DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-158

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FINAL DECISION

This is a proceeding under 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 July 14, 2008, upon receipt of the applicant's completed application, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 16, 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 AND ALLEGATIONS

The applicant, who was honorably retired from the Coast Guard on March 1, 1973, asked the Board to correct his record by removing a Letter of Reprimand from his file; removing his two failures of selection for promotion to lieutenant commander from his record; having his record reviewed by a "stand-by selection board"; and, if selected for promotion, awarding him back pay and allowances.

The Letter of Reprimand contested by the applicant is dated April 17, 1963. It is from the First District Commander to the applicant and bears the subject line "Dereliction in the performance of duty, Article 92 UCMJ; Imposition of disciplinary punishment, letter of reprimand." The letter, which concerns the results of a Board of Investigation (BOI) into the sinking of a boat in October 1962, states the following:

> 1. The findings of fact in [the report of the BOI], to which you were a party and were accorded your rights as such, reveal that you were derelict in the performance of your duties as industrial manager of the Coast Guard Base, South Portland, Maine. As industrial manager you were responsible for the operation and maintenance of the CG-24526, a ramp work boat assigned to the Base for use in industrial work. On October 11, 1962, you ordered this work boat placed into the water and subsequently ordered it to be used for the transfer of equipment at Matinicus Rock[1] despite the incompletion of scheduled repairs by the operational engineer. Your knowledge of the notoriously poor condition of this boat should have alerted you to the hazard involved in towing it

[1] Matinicus Rock is an island with a lighthouse off the coast of Maine.

> a considerable distance in the open sea and using it for the transfer of heavy equipment. Despite a directive from this office requiring the boat to be inspected and a report made of its deficiencies, you were instrumental in postponing this inspection and report thereby depriving your superiors of knowledge upon which appropriate action might have been taken to preserve the useful life of the boat. The necessity of accomplishing work assigned to the Base with the means at hand has been considered as a mitigating circumstance, however it does not justify the jeopardy to which government equipment was exposed nor the subsequent loss of the boat through foundering while being towed.
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> 2. You are hereby reprimanded for your derelictions in this matter which were contrary to the standards of care required of an industrial manager entrusted with the operation and maintenance of this piece of public property.
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> 3. By copy of this letter, your Commanding Officer is directed to make reference to this letter and the facts contained herein in your next fitness report.
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> 4. You are advised of your right to appeal to the Commandant, U.S. Coast Guard, via official channels, in accordance with the provisions of paragraph 135 MCM, as amended, and Section 0101f, CG Supp. MCM. You are directed to reply to this letter, through official channels, within 15 days after your receipt hereof. You will indicate in your reply the date of receipt of this communication and whether or not you propose to appeal. If you elect to appeal, your written appeal will be included in your reply.

The applicant alleged that this Letter of Reprimand is the second he received during his career and that it should be removed from his record because he was not named a party to the BOI; was not advised of his rights; was not provided an opportunity to review the evidence against him; was not advised he could consult counsel; and was not allowed to present evidence in his own behalf. The applicant alleged he had previously received another Letter of Reprimand as the result of a prior BOI for which he was also not named a party to the BOI; not advised of his rights; not provided an opportunity to review the evidence against him; not advised he could consult counsel; and not allowed to present evidence in his own behalf. The applicant further stated that he was never advised that he could request an Admiral's Mast to dispute the two Letters of Reprimand. The applicant argued that his record should not contain any Letters of Reprimand because he was denied procedural due process.

The applicant stated that although he was told of his right to appeal the second Letter of Reprimand, he did not exercise that right because, at the time, he believed that his record contained the first Letter of Reprimand, which would have "doomed any chance for promotion." However, when he requested a copy of his military record in 2007, he discovered that the first Letter of Reprimand he had received was not in the file. The applicant alleged that if he had known the first Letter of Reprimand was not in his military record, he would have appealed the second Letter of Reprimand, and if his appeal had succeeded, he might have been selected for promotion in 1967 or 1968. Therefore, he asked the Board, after removing any and all Letters of Reprimand, to place his record before a "stand-by promotion board to determine if [he] warranted promotion."[2] In addition, he claimed "back pay and allowances from the date [his] promotion should have occurred to the present should the board determine [his] record warranted promotion."

