if it finds that an order of the Board is incomplete because of an oversight. All of these matters are addressed in the final rule.

#### Notice and Comment

The Department published a Notice of Proposed Rulemaking on December 11, 2002, at 67 FR 76142. No comments were received in response to that notice. Therefore, this final rule adopts the proposed rule without change.

### Section-by-Section Analysis of the Final Rule

#### Subpart A—Purpose and Authority

##### Section 52.1 Purpose

This section remains unchanged.

##### Section 52.2 Authority

This section is amended to reflect the codification of the Board's ten-month deadline for issuing decisions under 14 U.S.C. 425 and to add a citation (10 U.S.C. 1552(a)(4)) for the finality and conclusiveness of the Board's orders.

#### Subpart B—Establishment, Function, and Jurisdiction of Board

##### Section 52.11 Establishment and Composition

Throughout this section and all of Part 52, the term Chair is substituted for the term Chairman to establish gender neutrality. This section is also amended to remove a citation to 49 U.S.C. 108(a).

##### Section 52.12 Function

This section is amended to reflect the fact that the Board considers submissions from the Coast Guard and other Government offices along with applications and military records in reaching its decisions.

##### Section 52.13 Jurisdiction

No changes have been made to this section.

#### Subpart C—General Provisions Regarding Applications

##### Section 52.21 General Requirements

No changes have been made to paragraph (a). Paragraph (b) is amended to inform family members and legal representatives that they must submit proof of their proper interest when applying to the Board for the correction of the military record of a deceased or incompetent veteran. Paragraph (c) is amended to reflect the fact that applications are not docketed by the Board until they are complete and to reflect the need for substantial evidence or information and all military and medical records before an application is considered complete. Paragraph (d) is added to advise applicants of the necessity of keeping the Board informed of any changes in mailing address so that they will receive the Board's correspondence. Paragraph (e) is added to ensure that briefs submitted in support of applications are readable, replicable, and not unduly lengthy.

##### Section 52.22 Time Limit for Filing Application

This section is reworded to clarify why an applicant must provide reasons

for submitting an application after the three-year statute of limitations has passed.

#### Section 52.23 Counsel

Paragraph (a) is added to inform applicants that they may be represented by counsel at their own expense but that applicants whose cases are processed under the Whistleblower Protection Act may be entitled to representation by a law specialist at a hearing convened in accordance with Subpart F. The previous text of this section appears in paragraph (b) and is amended by updating two citations and by making the Chair, rather than the Board, responsible for deciding the competence of an applicant's chosen representative.

#### Section 52.24 Evidence and Burden of Proof

Paragraph (a) is revised to encourage the timely submission of evidence with the initial application and to direct attention toward the new rule concerning late submissions of evidence in § 52.26. Paragraph (b) is added to inform applicants of the presumption of regularity accorded military records and of the burden of proof they must meet to be granted relief, which is the preponderance of the evidence.

#### Section 52.25 Access to Official Records

This section is amended to consolidate the sentences.

#### Section 52.26 Right to Timely Decision; Effect of Requests for Extensions, Changes in Requests for Relief, and Late Submissions of Evidence

This new section, which incorporates the provisions in old §§ 52.68 and 52.61(c), informs applicants of their right to a final decision on their applications within ten months of the completion of their applications. It also permits applicants to request extensions, submit evidence after their applications have been docketed, and alter their requests for relief without waiving their right to a timely decision. It provides that, if an applicant requests an extension or unreasonably delays responding to a request from the Board, the Board's ten-month deadline is extended by the duration of the extension or of the unreasonable delay. It further provides that, if in the determination of the Chair, an applicant has submitted significant new evidence or has significantly altered his or her request for relief after his or her application has been docketed, the application is considered newly completed and the applicant has the right to a final decision within ten months of the new date of completion.

#### Section 52.27 Withdrawal of Application

This section (old § 52.26) is revised to allow the Chair to permit an applicant to withdraw his or her application without Board action.

#### Section 52.28 Stay of Proceedings

No changes have been made to this section (old § 52.33), apart from its renumbering. It has been renumbered because it belongs better under this Subpart C—General Provisions Regarding Applications than where it was under Subpart D—Consideration of Application.

#### Subpart D—Consideration of Application and Administrative Closure

#### Section 52.31 Consideration of Application

This section is amended to show that the Chair's initial review of an application to determine whether it is complete occurs before the application is docketed.

#### Section 52.32 Administrative Closure

This section is renamed and expanded to clarify the circumstances under which the Chair may close a case without prejudice and without Board action. Paragraph (a) permits the Chair to close a case when he or she determines that the application was erroneously documented because it was never completed, the Board lacks authority to grant the requested relief, the applicant failed to exhaust an administrative remedy before applying to the Board, or the Coast Guard has already made the requested corrections. Paragraph (b) addresses how applicants might reapply after their cases have been administratively closed. Paragraph (c) requires the Chair to inform applicants of their right to reapply whenever he or she administratively closes a case.

