

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-058

XXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

ANDREWS, Deputy Chair:

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The BCMR docketed this case on March 24, 2003, upon receipt of the applicant's completed application.

This final decision, dated November 20, 2003, is 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 asked the Board to correct his discharge form, DD 214, to show his correct date of rank as an RM3/E-4 (radioman third class/pay grade E-4). He alleged that instead of April 19, 1976, his DD 214 should reflect his date of rank as an RM3 in the Navy, which was in 1968, or his date of entry in the Coast Guard in 1974.

The applicant also asked the Board to correct an Achievement Sheet, CG-3303, in his record. The form shows (a) his original date of rank in the Coast Guard as his date of enlistment, October 7, 1974; (b) a demotion to seaman-radioman (SNRM/E-3) on November 29, 1974, which is struck out; (c) a re-advancement to RM3 on December 16, 1974, which is also struck out; and (d) a new date of rank as an RM3, April 19, 1976, recorded thereafter. The applicant first alleged that the CG-3303 is erroneous because he served continuously as an RM3 in the Coast Guard until his discharge and was never "busted a rank" for being AWOL for 19 days in November 1974. He stated, "I was only given confinement to the base—not busted!" However, he also alleged that his sentence was "mitigated" by his commanding officer (CO). In a separate letter to the Board, he

stated that his "reduction in pay was only for 30 days," and later that "I was not demoted to SNRM until 10 Apr 1976 as my DD 214 states."

The applicant alleged that he was unaware of the errors in his record until February 2002, when someone at a Reserve recruiting office told him that he might have lost pay because of the alleged errors. Therefore, he asked the Board to award him any back pay and allowances he might be due as a result of the corrections.

SUMMARY OF THE RECORD

From June 14, 1965, to June 11, 1969, the applicant served on active duty in the Navy, attaining the rank of RM3 on April 16, 1968. After his release, he served in the Naval Reserve from June 12, 1969, through July 17, 1974.

On October 7, 1974, the applicant enlisted in the Coast Guard as an RM3. He was assigned to the Marine Safety Office (MSO) in xxxxxxxxxxxxxxxx. From November 2 to 21, 1974, the applicant was absent without leave (AWOL) from his unit. According to a letter from the applicant's CO to the District Commander dated December 10, 1974,* while the applicant was AWOL, an attorney sent the CO a letter, seeking to have the applicant's enlistment voided. The attorney stated that the applicant's recruiter had promised him that he would be stationed at the MSO, that he would not have to live in barracks because there was insufficient housing, and that he would receive a housing allowance in addition to his basic pay. However, upon arriving at the MSO, the applicant discovered that all unmarried enlisted personnel were required to live in barracks. Upon the applicant's return to the MSO on November 21, 1974, he was taken to mast, which resulted in a sentence of reduction in rate from RM3/E-4 to SNRM/E-3 and restriction to the MSO for 30 days.

In the December 10, 1974, letter to the District Commander, the CO requested a psychiatric evaluation for "SNRM [applicant's name]" because he had "been in a complete state of confusion since he first approached the recruiter concerning enlistment in the Coast Guard. However, it is difficult to comprehend his actions and behavior since he originally reported to this unit." Subsequent correspondence* in December 1974 and in January, February, March, and August 1975—concerning the applicant's mental health and his attempt to void his enlistment contract because of false promises allegedly made by his recruiter—refers to him as an RM3.

The disputed CG-3303* appears as follows.

* The applicant submitted copies of these documents. They do not appear in the military records for the applicant received by the Board from the National Personnel Record Center, which contain only his DD 214 dated March 31, 1977, and records from his two years in the Reserves from 1983 to 1985.

Date	Rate	Authority	Signature	Unit
10-7-74	RM3	Date of Orig. Enlistment	/s/ Acting Officer in Charge	xxxxxxxxxxxxxxxxxx
Nov 29, 74	SNRM	CO's NJP	/s/ CWO3, by direction	xxxxxxxxxxxxxxxxxx
Dec 18, 74	RM3	CO Mitigated NJP	[unsigned]	xxxxxxxxxxxxxxxxxx
76 Apr 19	RM3	CG311 ¹	/s/ Executive Officer	xxxxxxxxxxxxxxxxxx

A record of the applicant's performance marks while stationed at the MSO shows that his rate was RM3 when he received performance evaluations on December 31, 1974; June 30, 1975; December 31, 1975; June 30, 1976; and December 31, 1976. On the December 31, 1974, evaluation, he received a mark of 3.5 (out of 4) for conduct, but thereafter, he received all marks of 4. On February 24, 1976, the applicant received a security clearance, and the certificate shows that he was an RM3 at the time.*

On March 31, 1977, while still stationed at the MSO, the applicant was honorably discharged. No reason for the discharge is shown on the DD 214. His date of rank as an RM3 is given as April 19, 1976.

