

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-031

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XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Andrews, J.

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on December 16, 2005, upon receipt of the completed application and the applicant's military records.

This final decision, dated February 15, 2007, 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 her military record to show that when she was retired from the Coast Guard by reason of physical disability on April 16, 1980, her pay grade was E-4, rather than E-3. She alleged that at the time of her retirement, she had graduated from "A" School and passed the test for advancement to E-4 but did not yet have the time in grade as an E-3 to be advanced. The applicant alleged that page 593 of the Personnel Manual authorizes graduates of "A" School to be advanced to E-4 as soon as there is a vacancy in the rating and the member has completed at least one year of continuous service. In support of her allegations, the applicant submitted a document that congratulates her for having successfully completed a course, MRN4, through the Coast Guard Institute.

The applicant alleged that she did not discover the error in her record until September 1, 2003. She did not offer any explanation of the delay in her alleged discovery of the error.

SUMMARY OF THE RECORD

On October 23, 1978, the applicant enlisted in the Coast Guard. On January 19, 1979, after completing boot camp, she was advanced to seaman apprentice (SA/E-2) and transferred to Miami Beach, where she served for three months. As an SA/E-2, the applicant was not assigned a mark for leadership, but she received a mark of 3.4 for proficiency and a mark of 4.0 for conduct on a performance evaluation dated March 23, 1979.

On April 7, 1979, the applicant began "A" School in Petaluma, California, to become a subsistence specialist (cook). Upon graduating from "A" School on July 3, 1979, the applicant was advanced to SNSS/E-3. Notes in her record indicate that she had not yet passed a course, MRN-4, required for advancement to E-4 and that she did not yet have the required time in grade (six months) as an E-3 for advancement to E-4.

On July 7, 1979, the applicant reported for duty to the U.S. Coast Guard Academy, where she was assigned to work in the cadet mess. On July 31, 1979, she was admitted to the psychiatric ward of a hospital because she was complaining that everyone was talking about her and she was afraid she was "losing her mind." On August 22, 1979, an Initial Medical Board (IMB) found that she was not fit for duty as a result of an "acute schizophrenic reaction" and recommended that she be placed on sick leave until she could be retired from the Service because attempts to return her to work part-time had caused her thought processes to be more disorganized and caused disruption among the mess staff. The IMB attributed her "acute schizophrenic reaction" reaction to her feelings of guilt about a relationship with a man she met while at "A" School in California and noted that she reported having been molested by two uncles as a child.

Notations in the applicant's record indicate that following her discharge from the hospital, she was placed on sick leave from August 31 through October 28, 1979. On October 29, 1979, a doctor noted that the applicant had returned to duty for the week of her medical board. On October 31, 1979, the doctor noted that the applicant "has had several altercations in the galley. She pointed a knife at one of her peers this afternoon in a fit of anger. Will hospitalize pending [physical evaluation] board."

On November 8, 1979, the applicant had a hearing before a medical board. On November 9, 1979, she was placed in a Home Awaiting Orders Status (HAOS) pending the completion of her medical retirement processing.

On December 31, 1979, the applicant's supervisor made the following entry on a CG-3307 in her record:

Member reported for duty at the USCG Academy on 79JUL07. She was hospitalized for most of the month of August 1979, was absent on sick leave during the months of September and October 1979, and has been at home in an awaiting orders status since detachment from the Academy on 79NOV08. Thus, she has been observed for an insufficient period of time to assign any meaningful proficiency or leadership marks. A conduct mark of 4.0 has been assigned.

On March 14, 1980, the applicant concurred with the recommendation of the medical board that she be placed on the temporary disability retired list (TDRL) with a 50% disability rating.

On April 2, 1980, the Commandant sent the applicant a letter, addressing her as an SNSS, to inform her that she would be placed on the TDRL with a 50% disability rating as of April 16, 1980.

On April 15, 1980, the applicant was honorably separated by reason of physical disability. On April 16, 1980, she was placed on the TDRL as an SNSS/E-3. A notation indicates that she was not assigned any evaluation marks upon her separation because she had been in HAOS since November 9, 1979.

On March 24, 1983, a Central Physical Evaluation Board recommended that the applicant be permanently retired with a 30% disability rating. On April 14, 1983, after conferring with counsel by telephone, the applicant accepted the findings and recommendation of that board.

On May 11, 1983, the Commandant sent a letter to the applicant, addressing her as an SNSS, to inform her that she would be permanently retired from the Coast Guard on May 24, 1983, with a 30% disability rating.

From July 3, 1979, through her permanent retirement on May 24, 1983, all of the documents in the applicant's record, including copies of letters addressed to her, refer to her as an SNSS/E-3.

VIEWS OF THE COAST GUARD

On May 16, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief.

