

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-231

**XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX**

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 upon receipt of the applicant's completed application on August 25, 2011, and subsequently prepared the final decision as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 17, 2012, 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 ALLEGATION

The applicant asked the Board to correct his record to show that he was advanced in rank to Machinery Technician Second Class (MK2; pay grade E-5). The applicant was discharged from the Coast Guard on July 28, 1989, in pay grade E-4 (MK3).

The applicant stated that he suffered an injustice because his senior chief refused to approve his advancement to the next grade because he declined to extend his enlistment in the Coast Guard. He stated that he declined to extend his enlistment because Reserve personnel told him that he "had to re-qualify."

The applicant did not provide a date on which he discovered the injustice, but stated that it is in the interest of justice to excuse his untimeliness because "I am proud of my achievements, but I was shorted. This advancement could have placed me in a more competitive market in the civilian sector." He stated that it was also important that his sons "will have the paperwork to tell all, an injustice can be righted."

The applicant submitted a May 19, 1989 letter from the Commanding Officer of the Coast Guard Institute informing the applicant that he had passed the MK2 examination. The

letter also informed the applicant that he was number 82 on the advancement list and the cutoff¹ was at number 42.

VIEWS OF THE COAST GUARD

On October 17, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in accordance with a memorandum from the Commander, Personnel Service Center (PSC).

The JAG stated that the application was untimely and argued that “due to the length of the delay, the lack of compelling reasons for not filing his application sooner, and the probable lack of success on the merits of his claim, the Board should find that it is not in the interest of justice to waive the statute of limitations.”

The PSC Memorandum

PSC also noted that the application was untimely and should be denied for that reason. With regard to the merits of the applicant’s claim, PSC stated that “after careful review of the applicant’s entire service record, there is no documentation that he was ever approved by CGPC² to be advanced to pay grade E-5 anytime in his career.” PSC also noted that the applicant did not provide any proof or documentation to substantiate his claim that “he was erroneously not advanced to the next higher pay grade.”

PSC stated that the Coast Guard is presumptively correct, and the applicant has failed to substantiate any error or injustice with regards to his record.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 10, 2011, the Board received the applicant’s response to the views of the Coast Guard. The applicant stated that he did not realize that there was a time limit in which to request a correction of his record. He stated that it is important to him to correct his record. The applicant suggested that he was treated unfairly because he was denied advancement and because he was told that to stay in the Reserve he was required to redo his qualifications (he does not state which qualifications).

¹ The Coast Guard anticipates the number of vacancies for each rating and makes that the cutoff point for each rate. Only the members whose names appear above the cutoff are guaranteed advancements. Those below the cutoff must compete for advancement the following year. The effective period of the advancement eligibility list is published with the advancement list. Normally, each list remains in effect until superseded by a new eligibility list resulting from a later SWE competition. When the new list is published, the candidates above the cutoff on the superseded list are carried over to the top of each new list.

² In a recent reorganization, CGPC was renamed PSC.

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.

2. The application was not timely. To be timely, an application for correction of a military record must be submitted within three years after the applicant discovered the alleged error or injustice. *See* 10 U.S.C. § 1552(b). The applicant did not provide a date on which he discovered the alleged error or injustice, but the Board finds that he must have been aware at the time of his discharge from active duty in 1989 that he had not been advanced to pay grade E-5 because his rate (MK3; E-4) is written on the DD 214 that he signed. Therefore, he should have filed his application within 3 years of that date. His application is untimely by approximately 19 years.

3. The applicant stated that the Board should excuse the untimeliness of his application because he was not aware of the three-year statute of limitations. However, the applicant's lack of knowledge about the statute is an insufficient basis on which to excuse his delay. Nor is the Board persuaded to excuse the untimeliness of his application because he believed that his command treated him unfairly by denying his advancement to the higher grade. His belief in this regard does not explain why he could not have submitted his application earlier. Therefore, the applicant's reasons for not filing his application sooner are not persuasive.

4. Although the application is untimely and the applicant's reasons for not filing a timely application are not persuasive, the Board must still perform at least a cursory review of the merits to determine whether it is the interest of justice to waive the statute of limitations. 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 stated 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.

5. A cursory examination of the merits indicates that the applicant cannot prevail because there is no evidence in his military record that CGPC ever authorized his advancement to E-5. Although the applicant submitted evidence that he passed the examination for advancement to MK2, he could not be advanced until his number (82) was reached on the advancement list and CGPC published a monthly advancement list authorizing his advancement. Article 3.A.20 of the Personnel Manual states that Commander, PSC will publish monthly advancement lists from which a CO may advance eligible personnel. Article 3.A.22.b. of the Personnel Manual states that "[w]hen notification for advancement has officially been announced by Commander (CG PSC) specifying the earliest date on which these advancements may be effected such advancements may be effected, as of the date specified regardless of the date of receipt of the notification on board." There is no evidence in the record that CGPC ever authorized the applicant's advancement to MK2 and the applicant has provided none.

6. The application should be denied because it is untimely and it is not in the interest of justice to excuse the untimeliness.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Lillian Cheng

Thomas H. Van Horn

Barbara Walthers