

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-129

**XXXXXXXXXXXXXXXXXX.
XXXXXXXXXXXXXXXXXX**

FINAL DECISION

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 application on May 20, 2008, upon receipt of the applicant's completed application, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated February 12, 2009, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his retirement certificate from the Coast Guard Reserve to show that he retired as a lieutenant (LT; pay grade O-3), which is the highest grade that he held in the Navy, rather than as a Chief Port Security Specialist (PSC; pay grade E-7), which is the highest grade he held in the Coast Guard.

Prior to enlisting in the Coast Guard, the applicant was an officer in the Navy Reserve and was promoted to LT on July 1, 1969, while in that Service. On October 28, 1977, the applicant enlisted in the Coast Guard as a PS2. He advanced to PSC during his enlisted Coast Guard Service.

On May 1, 2002, the applicant was transferred to the Coast Guard Reserve Retired list without pay (RET-2). At that time he had over 36 years of service. On May 14, 2002, the Coast Guard Personnel Command's (CGPC's) Enlisted Status Manager, a CWO4, certified that LT was highest grade held by the applicant in the Armed Forces and directed that the applicant be placed on the Coast Guard retired list in that grade. On November 12, 2003, the applicant was notified of his transfer to the retired list with pay (RET-1) at the rank of LT with over 38 years of service. At some point later, the applicant received a retirement certificate from the Commandant that referred to him as Chief Port Security Specialist.

The applicant stated that he discovered the alleged error in April 2004, but he did not provide a reason why it is the interest of justice to consider his application even though it was filed more than three years after he discovered the error.

APPLICABLE LAW

United States Code

Section 1406(b)(2) of title 10 of the United States Codes (Retired pay base for members who first became members before September 8, 1980: final basic pay) states the following:

Non-regular service retirement. In the case of a person who is entitled to retired pay under section 12731 of this title . . . the retired pay base is the monthly basic pay, determined at the rates applicable on the date when retired pay is granted, of the highest grade held satisfactorily by the person at any time in the armed forces.

Coast Guard Reserve Policy Manual

Article 8.C.8.b of the Reserve Policy Manual states that retired pay for members with dates of initial entry into military service (DIEMS) prior to 8 September 1980 is computed based on the highest grade satisfactorily held at any time in the Armed Forces and the Commandant's determination that the member's performance in that grade was satisfactory.

VIEWS OF THE COAST GUARD

On October 14, 2008, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief, as recommended by the Commander, Coast Guard Personnel Command (CGPC) in a memorandum attached to the views of the Coast Guard.

CGPC noted that the application was not timely and the applicant had submitted no justification for the delay. CGPC further stated the following:

The provision of the highest grade held pursuant to [10 USC § 1406(b)(2)] relates to retirement compensation and not documentation of the grade held in the Coast Guard Reserve at time of retirement.

While the applicant's retirement computation is based upon the highest grade satisfactorily held in any branch of the military, his record clearly supports that at the time of his retirement he was a PSC in the Coast Guard Reserve which is the authorized rank for his uniform and for address in official correspondence. The rate/grade applied to the computation of the applicant's retired pay does not have to conform to the applicant's rate/grade at the time of retirement. Additionally, it would be improper to indicate a grade as the applicant's official grade within the Coast Guard Reserve that he applicant never held while in the Coast Guard

Reserve, i.e., Lieutenant, O-3. The applicant was properly issued a retirement certificate that reflects his rank/rating held in the Coast Guard Reserve.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 16, 2008, the Board sent the applicant a copy of the views of the Coast Guard for a reply. The Board did not receive a reply to the views of the Coast Guard.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was not timely.

2. To be timely, an application for correction must be filed within three years of the date the alleged error or injustice was, or should have been, discovered. See 10 U.S.C. § 1552, 33 CFR § 52.22. The applicant stated that he discovered the alleged error or injustice in April 2004. Therefore, his application was submitted approximately one year past the statute of limitations.

3. The Board may still consider the application on the merits, if it finds 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 in assessing 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. The applicant acknowledged that he discovered the alleged error in April 2004 but he did not provide a reason why it is the interest of justice for the Board to waive the statute of limitation in his case and consider it on the merits.

5. With respect to the merits, the Board finds that the applicant is not likely to prevail. In 2003, the Coast Guard determined that the applicant's service as a LT in the Navy was satisfactory and directed that he be placed on the retired list at that rank. The Coast Guard's decision in this regard complies with Article 8.C.8. of the Reserve Policy Manual. This provision states that "retired pay for members with date of initial entry to military service . . . prior to 8 September 1980 is *computed* based on the highest grade satisfactorily held at any time in the Armed Forces and the Commandant's determination that the member's performance in that grade was satisfactory." This provision, however, does not mandate that a member like the applicant who holds a rank upon retirement from the Coast Guard different than a higher rank held previously in the another branch of the armed forces should have the earlier higher rank/rate reflected on such retirement documents that have nothing to do with calculating his retired pay.

6. Accordingly, the application should be denied because it is untimely and because it lacks merit.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXXXXXXXXXXXX, USCGR (Retired), for correction of his military record is denied.

Lillian Cheng

Paul B. Oman

Darren S. Wall