The JAG alleged that the applicant's request was untimely because it was submitted long after her separation from the Coast Guard as an SNSS/E-3. He noted that the applicant "offered no explanation or justification for her twenty-three year delay in seeking retroactive advancement to E-4. Applicant's claim to have discovered the alleged error in September 2003 does not seem plausible or

reasonable.” The JAG argued that the applicant “reasonably should have discovered” the alleged error while she was still on active duty and so her application was untimely under the Board’s rules at 33 C.F.R. § 52.22. He further pointed out that the rules state that 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.” The JAG argued that the applicant has not submitted sufficient evidence to overcome the presumption of regularity accorded the Coast Guard in such matters or to prove that the Coast Guard erred in retiring her as an E-3 rather than an E-4.

The JAG stated that, under Article 5-C-3(a) of the Personnel Manual in effect in 1980, to be advanced to SS3/E-4, the applicant needed to

- (a) complete the required practical factors and military requirements;
- (b) complete the required correspondence courses;
- (c) be in the “proper path” of advancement;
- (d) have the necessary time in service and time in grade as an E-3;
- (e) have received a mark of 3.3 (out of 4.0) in Proficiency and Leadership on her last evaluation; and
- (f) be recommended for advancement by her commanding officer.

The JAG stated that the applicant passed the MRN-4 course on August 19, 1979, and passed the six-month mark as an E-3 on January 3, 1980. Therefore, he admitted, she met all of the eligibility requirements except for (e) and (f). The JAG stated that the applicant never received a performance evaluation from her last command because she was in HAOS during her PDES processing.

The JAG stated that the applicant’s “commanding officer did not advance her to SS3/E-4 on 3 January 1980 because [she] failed to meet all of the eligibility requirements for advancement. Applicant did not have a mark of 3.3 or higher in Proficiency and Leadership in her last evaluation. In an Administrative Remarks (CG-3307) entry dated 31 December 1979, Applicant’s command noted that it did not assign her marks for proficiency and leadership because of insufficient observation of performance.” The JAG also noted that the applicant’s military record lacks documentation of her request for advancement and of her commanding officer’s approval of such a request. He pointed out that the records show that throughout the applicant’s PDES processing, she was referred to as an SNSS/E-3.

The JAG concluded that “[w]ithout any substantive reason for the twenty-two year delay in taking action, and without any reasonable chance of prevailing on the merits, it is not in the interest of justice to waive the statutory three-year filing deadline for this case.” He further argued that, if the Board does waive the

statute of limitations, the Board should deny relief because the applicant has failed to prove by a preponderance of the evidence that her commanding officer erred in not advancing her to SS3/E-4.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 15, 2006, the Chair sent a copy of the views of the Coast Guard to the applicant and invited her to respond within 30 days. The applicant requested three extensions of the time to respond and on November 15, 2006, asked the BCMR staff to send her copies of certain documents from her record, which was done. The applicant's third extension expired on January 19, 2006, but no response to the JAG's advisory opinion was received.

APPLICABLE LAW

Article 5-C-26(a)(2) of the Personnel Manual in effect in 1980 stated that a commanding officer may advance a graduate of an "A" School course if that person meets the applicable requirements of Article 5-C-3. Article 5-C-26(a)(3)b. stated that graduates of "A" School who do not immediately qualify for advancement to E-4 shall be assigned a rating designator, such as SNSS, and "shall be advanced on the effective date of satisfactory completion of the applicable requirements of Article 5-C-3." Article 5-C-3(a) stated that to be eligible for advancement, a member must

- (1) Complete required practical factors and Military Requirements ...
- (2) Complete required correspondence courses ...
- (3) Successfully complete service course, if required, for particular pay grade or rating ...
- (4) Meet citizenship or security clearance requirements ...
- (5) Be in proper path of advancement ...
- (6) Fulfill special requirements for certain ratings ...
- (7) Not be involved in circumstances which render him/her ineligible for advancement (Article 5-C-12).
- (8) Fulfill service requirements; time in service, time in pay grade in present rating, and sea duty (Articles 5-C-13 and 5-C-14).
- (9) Fulfill additional eligibility requirements for personnel competing in E-8/E-9 examination ...
- (10) Have been assigned a mark of at least 3.3 in Proficiency and Leadership on last evaluation (Article 5-C-5).
- (11) Be recommended by commanding officer (Article 5-C-16).

Article 5-C-12(a) allowed members awaiting action by a medical board to compete for advancement unless their commanding officer determined that participation in the advancement system would be deleterious to their health. Article 5-C-12(b) provided that once a member had been declared unfit for duty by

the Commandant's final action on disability separation procedures, the member was ineligible for advancement.

Article 5-C-13 provided that to be advanced to E-4, a member must have at least six months' time in grade as an E-3.

Article 5-C-16 stated the following about the importance of a commanding officer's recommendation for advancement:

A well considered and affirmative recommendation of the commanding officer is the most important eligibility requirement in the Coast Guard advancement system. Regardless of how much time in service or time in rate an individual may have, or, the existence of other personal considerations, the individual must earn his/her commanding officer's recommendation. Recommendations for advancement to or in petty officer ratings shall first be based on the individual's qualities of leadership, personal integrity and his/her potential to perform in the higher rate as a petty officer.