#### Old § 52.33 Stay of Proceedings

This old section has been renumbered as § 52.28.

#### Subpart E—Submissions by the Coast Guard and Other Offices

This new subpart E embodies old Subpart—Miscellaneous Provisions. It has been renamed and repositioned to better reflect its contents and the order of the Board's procedures. Old subpart E is included in subpart F.

#### Section 52.41 Assistance

No changes have been made to this section (old § 52.81), apart from its renumbering.

#### Section 52.42 Views of the Coast Guard

Paragraph (a) (old § 52.82(a)) is amended to reflect the amendments to sections 52.21 and 52.32. Paragraphs (a) and (b) (old § 52.82(c)) are amended to reflect the fact that the views of the Coast Guard may be submitted in an advisory opinion by any delegate of the Commandant. Paragraph (c) (old § 52.82(e)) is amended to require the Board to consider the advisory opinion of the Coast Guard only if it is submitted within 135 days of the date the application is complete but to permit the Board to consider advisory opinions submitted after the 135-day deadline has passed. The rule facilitates timely decisions when submissions of advisory opinions by the Coast Guard are delayed to the point where little or no time remains for the Board to receive the applicant's response to the advisory opinion, issue a decision, and have it reviewed by the delegate of the Secretary before the statutory ten-month deadline has expired. Paragraph (d) (old § 52.82(d)) increases the time provided for the applicant's response to the advisory opinion from 15 to 30 days and allows the Chair to grant extensions of the time to respond. Paragraph (e), which is new, requires advisory opinions and applicants' briefs in response to advisory opinions to be readable, replicable, and not unduly lengthy.

#### Section 52.43 Requests for Further Information; Submissions of Classified, Privileged, and Sensitive Information

This section (old § 52.82(b)) has been expanded to address the Board's ability to seek information from applicants and from other Government offices, as well as from the Coast Guard. It addresses how the Board can receive and review classified, privileged, and sensitive information from the Coast Guard or another Government office while providing the applicant with a copy of any part of that information that would be released to him or her if requested by the applicant from the custodian of the information under 49 CFR parts 7 or 10.

#### Subpart F—Hearings

This subpart incorporates both old Subpart E—Hearings and old Subpart F—Procedure at Hearings because both concern hearings.

#### Section 52.51 General Provision

No changes other than renumbering and substituting the term Chair for the term Chairman have been made to this section (old § 52.41).

**Section 52.52 Notice of Hearing**

No changes other than renumbering, substituting the term Chair for the term Chairman, and adding a comma for stylistic consistency have been made to this section (old § 52.42).

**Section 52.53 Witnesses**

This section (old § 52.43) has been renumbered and amended by substituting the term Chair for the term Chairman, adding a comma for stylistic consistency, and clarifying the language to indicate that the applicant is only responsible for ensuring the appearance of his or her own witnesses at a hearing.

**Section 52.54 Expenses**

This section (old § 52.44) has been renumbered and amended to inform applicants that they may be entitled to representation by a law specialist if they are granted a hearing and their cases are processed under the Whistleblower Protection Act.

**Section 52.55 Nonappearance**

No change has been made to this section (old § 52.45), apart from its renumbering.

**Section 52.56 Conduct of Hearing**

No amendments other than renumbering, substituting the term Chair for the term Chairman, and adding a comma for stylistic consistency have been made to this section (old § 52.51).

**Section 52.57 Record of Hearing**

No change has been made to this section (old § 52.52), apart from its renumbering.

**Subpart G—Judgment and Disposition****Section 52.61 Deliberations and Decision**

No amendments other than substituting the term Chair for the term Chairman have been made to paragraphs (a) and (b). Old paragraph (c) is amended and moved to paragraphs 52.24(a) and 52.26(c). New paragraph (c) (old paragraph (d)) is amended only by substituting the term Chair for the term Chairman and by capitalizing the letter b in Board for stylistic consistency. Paragraph (d) (old paragraph (e)) is revised to show that the Board's authority to order the Coast Guard to take "any other action deemed necessary to carry out the Board's recommendation," as previously provided, includes the authority to order the Coast Guard to convene medical boards to help determine an applicant's proper disability rating for a correction of his or her separation. No changes have been made to paragraph (e) (old paragraph (f)).

**Section 52.62 Minority Report**

No changes have been made to this section.

**Section 52.63 Record of Proceedings**

Paragraph (a) contains the existing, unamended text of this section. Paragraph (b) has been added to provide for the return of classified, privileged, or sensitive information reviewed by the Board to the custodial Government office and the inclusion of the redacted copy of the information that was provided to the applicant in the Board's permanent record of proceedings after final action is taken.

**Section 52.64 Final Action**

Paragraph (a)(2) is amended to require the delegate of the Commandant of the Coast Guard to identify and describe in his or her advisory opinion the significant issue of Coast Guard policy challenged in an application that requires its review by the delegate of the Secretary under paragraph (b) if the Board grants relief contrary to the Coast Guard's advisory opinion or if the Board grants substantially different relief than that recommended by the Coast Guard. Paragraph (a)(2) is also amended to make the Board's decision on an application to receive a medal or award final unless the Coast Guard describes a significant issue of Coast Guard policy that is challenged in the application. Paragraph (b) is amended to reflect the range of actions the delegate of the Secretary may take in reviewing a decision of the Board.