[2] The Board notes that, unlike the Army, Navy, and Air Force, the Coast Guard does not convene "stand-by" or special selection boards.

The applicant attributed his many years of inaction in this case to his lack of knowledge of the BCMR. In support of this contention, the applicant submitted two 1971 letters from the Chief of the Office of Personnel, in which it is explained that because the applicant had failed twice of selection for promotion to lieutenant commander, his separation was mandatory under the law. The first letter is addressed to the applicant's commanding officer, who had written a letter asking the Commandant to put the applicant "back in the line for promotion." This letter notes that "[t]here are no other provisions, under law, that allow for his reinstatement for further consideration for promotion." The second letter, which is addressed to the applicant's father, states that "[h]aving twice failed of selection for promotion, under the applicable laws, he is no longer eligible for further consideration for promotion. There is no provision in the law for such a reinstatement."

VIEWS OF THE COAST GUARD

On November 24, 2008, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case.

The JAG stated that the application should be denied for untimeliness because the applicant "provided no justification for the over 35 year delay in this application" and because more than 45 years have passed since the second Letter of Reprimand was issued. In addition, the JAG argued that the applicant's claim should be barred under the equitable doctrine of laches because during the applicant's long delay, evidence has become "lost, stale, or inaccessible" and the cost of investigating his claims has accumulated.

Regarding the merits of the applicant's claim, the JAG argued that the applicant's records are presumptively correct and that he has failed to overcome the presumption of regularity afforded his military records and Coast Guard officials. In addition, the JAG argued that the applicant has failed to submit evidence that the Letter of Reprimand is erroneous or unjust, and so there is no basis for removing his failures of selection for promotion.

The JAG submitted with his advisory opinion a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC), and he adopted the findings and analysis therein. CGPC stated that only one Letter of Reprimand appears in the applicant's military record and that on April 30, 1963, he did in fact appeal it, but his appeal was denied. Moreover, CGPC stated, documents in the applicant's record show that "he was afforded due process throughout the investigation."

CGPC pointed out particular documents in the applicant's military record for consideration, including a letter from the applicant to the Commandant, dated April 30, 1963, in which the applicant acknowledged and appealed the Letter of Reprimand dated April 17, 1963, as follows:

> Reference has been made pertaining to responsibility for operation and maintenance of the CG-24526. Prior to the sinking of subject boat, responsibility for it was never clearly and concisely fixed upon any one person, and it was only an assumption on my part that it was my responsibility. Since I had made this assumption, I never at any time felt there was any degree of hazard, commensurate with its condition, in sending this boat out in the company of the CG-65028-D for the completion of work orders. On the completion of nearly every trip, I discussed with the Officer-in-Charge of the CG-65028-D the trip in general, including problems encountered with the CG-

> 24526, if any. This, coupled with my personal knowledge of the CG-24526 and the operation and care of small boats in general, led me to feel that no problems would be encountered in our operations. I can only maintain that in my opinion, the CG-24526 was in as good a shape as it had been since my arrival at CG Base, South Portland. Consequently, I feel that my judgment was sound in allowing the continued use of this boat.

CGPC also submitted copies of the notes of the chain of command forwarding the applicant's appeal—one of which states that the applicant "was a party to [the BOI] and was accorded his rights as such"—and a copy of the Commandant's letter, dated June 12, 1963, stating that the Letter of Reprimand was not unjust and denying the appeal.