Article 10-B-2(a) provided that enlisted personnel would receive regular evaluations on June 30 and December 31 each year unless they had received a special evaluation during the prior three months. Article 10-B-2(e) provided that personnel in pay grades E-1 and E-2 would receive marks for conduct and proficiency but not for leadership. Article 10-B-2(d) provided that during a long-term hospitalization, incarceration, or other situation in which a member's performance was not observed by the command, a member would receive a mark for conduct only and not for proficiency or leadership.

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 over this matter under 10 U.S.C. § 1552.
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 alleged that she should have been retired as an E-4, rather than an E-3, and that she discovered the alleged error in September 2003. However, the applicant received her DD 214, which shows that she was separated as an SNSS/E-3, in 1980, and she received her permanent retirement orders in 1983. Therefore, the Board finds that she knew or should have known of the alleged error in her record by 1983 at the latest. Therefore, her application was untimely.

3. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if it is in the interest of justice to do so. In *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that to determine whether the interest of justice supports a waiver of the statute of limitations, the Board “should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review.” The court further instructed that “the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review.” *Id.* at 164, 165; see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. Although the applicant did not explain her long delay in applying for correction of her pay grade, the Board notes that she was diagnosed with and retired from the Service due to an “acute schizophrenic reaction.” Her long delay may well be explained and excused by her mental illness. In addition, the Board notes that the JAG has admitted that the applicant met many of the requirements for advancement to E-4 prior to her retirement from active duty. Therefore, the Board finds that it is in the interest of justice to waive the statute of limitations and to consider and decide this case on its merits.

5. The JAG has stated that on January 3, 1980, the applicant met all of the requirements for advancement to E-4 under Article 5-C-3 of the Personnel Manual then in effect except (a) the requirement that she have marks of at least 3.3 for proficiency and leadership on her most recent performance evaluation and (b) the requirement that she have her CO’s recommendation for advancement. In light of the JAG’s admission, the Board finds that on January 3, 1980, the applicant met all of the requirements for advancement to E-4 under Article 5-C-3(a), subparagraphs (1) through (9). Therefore, the issue to be decided is whether she has proved by a preponderance of the evidence that she met the requirements under subparagraphs (10) and (11) of Article 5-C-3(a), which require, respectively, that the member “[h]ave been assigned a mark of at least 3.3 in Proficiency and Leadership on last evaluation” and “[b]e recommended by commanding officer.”

6. The record shows that the applicant did not meet the requirement for advancement under Article 5-C-3(a)(10) because she did not earn a mark of at least 3.3 for leadership on her last evaluation. In fact, she never received an evaluation mark for leadership at all. She did not receive marks for leadership or proficiency as an E-3 because she was either hospitalized, on sick leave, or in HAOS for five of the six months from her advancement to E-3 on July 3, 1979, until the end of the evaluation period on December 31, 1979, and on through her separation from active duty on April 15, 1980. Therefore, in accordance with Article 10-B-2(d) of the Personnel Manual, her CO did not assign her marks for proficiency or leadership on December 31, 1979, or upon her separation from

active duty on April 15, 1980. The applicant has not proved by a preponderance of the evidence that her CO committed error or injustice by not assigning her marks for leadership or proficiency.

7. The record shows that the applicant did not meet the requirement for advancement under Article 5-C-3(a)(11) because she did not earn her CO's recommendation for advancement to E-4. On December 31, 1979, the CO indicated that he had not had sufficient time to observe the applicant's performance as an E-3 to complete a full evaluation. In light of the fact that the applicant was either hospitalized, on sick leave, or in HAOS for five of the six months from her advancement to E-3 on July 3, 1979, until the end of the evaluation period on December 31, 1979, the Board finds that the CO did not commit any error or injustice in failing to provide a recommendation for advancement for the applicant. The record shows that the applicant served full-time in the cadet mess for fewer than four weeks in July 1979 and for a couple days in October 1979. Moreover, during that limited opportunity for her performance to be observed, she was apparently involved in some altercations with coworkers. In light of the requirements for such a recommendation under Article 5-C-16 of the Personnel Manual, the Board cannot find that the CO's failure to recommend the applicant for advancement was erroneous or unjust.

8. The applicant performed work as an E-3 for only a few weeks before she was hospitalized. Although she technically served on active duty as an E-3 for more than nine months, she was hospitalized or on sick leave or in HAOS for all but about four weeks of that time. Under such circumstances and given the requirements for advancement under Article 5-C-3 of the Personnel Manual, the Board is not persuaded that the Coast Guard erred or committed an injustice¹ by not advancing her to E-4.

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

¹ See *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577 (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (holding that for purposes of 10 U.S.C. § 1552, "injustice" means "treatment by military authorities that shocks the sense of justice"))).

ORDER

The application of retired xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of her military record is denied.

Patrick B. Kernan

J. Carter Robertson

Richard Walter