**Section 52.65 Orders**

No changes have been made to this section.

**Section 52.66 Notification**

This section is amended to make only the permanent record of proceedings, as compiled in accordance with § 52.63(b), available for the applicant's inspection.

**Section 52.67 Reconsideration**

In paragraphs (a), (b), and (e), the term Chair is substituted for the term Chairman. Paragraph (a)(1) is amended for clarification. Paragraph (c) is amended to better explain who can serve on a Board to reconsider a case. Paragraph (d) is amended to make applications for reconsideration subject to the provisions in § 52.26 for permitting applicants to request extensions, submit evidence late, and alter their requests for relief.

**Old section 52.68 Time Limit for Final Action**

This old section has been incorporated into § 52.26.

**Subpart H—Payment of Claims and Implementation of Orders****Section 52.71 Authority To Pay**

No changes have been made to this section.

**Section 52.72 Implementation of Orders**

This section is renamed for clarity and the words "shall transmit" are substituted for the word "transmits." Paragraph (b) is amended to specify that applicants must furnish to the Board or to the Coast Guard information needed to determine the proper parties to a claim. Paragraph (c) is amended to notify applicants that monetary awards resulting from record corrections may be reduced by setoffs required by law or regulation.

**Section 52.73 Interpretation**

This section is amended to provide that the Coast Guard should return a decision to the Board for clarification or technical amendment if it believes that the Board's order is incomplete because of an oversight.

**Section 52.74 Report of Settlement**

No changes have been made to this section.

**Subpart I—Public Access to Decisions**

The old Subpart I—Miscellaneous Provisions is repositioned and renamed as Subpart E—Submissions by the Coast Guard and Other Offices.

**Section 52.81 Reading Room and Index**

This new section informs the public of the availability of copies of its final decisions, redacted to protect the privacy of applicants, for public review in the Board's reading room and on the Internet.

**Regulatory Analyses and Notices****Executive Order 12866**

This rule does not constitute a significant rule under Executive Order 12866 or the Department's Regulatory Policies and Procedures. The costs of these procedural changes are negligible, their effect on industry is negligible, and they are not of general policy interest.

**Regulatory Flexibility Act and Federalism**

Under 5 U.S.C. 604, we certify that this rule will not have a significant economic impact on a substantial number of small entities because it will affect only the procedures followed by the Board, the Coast Guard, and applicants in the submission and processing of applications for correction of individuals' personal military records. There are no Federalism factors

to warrant the preparation of a Federalism assessment.

#### *Paperwork Reduction Act*

This final rule does not have any information collection requirements subject to review under the Paperwork Reduction Act.

#### **Lists of Subjects in 33 CFR Part 52**

Administrative practice and procedures, Archives and records, Military personnel.

Issued this 14th day of February 2003 at Washington, DC.

**Norman Y. Mineta,**

*Secretary of Transportation.*

For the reasons set forth in the preamble, the Department revises 33 CFR Part 52 to read as follows:

### **PART 52—BOARD FOR CORRECTION OF MILITARY RECORDS OF THE COAST GUARD**

#### **Subpart A—Purpose and Authority**

Sec.

- 52.1 Purpose.
- 52.2 Authority.

#### **Subpart B—Establishment, Function, and Jurisdiction of Board**

- 52.11 Establishment and composition.
- 52.12 Function.
- 52.13 Jurisdiction.

#### **Subpart C—General Provisions Regarding Applications**

- 52.21 General requirements.
- 52.22 Time limit for filing application.
- 52.23 Counsel.
- 52.24 Evidence and burden of proof.
- 52.25 Access to official records.
- 52.26 Right to timely decision; effect of requests for extensions, changes in requests for relief, and late submissions of evidence.
- 52.27 Withdrawal of application.
- 52.28 Stay of proceedings.

#### **Subpart D—Consideration of Application and Administrative Closure**

- 52.31 Consideration of application.
- 52.32 Administrative closure.

#### **Subpart E—Submissions by the Coast Guard and Other Offices**

- 52.41 Assistance.
- 52.42 Views of the Coast Guard.
- 52.43 Requests for further information; submissions of classified, privileged, and sensitive information.

#### **Subpart F—Hearings**

- 52.51 General provision.
- 52.52 Notice of hearing.
- 52.53 Witnesses.
- 52.54 Expenses.
- 52.55 Nonappearance.
- 52.56 Conduct of hearing.
- 52.57 Record of hearing.

#### **Subpart G—Judgment and Disposition**

- 52.61 Deliberations and decision.

- 52.62 Minority report.
- 52.63 Record of proceedings.
- 52.64 Final action.
- 52.65 Orders.
- 52.66 Notification.
- 52.67 Reconsideration.