CGPC stated that the applicant twice failed of selection for promotion and would normally have been discharged except that he was allowed to remain on active duty until he could retire with 20 years of service in 1973. Regarding the failures of selection, CGPC stated that while a review of his record reveals overall satisfactory performance, "his early record as an Ensign and Lieutenant Junior Grade reveals numerous leadership and performance deficiencies and a noted lack of self-direction and issues relative to his transition into the commissioned officer corps. The applicant has not demonstrated that his non-selection for Lieutenant Commander was in error or unjust."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 16, 2008, the applicant responded to the views of the Coast Guard. He repeated his request for relief and claims that he was denied due process during the BOI.

With regard to the timeliness of his application, the applicant alleged that he did not learn that he even had procedural rights with regard to the BOI and the Letter of Reprimand until 2007. Therefore, he argued, because "the gravamen of the injustice is the issuance of adverse action based on an investigation that denied his right[s]," his application was timely filed. He also argued that the doctrine of laches is irrelevant because his application was timely filed. Moreover, the applicant argued that it was the duty of the Coast Guard to retain the report of the BOI, and the Coast Guard's "inability to preserve records as required by law and regulation cannot be used as a basis for denying applicant's requested relief."

With regard to his failures of selection, the applicant argued that his record was erroneous and unjust when it was reviewed by the selection boards because it contained a Letter of Reprimand based on an investigation during which he was denied due process, as proven by his sworn testimony. The applicant argued that the Letter of Reprimand should be removed, and his record should be reviewed by a "stand-by promotion board" to determine if his promotion is warranted.

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 over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required

by 33 C.F.R. § 52.13(b), because there is no other currently available procedure provided by the Coast Guard for correcting the alleged error or injustice.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.[3]

3. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers, or reasonably should have discovered, the alleged error or injustice. The applicant argued that his application is timely because he discovered the error in 2007 since he did not know prior to 2007 that he had certain rights before the 1963 BOI, which he alleged he was denied. However, the applicant is asking the Board to remove a Letter of Reprimand and two failures of selection for promotion from his military record. As these are the allegedly erroneous or unjust records that he wants the Board to correct, his date of discovery of them determines whether his application is timely, not the alleged date of discovery of certain rights. The record shows that the applicant knew or should have known of these alleged errors in his record upon his retirement in 1973,[4] and so his application is untimely.

4. 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."[5]

5. Regarding the delay of his application, the applicant explained that he did not learn of his rights before the 1963 BOI or of the existence of the BCMR until 2007. The Board finds that the applicant's explanation for his delay is not compelling because he failed to show that anything prevented him from seeking correction of the alleged errors and injustices in his military record more promptly.

6. A cursory review of the merits of this case shows that it lacks potential merit. The record before the Board contains no evidence that supports the applicant's allegations of error or injustice in his military record, which is presumptively correct.[6] Although the applicant com-

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[3] *See Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that "whether to grant such a hearing is a decision entirely within the discretion of the Board"); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) ("The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process."); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

[4] *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

[5] *Allen v. Card*, 799 F. Supp. 158, 164-65 (D.D.C. 1992); *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

[6] 33 C.F.R. § 52.24(b); *see Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

plained that the Coast Guard should have retained and submitted the report of the BOI, he presented no evidence that the Coast Guard is required to retain such a record for more than 45 years. Moreover, under 33 C.F.R. § 52.24(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." At least two documents in the applicant's official military record state that he was accorded his rights with respect to the BOI. Nevertheless, the applicant asks the Board to accept his sworn testimony that he was denied due process as proof to the contrary. However, the applicant's memory of what happened in 1963 is clearly faulty since he also claimed that he did not appeal his Letter of Reprimand dated April 17, 1963, when his military record shows that he did appeal it. The Board finds that the applicant's claim cannot prevail on the merits.

7. Accordingly, the Board will not excuse the untimeliness of the application or waive the statute of limitations. The applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of LT xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG (Retired), for correction of his military record is denied.

Diane Donley

Robert S. Johnson, Jr.

Kathryn Sinniger