On April 20, 1983, the applicant enlisted in the Coast Guard Reserve for two years as an RM3. He was discharged at the end of his enlistment on April 19, 1985.

VIEWS OF THE COAST GUARD

On August 7, 2003, the Chief Counsel of the Coast Guard submitted an advisory opinion in which recommended that the Board deny the applicant's request because of the untimeliness of his request in light of the Board's three-year statute of limitations. He also argued that the doctrine of laches should bar the applicant's request.

The Chief Counsel submitted with his advisory opinion a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC). CGPC stated that, although the applicant's official military record does not contain the disputed CG-3303 and other documentation submitted by the applicant, a thorough examination of the documents indicated that they are authentic. CGPC stated that evidence of the NJP would have been removed from his record when he enlisted in the Reserves in 1983.

CGPC stated that the record indicates that, following the applicant's 19-day period of being AWOL, he was taken to mast on November 29, 1974, and his punishment, in part, was reduction in rate to SNRM/E-3. However, his CO mitigated the reduction in rate on December 18, 1974, in accordance with Chapter 1.E.6.b. of the Military Justice Manual, which stated that a "[r]eduction in pay grade regardless of whether the reduction has been executed, may be mitigated to forfeiture." CGPC stated that it "is possible

¹ This is the number of the Coast Guard's Enlisted Qualifications Manual in effect in the 1970s. The manual contained all of the qualifications that petty officers must meet to advance within their ratings.

* The applicant submitted this document.

that the mitigation was not fully carried out administratively, i.e., the mitigation was approved locally, but never fully administratively processed at the time it took place, and that the final entry on his achievement sheet was an inappropriate attempt to rectify these administrative lapses.”

CGPC stated that under the Pay and Personnel Procedures Manual, the date of rank entered on the applicant’s March 31, 1977, discharge form DD 214, should have been “the date of latest advancement,” or December 18, 1974, since his reduction in rate to SNRM was reversed on that date. CGPC stated that if the BCMR approved the applicant’s request to change his date of rank on his DD 214, the Coast Guard “should determine, if the pay records still exist, whether the Applicant’s pay for [the period from December 18, 1974, through April 18, 1976] was at pay grade E-4. If not, the Coast Guard should pay the Applicant the difference between pay grade E-3 and E-4.” CGPC stated that the applicant’s current date of rank is the day he enlisted in the Coast Guard Reserve, April 20, 1983, since more than three months had elapsed since his discharge.

The Chief Counsel, however, argued that the applicant’s request should be denied. He stated that the applicant’s allegations are inconsistent and “present a puzzling picture,” which is aggravated by the lack of documentation concerning his NJP and the mitigation. The Chief Counsel pointed out that there would not have been any confusion if the applicant had timely applied for the correction he is requesting within three years of his discharge.

The Chief Counsel alleged that the applicant’s claim is moot because no harm was caused by the alleged error in his date of rank on the March 31, 1977, discharge form since his date of rank was reestablished as April 20, 1983, when he enlisted in the Reserve. The Chief Counsel also alleged that no harm was caused by the alleged error because the Pay and Personnel Center has investigated the matter and reported that the applicant was paid as an E-4 throughout the entire enlistment from October 7, 1974, until March 31, 1977. The Chief Counsel submitted an email from the Coast Guard Personnel Service Center and printouts of microfiche pay records supporting his statement about the applicant’s pay grade. The microfiche records show that the applicant was paid as an RM3 throughout the enlistment and that the only adjustment made was for the 19 days he was AWOL.

The Chief Counsel also argued that the applicant has “failed to provide any substantive reason for his delay in filing the present claim.” He argued that a perplexing and moot entry on a form issued 26 years ago is not an injustice for which the Board can or should grant relief. The Chief Counsel stated that the applicant’s claim that he did not discover the claim until recently “does not overcome the fact that he should have found it sooner. Assuming *arguendo* that Applicant was correspondingly underpaid, he would have had even more reason to investigate the event giving rise to this case at that time.”

Regarding the date of rank on the March 31, 1977, DD 214, the Chief Counsel stated that his review of the merits

creates more questions than answers. Admittedly, Applicant's military pay records support his original assertion that he was never reduced in rank. However, [his CO's letter dated December 10, 1974] which refers to Applicant as [an SNRM] contradicts this conclusion. Additionally, subsequent correspondence provided by Applicant, addressing him as an RM3 clearly conflicts with the 19 April 76 date of rank at issue. The fact that all of these documents were dated after 18 Dec 74 supports CGPC's conclusion that Applicant's punishment was mitigated on that date. ... However, this position does not explain why entries regarding the mitigation of Applicant's punishment were lined out and initialed on the CG-3303. It is simply impossible to determine the precise disposition of Applicant's NJP sentence, and resulting date of rank from the limited record available.