#### **Subpart H—Payment of Claims and Implementation of Orders**

- 52.71 Authority to pay.
- 52.72 Implementation of orders.
- 52.73 Interpretation.
- 52.74 Report of settlement.

#### **Subpart I—Public Access to Decisions**

- 52.81 Reading room and index.

**Authority:** 10 U.S.C. 1552; 14 U.S.C. 425.

#### **Subpart A—Purpose and Authority**

##### **§ 52.1 Purpose.**

This part establishes the procedure for application for correction of military records of the Coast Guard, for consideration of applications by the Department of Transportation Board for Correction of Military Records of the Coast Guard (hereinafter “the Board”), and for settling claims or determining monetary benefits.

##### **§ 52.2 Authority.**

(a) The Secretary of Transportation, acting through boards of civilians, is authorized to correct any military record of the Coast Guard when the Secretary considers it necessary to correct an error or remove an injustice. 10 U.S.C. 1552. The Secretary shall ensure that final action on a complete application for correction is taken within 10 months of its receipt.

14 U.S.C. 425.

(b) Corrections made under this authority are final and conclusive on all officers of the Government except when procured by fraud. 10 U.S.C. 1552(a)(4).

#### **Subpart B—Establishment, Function, and Jurisdiction of Board**

##### **§ 52.11 Establishment and composition.**

(a) Pursuant to 10 U.S.C. 1552, the Board for Correction of Military Records of the Coast Guard is established in the Office of the Secretary of Transportation.

(b) The Secretary appoints a panel of civilian officers or employees of the Department of Transportation to serve as members of the Board, and designates one such member to serve as Chair of the Board. The Chair designates members from this panel to serve as the Board for each case requiring consideration by a Board. The Board consists of three members, and two members present constitute a quorum of the Board.

(c) The Deputy Chair of the Board exercises the functions prescribed by these regulations and such other duties as may be assigned by the Chair.

##### **§ 52.12 Function.**

The function of the Board is to consider all applications properly before it, together with all pertinent military records and any submission received from the Coast Guard or other Government office under subpart E, to determine:

(a) Whether an error has been made in the applicant’s Coast Guard military record, whether the applicant has suffered an error or injustice as the result of an omission or commission in his or her record, or whether the applicant has suffered some manifest injustice in the treatment accorded him or her; and

(b) Whether the Board finds it necessary to change a military record to correct an error or remove an injustice.

##### **§ 52.13 Jurisdiction.**

(a) The Board has jurisdiction to review and determine all matters properly brought before it, consistent with existing law and such directives as may be issued by the Secretary.

(b) No application shall be considered by the Board until the applicant has exhausted all effective administrative remedies afforded under existing law or regulations, and such legal remedies as the Board may determine are practical, appropriate, and available to the applicant.

#### **Subpart C—General Provisions Regarding Applications**

##### **§ 52.21 General requirements.**

(a) An application for correction of a Coast Guard record shall be submitted on DD Form 149 (Application for Correction of Military or Naval Record) or an exact copy thereof, and shall be addressed to: Chair, Board for Correction of Military Records of the Coast Guard (C-60), United States Department of Transportation, Washington, DC 20590. Forms and explanatory material may be obtained from the Chair of the Board.

(b) The application shall be signed by the person alleging error or injustice in his or her military record, except that an application may be signed by a family member or legal representative with respect to the record of a deceased, incapacitated, or missing person. The family member or legal representative must submit proof of his or her proper interest with the application.

(c) No application shall be docketed or processed until it is complete. An

application for relief is complete when all of the following have been received by the Board:

(1) A signed DD Form 149, providing all necessary responses, including a specific allegation of error or injustice, accompanied by substantial evidence or information in support of such allegation;

(2) The military records of the applicant; and

(3) Any applicable military and Department of Veterans Affairs medical records.

(d) It is the applicant's responsibility to include his or her correct mailing address on the DD Form 149 and to inform the Chair in writing of any subsequent change of address until the Board or the Secretary takes final action on the application.

(e) Briefs in support of applications must be assembled in a manner that permits easy reproduction and may not exceed twenty-five double-spaced typewritten pages in a type size with no more than twelve characters per inch. This limitation does not apply to supporting documentary evidence. In complex cases, the Chair may waive this limitation.

#### **§ 52.22 Time limit for filing application.**

An application for correction of a record must be filed within three years after the applicant discovered or reasonably should have discovered the alleged error or injustice. If an application is untimely, the applicant shall set forth reasons in the application why it is in the interest of justice for the Board to consider the application. An untimely application shall be denied unless the Board finds that sufficient evidence has been presented to warrant a finding that it would be in the interest of justice to excuse the failure to file timely.

#### **§ 52.23 Counsel.**

(a) Applicants may be represented by counsel at their own expense. Applicants whose cases are processed under the Whistleblower Protection Act and who are granted a hearing by the Board may be entitled to representation by a Coast Guard law specialist. 10 U.S.C. 1034(f)(3)(A).

(b) As used in this part, the term "counsel" includes attorneys who are members in good standing of any bar; accredited representatives of veterans' organizations recognized by the Secretary of Veterans Affairs pursuant to 38 U.S.C. 5902; and other persons who, in the opinion of the Chair, are competent to represent the applicant for correction. Whenever the term "applicant" is used in these rules,

except in § 52.21(c), the term shall mean an applicant or his or her counsel.

#### **§ 52.24 Evidence and burden of proof.**

(a) It is the responsibility of the applicant to procure and submit with his or her application such evidence, including official records, as the applicant desires to present in support of his or her case. All such evidence should be submitted with the applicant's DD Form 149 in accordance with § 52.21(c)(1). Evidence submitted by an applicant after an application has been filed and docketed shall be considered late and its acceptance is subject to the provisions in § 52.26(a)(4) and (c).

(b) The Board begins its consideration of each case presuming administrative regularity on the part of Coast Guard and other Government officials. The applicant has the burden of proving the existence of an error or injustice by the preponderance of the evidence.

#### **§ 52.25 Access to official records.**

The applicant shall have such access to official records or to any information pertaining to the applicant which is in the custody of the Coast Guard as is provided in 49 CFR parts 7 and 10.

#### **§ 52.26 Right to timely decision; effect of requests for extensions, changes in requests for relief, and late submissions of evidence.**

(a) Each applicant has a right to have final action taken on his or her application within 10 months after all the elements of a complete application, as defined in § 52.21(c), have been received by the Board, unless the applicant:

(1) Submits a written request, which is granted by the Chair, for an extension of a specific duration to seek counsel or additional evidence;

(2) Submits a written request, which is granted by the Chair, for an extension of the time provided for responding to the views of the Coast Guard in accordance with § 52.42(d);

(3) Submits a signed statement that is determined by the Chair to significantly amend the applicant's request for relief after the application has been docketed;

(4) Submits significant new evidence, as determined by the Chair, after the application has been docketed; or

(5) Is found by the Chair to have unreasonably delayed responding to a request for further information or evidence.

(b) If the applicant requests an extension in accordance with paragraphs (a)(1) or (a)(2) of this section or unreasonably delays responding to a request for further information or evidence in accordance with paragraph

(a)(5) of this section, he or she shall have a right to have final action taken on the application for correction within 10 months of the application's completion plus all periods of extension granted to the applicant by the Chair and all periods of unreasonable delay.

(c) If the applicant significantly amends his or her request for relief or submits significant new evidence after the application has been docketed, in accordance with paragraphs (a)(3) or (a)(4) of this section, the application shall be considered newly complete as of the date the amended request for relief or new evidence is received, in which case the applicant shall have a right to have final action taken on the application within 10 months of the date the Board receives the amended request for relief or significant new evidence.

#### **§ 52.27 Withdrawal of application.**

The Chair may, at his or her discretion, permit the applicant to withdraw his or her application at any time before final action is taken under § 52.64. Any further consideration by the Board of the issues raised in the withdrawn application shall occur only upon the filing of a new application.

#### **§ 52.28 Stay of proceedings.**

An application to the Board for correction of a military record does not operate as a stay of any proceeding or administrative action taken with respect to or affecting the applicant.

### **Subpart D—Consideration of Application and Administrative Closure**

#### **§ 52.31 Consideration of application.**

Each application shall be reviewed by the Chair to determine whether it meets the requirements of § 52.21 before it is docketed. The Chair shall decide in appropriate cases whether to grant a hearing or to recommend disposition on the merits without a hearing.

#### **§ 52.32 Administrative closure.**

(a) The Chair may administratively close a case after it has been docketed and at any time prior to its consideration by the Board if the Chair determines that:

(1) The application was erroneously docketed because the application did not meet the criteria under § 52.21;

(2) Effective relief cannot be granted by the Board;

(3) The Board does not have jurisdiction to determine the issues presented or the applicant has not exhausted an available administrative remedy, as required under § 52.13(b); or

(4) The Coast Guard has granted effective relief satisfactory to the applicant.

(b) Administrative closure does not constitute a denial of relief. Applicants who believe their cases should not have been administratively closed by the Chair may resubmit their applications with a request for further consideration and a statement explaining why the applicant believes his or her case should be docketed and considered by the Board. A request for further consideration shall be regarded as a new application for the purposes of §§ 52.21 and 52.26.

(c) If the Chair administratively closes a case, the applicant shall be advised of the reason and of the right to resubmit his or her application.

#### **Subpart E—Submissions by the Coast Guard and Other Offices**

##### **§ 52.41 Assistance.**

The Board may request such advice, opinion, assistance, or use of the facilities of any other bureau, board, or office of the Department of Transportation as the Board deems necessary.

##### **§ 52.42 Views of the Coast Guard.**

(a) The Board shall transmit to the Commandant of the Coast Guard or his or her delegate a copy of each application for relief submitted and docketed under subpart C of this part, together with any briefs, memoranda, and documentary evidence submitted or obtained in the case.