The Chief Counsel concluded, therefore, that even if the Board waives the statute of limitations for this case, it should find that the doctrine of laches bars the claim because many of the documents that would have clarified the matter were properly purged from the applicant's record when he enlisted in the Reserve. He also argued that the microfiche pay records counter the applicant's concern that he was not properly paid as an RM3 but "do not shed any light on the circumstances surrounding applicant's NJP proceedings. Thus the government is prejudiced by the delay in this case and should not be forced to solve the mystery surrounding Applicant's NJP when Applicant himself cannot present a clear and cogent explanation." The Chief Counsel argued that "any attempt by the Board to insert a substitute date of rank [on the applicant's March 31, 1977, DD 214] would border on the capricious rather than serve to correct any 'injustice.'"

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 11, 2003, the BCMR sent the applicant a copy of the Chief Counsel's advisory opinion and invited him to respond within 30 days. On November 3, 2003, the Board received a response from the applicant, who submitted additional copies of correspondence showing that his rank after December 18, 1974, was RM3.

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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record. 10 U.S.C. § 1552. The applicant knew or should have known of the date of rank on his DD 214 when he received it in 1977. Likewise, he knew or should have known of the alleged pay grade reduction from E-4 to E-3 when he received his pay during the enlistment. Therefore, his application was untimely.

3. Pursuant to 10 U.S.C. § 1552(b), the Board may waive the three-year statute of limitations if it is in the interest of justice to do so. To determine whether it is in the interest of justice to waive the statute of limitations, the Board should conduct a cursory review of the merits of the case and consider the reasons for the delay. *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.D.C. 1995). The applicant provided no explanation for the delay. He stated only that he was applying because a recruiter had suggested that he might not have been paid properly. This is not an explanation for the 25-year delay, but it explains why the applicant might have decided to apply to the Board to have the alleged error corrected.

4. A cursory review of the merits indicates that the applicant's date of rank on his DD 214 might be erroneous. The date of rank, April 19, 1976, is apparently taken from a CG-3303, which was submitted by the applicant and appears to be authentic but which does not appear in the files of the applicant's official military record, which the Board received from the National Personnel Records Center (NPRC). The CG-3303 anomalously shows a reduction in rank and subsequent mitigation of that reduction both struck out, and it includes April 19, 1976, as his second RM3 date of rank without an intervening reduction to SNRM that has not been struck out. In addition, the applicant submitted copies of official correspondence, which appear to be authentic, showing that he was referred to as an RM3 between December 18, 1974, and April 19, 1976. Therefore, the Board finds that it is in the interest of justice to waive the statute of limitations and consider the case.

5. Copies of official Coast Guard correspondence between the applicant's command and Coast Guard headquarters following the mitigation of his NJP on December 18, 1974, indicate that the applicant was considered to be an RM3 by his CO. A certificate for a security clearance dated February 24, 1976, also refers to him as an RM3. In addition, Coast Guard records show that he was paid as an RM3 throughout the enlistment. There is no explanation in the record for the applicant's April 19, 1976, date of rank on the CG-3303 or on his DD 214. The authority for the entry cited on the CG-3303, which is CG-311—a reference to the Enlisted Qualifications Manual in effect at the time—does not elucidate the reason for the entry.

6. Unfortunately, however, most of the applicant's military records for his enlistment from 1974 to 1977 are not in the files sent to the Board by the NPRC. Some of the records may have been properly purged when he enlisted in the Reserve in 1983,

but other records that would not have been purged, including his enlistment contract, his performance marks, and the CG-3303, are clearly missing from the official records provided by the NPRC.

7. The Chief Counsel has argued that the Board should deny the applicant's request under the doctrine of laches, which bars a claim if an applicant's undue delay in seeking relief has prejudiced the Coast Guard's ability to defend the record. In light of the fact that after the applicant's 25-year delay, most of the documentation of his 1974 to 1977 enlistment, including the mitigated NJP and the reason for the April 19, 1976, date of rank entry on the CG-3303, is missing, and the people at the MSO who were responsible for making the allegedly erroneous entries are no longer available to explain their actions, the Board finds that the applicant's request should be denied under the doctrine of laches. His DD 214 was prepared at the same MSO where he had served for the entire enlistment. Therefore, if the applicant had timely applied to the Board, the allegedly erroneous entries could have been investigated, elucidated, and corrected if they proved to be erroneous. However, 25 years after the fact and with many of the official records purged or missing, it is impossible for the Board to know exactly what did or did not occur in April 1976 that might have caused his date of rank to change.

8. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former xxxxxxxxxxxxxxxxxxxxxxxx, for correction of his military record is denied.

Patricia V. Kingcade

James G. Parks

Dorothy J. Ulmer