(b) The Commandant of the Coast Guard or his or her delegate may forward to the Board a written advisory opinion presenting the views of the Coast Guard on any case before the Board.

(c) An advisory opinion furnished by the Coast Guard under this section shall not be binding upon the Board, but shall be considered by the Board, along with all other information and material submitted in the particular case, if it is received by the Board within 135 days of the date the application is complete. The Chair may, in his or her discretion, grant the Coast Guard an extension of the time provided for submitting the advisory opinion.

(d) The Board shall promptly send a copy of each submission made by the Coast Guard under this section to the applicant involved, subject to the limitations in §§ 52.42(c) and 52.43(c). Each applicant has 30 days, from the date the Board sends the submission, to submit to the Board a written rebuttal or response to the Coast Guard's advisory opinion or a written request for an

extension of the time to respond, subject to the provisions in § 52.26.

(e) Advisory opinions submitted by the Coast Guard and briefs submitted by applicants in response to the advisory opinions of the Coast Guard must be assembled in a manner that permits easy reproduction and may not exceed fifteen double-spaced typewritten pages in a type size with no more than twelve characters per inch. This limitation does not apply to supporting documentary evidence. In complex cases, the Chair may waive this limitation.

##### **§ 52.43 Requests for further information; submissions of classified, privileged, and sensitive information.**

(a) The Chair or the Board may ask the applicant to submit additional information not included in the application or response to the advisory opinion.

(b) The Chair or the Board may ask the Coast Guard or other Government office to submit any information, including reports of investigations, that the Chair or the Board deems relevant to an applicant's case.

(c) Whenever the Coast Guard or other Government office submits classified, privileged, or sensitive information to the Board in accordance with paragraph (b) of this section or § 52.42(b), it shall identify such information and also provide the Board with a copy of that part of the information that would be released to the applicant by the Coast Guard or other Government office if he or she requested it under 49 CFR parts 7 and 10. The Board shall forward only this redacted copy to the applicant.

#### **Subpart F—Hearings**

##### **§ 52.51 General provision.**

In each case in which the Chair determines that a hearing is warranted, the applicant will be entitled to be heard orally in person, by counsel, or in person with counsel.

##### **§ 52.52 Notice of hearing.**

(a) If the Chair determines that a hearing is warranted, the Chair shall notify the applicant that a hearing has been granted.

(b) The date of hearing shall be not less than 21 days from the date of this notification. Written notice stating the date, time, and place of the hearing shall be given to the applicant and the Coast Guard.

##### **§ 52.53 Witnesses.**

(a) In any case in which the Chair has granted a hearing, the applicant shall have the right to present witnesses.

(b) It is the responsibility of the applicant to notify his or her witnesses

and to ensure their appearance at the date, time, and place set for the hearing.

##### **§ 52.54 Expenses.**

No expenses of any nature whatsoever incurred by an applicant, his or her counsel, witnesses, or others acting on behalf of the applicant shall be paid by the Government, except that an applicant may be entitled to representation by a Coast Guard law specialist if the case has been processed under the Whistleblower Protection Act, 10 U.S.C. 1034(f)(3)(A).

##### **§ 52.55 Nonappearance.**

An applicant who fails without good cause to appear in person or by counsel at the appointed date, time, and place for hearing, is deemed to have waived the right to a hearing. The application is then considered by the Board on the basis of all the material of record.

##### **§ 52.56 Conduct of hearing.**

(a) The Chair or the Chair's designee shall conduct a hearing so as to ensure a full and fair presentation of the evidence.

(b) The hearing is not limited by legal rules of evidence, but reasonable standards of competency, relevancy, and materiality are observed for the receipt and consideration of evidence.

(c) All testimony shall be given under oath or affirmation.

##### **§ 52.57 Record of hearing.**

A hearing pursuant to this subpart in open session shall be recorded verbatim and, at the discretion of the Board or direction of the Secretary, shall be transcribed.

#### **Subpart G—Judgment and Disposition**

##### **§ 52.61 Deliberations and decision.**

(a) The Board is convened at the call of the Chair and its meetings are recessed or adjourned by order of the Chair. Only members of the Board and its staff may be present during the deliberations of the Board. The Board's deliberations are conducted in executive session and are not reported.

(b) When the Board finds that the facts have not been fully and fairly disclosed by the records, testimony, and any other evidence before the Board, the Board may request the applicant and/or the Coast Guard to obtain and submit such further evidence as it considers essential to a complete and impartial understanding of the facts and issues.

(c) Following the receipt of all evidence, the Chair shall cause to be prepared and shall submit to the Board for its consideration a draft decision containing proposed findings and conclusions and a proposed order. A

majority vote of the members of the Board present at a meeting on any matter relating to a draft decision before the Board shall constitute the action of the Board. If a draft decision is approved by the Board, it shall become a decision of the Board.

(d) 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.

(e) If the Board deems it necessary to submit a comment or recommendation to the Secretary as to a matter arising from, but not directly related to, the issues in a case, it does so by separate communication.

#### **§ 52.62 Minority report.**

In case of disagreement among Board members, a minority report may be submitted dissenting from or concurring with the decision of the Board.

#### **§ 52.63 Record of proceedings.**

(a) The Board shall prepare a complete record of each proceeding. The record shall include the application for relief; the written views of the Coast Guard, if any; any transcript of testimony; affidavits and documents considered by the Board; briefs and written arguments filed in the case; the findings, decisions, and recommendations of the Board; minority reports, if any; and all other materials necessary to reflect a true and complete history of the proceedings.

(b) After final action has been taken on an application in accordance with § 52.64, any classified, privileged, or sensitive information in the record of proceedings that has been provided by the Coast Guard or another Government office in accordance with §§ 52.42 or 52.43 shall be returned by the Board to the office from which it was received. Only a copy of the information provided by the Coast Guard or other Government office for release to the applicant in accordance with § 52.43(c) shall be retained in the permanent record of proceedings after final action is taken.

#### **§ 52.64 Final action.**

(a) The Board, provided that it acts unanimously, may take final action on behalf of the Secretary, pursuant to 10 U.S.C. 1552, as follows:

(1) The Board may deny an application for the correction of military records.

(2) Unless the Coast Guard, in submitting its views pursuant to § 52.42(b), identifies and describes a

significant issue of Coast Guard policy challenged in the application, the Board may approve an application for the correction of military records in any of the following categories:

(i) An application to correct an enlistment or reenlistment contract or agreement to extend an enlistment for the purpose of effecting or increasing entitlement to a Selective Reenlistment Bonus;

(ii) An application to modify an election to participate in the Survivor Benefit Plan;

(iii) An application to change a reenlistment eligibility code;

(iv) An application to correct the character of, or reason for, a discharge or separation; or

(v) An application to receive a medal or award.

(3) The Board may approve any application for correction of military records not included in one of the categories in paragraph (a)(2) of this section, if the Coast Guard recommends the same or substantially same relief as that requested by the applicant.

(b) Except in cases where the Board takes final action under paragraph (a) of this section, the Board shall forward the record of its proceedings to the Secretary, who may approve, disapprove, or concur in the decision of the Board or the minority report, if any, either in whole or in part, and amend the order of the Board accordingly, or return the case to the Board for additional consideration. After taking final action, the Secretary shall send any such statement and the record of proceedings to the Board for disposition.

#### **§ 52.65 Orders.**

(a) The Board shall issue such orders or directives as may be necessary to carry out a final action.

(b) The Board may ask the Coast Guard to submit a written report to the Board specifying the action taken and the date thereof with respect to any final action.

(c) Unless doing so is likely to nullify the relief granted, copies of the final decision shall be placed in the military record of the applicant.

#### **§ 52.66 Notification.**

After final action is taken under § 52.64, the Board shall send a copy of the final decision to the applicant. The applicant may inspect the permanent record of proceedings at Board offices.

#### **§ 52.67 Reconsideration.**

(a) Reconsideration of an application for correction of a military record shall occur if an applicant requests it and the

request meets the requirements set forth in paragraph (a)(1) or (a)(2) of this section.

(1) An applicant presents evidence or information that was not previously considered by the Board and that could result in a determination other than that originally made. Such new evidence or information may only be considered if it could not have been presented to the Board prior to its original determination if the applicant had exercised reasonable diligence; or

(2) An applicant presents evidence or information that the Board, or the Secretary as the case may be, committed legal or factual error in the original determination that could have resulted in a determination other than that originally made.

(b) The Chair shall docket a request for reconsideration of a final decision if it meets the requirements of paragraph (a)(1) or (a)(2) of this section. If neither of these requirements is met, the Chair shall not docket such request.

(c) The Board shall consider each application for reconsideration that has been docketed. None of the Board members who served on the Board that considered an applicant's original application for correction shall serve on the Board that decides the applicant's application upon reconsideration.

(d) Action by the Board on a docketed application for reconsideration is subject to §§ 52.26 and 52.64(b).

(e) An applicant's request for reconsideration must be filed within two years after the issuance of a final decision, except as otherwise required by law. If the Chair docketed an applicant's request for reconsideration, the two-year requirement may be waived if the Board finds that it would be in the interest of justice to consider the request despite its untimeliness.

### **Subpart H—Payment of Claims and Implementation of Orders**

#### **§ 52.71 Authority to pay.**

(a) The Coast Guard is authorized to pay the claims of any person as the result of any action heretofore or hereafter taken under 10 U.S.C. 1552.

(b) The Coast Guard is not authorized to pay any claim heretofore compensated by Congress through enactment of private law, or to pay any amount as compensation for any benefit to which the claimant might subsequently become entitled under the laws and regulations administered by the Secretary of Veterans Affairs.

#### **§ 52.72 Implementation of orders.**

(a) In each case the Board shall transmit a copy of its decision or the



Secretary's decision to the proper Coast Guard authority for determination of monetary benefits due, if any, as a result of the action of the Board and for corrections of the military record ordered by the Board.

(b) Upon request, the claimant is required to furnish to the Board or to the Coast Guard any information necessary to determine the proper parties to the claim for payment under applicable provisions of law.

(c) Appropriate records shall be examined in light of the Board's decision to determine all amounts which may be due. Amounts found due are subject to setoff in the amount of any existing indebtedness to the Government arising from Coast Guard service and to other setoffs required by law or regulation.

(d) At the time of payment, the claimant shall be advised as to the nature and amount of the various benefits represented by the total settlement, and of the fact that acceptance of the settlement constitutes a complete release by the claimant of any claim against the United States on account of the correction of record ordered by the Board.

#### **§ 52.73 Interpretation.**

If the intent or import of the final decision is not clear to the Coast Guard, if the Coast Guard believes that executing all or part of the order in the final decision is beyond the Coast Guard's authority, or if the Coast Guard believes that the order is incomplete because of an oversight, the final decision shall be returned to the Board for clarification or technical amendment.

#### **§ 52.74 Report of settlement.**

When payment is made pursuant to the order of the Board, the Board may request the Coast Guard to notify it of the name of any person to whom payment was made and of the amount of the payment.

### **Subpart I—Public Access to Decisions**

#### **§ 52.81 Reading room and index.**

After deleting only so much personal information as is necessary to prevent an unwarranted invasion of privacy of the applicant or other persons mentioned in the final decision of the Board, a redacted copy of each final decision shall be indexed by subject and made available for review and copying at a public reading room. Final decisions created on or after November

1, 1996, shall be made available by electronic means. 5 U.S.C. 552.

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## **DEPARTMENT OF TRANSPORTATION**

### **Coast Guard**

#### **33 CFR Part 117**

[CGD01-02-143]

RIN 2115-AE47

#### **Drawbridge Operation Regulations: Jamaica Bay and Connecting Waterways, NY**

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

**SUMMARY:** The Coast Guard has changed the drawbridge operation regulations that govern the operation of the New York City highway bridge, mile 0.8, across Mill Basin on Belt Parkway at New York City, New York. This temporary final rule will allow the bridge to remain closed to vessel traffic from 7 a.m. on February 24, 2003 through 5 p.m. on April 14, 2003. This action is necessary to facilitate the installation of median safety barriers at the bridge.

**DATES:** This rule is effective from February 24, 2003 through April 14, 2003.

**ADDRESSES:** Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket (CGD01-02-143) and are available for inspection or copying at the First Coast Guard District, Bridge Branch Office, 408 Atlantic Avenue, Boston, MA 02110, between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Mr. Joseph Schmied, Project Officer, First Coast Guard District, (212) 668-7195.

#### **SUPPLEMENTARY INFORMATION:**

#### **Regulatory Information**

Pursuant to 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this final rule effective in less than 30 days after publication in the **Federal Register**. Any delay encountered in this regulation's effective date would be unnecessary and contrary to the public interest because the work to be performed under this temporary final rule is necessary safety modifications that are scheduled to be performed when the bridge receives the fewest number of requests to open.

On December 27, 2002, we published a notice of proposed rulemaking (NPRM) entitled Drawbridge Operation Regulations; Jamaica Bay and Connecting Waterways, New York, in the **Federal Register** (67 FR 79012). We received no comments in response to the notice of proposed rulemaking. No public hearing was requested and none was held.

#### **Background and Purpose**

The New York City highway bridge has a vertical clearance of 34 feet at mean high water, and 39 feet at mean low water in the closed position. The existing drawbridge operating regulations are listed at 33 CFR 117.795(b).

The bridge owner, New York City Department of Transportation, requested a temporary bridge closure to install median safety barriers between the vehicular travel lanes at the bridge.

The bridge presently has no median safety barriers between the vehicular travel lanes that pass over the moveable lift spans at the bridge. There have been many serious head on automobile accidents at this bridge as a result of the absence of median safety barriers.

The average traffic count is 140,000 vehicles a day. There have been seven (7) head-on travel lane crossover accidents over the past several years, four (4) resulting in fatalities. These accidents resulted from the absence of a median safety barrier separating the opposite vehicular travel lanes.

The installation of the median safety barriers is considered necessary safety repairs that should be performed without delay.

In order to facilitate this structural work the bridge must remain in the closed position for the passage of vessel traffic from 7 a.m. on February 24, 2003 through 5 p.m. on April 14, 2003.

The time frame requested to perform this necessary safety work, February 24, 2003 through April 14, 2003, is the best time to perform this work because the bridge has historically had very few requests to open during that time period. In 2001 only one commercial vessel transit required a bridge opening and in 2002 only three commercial vessel transits required bridge openings between February 24 and April 14.

During the last ten days of the above closure the bridge will be balanced and tested. A limited number of bridge openings would be available for the passage of vessel traffic during the time period the bridge will be balanced and tested.

The Coast Guard believes this temporary final rule is reasonable because this work is essential for public