

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-107

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

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 March 28, 2012, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated November 15, 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's DD 214 shows that he retired from the Coast Guard as a chief electronics technician (ETC), pay grade E-7. He asked the Board to correct his DD 214 to show that he retired as a chief warrant officer – W2 (CWO2).

The applicant had been a CWO2, but his appointment to that grade was terminated upon the recommendation of a special board's finding that he was "not fully qualified and not serving satisfactorily in grade." The Vice-Commandant approved the special board's recommendation on March 12, 1991. On May 31, 1991, the applicant was discharged from the Coast Guard due to the termination of his chief warrant officer (CWO) appointment. On June 1, 1991, he reenlisted in the Coast Guard as an ETC, his permanent enlisted pay grade. He retired from active duty on January 30, 1994, while serving in the enlisted ranks.

The applicant appealed the termination of his CWO appointment to the Personnel Records Review Board in 1991 and to the BCMR also in 1991. The PRRB denied the applicant's request. The BCMR also denied the applicant's request for restoration of his rank on September 25, 1992.

In his current application, the applicant alleged that immediately after his retirement, he sent a letter to Coast Guard Headquarters disputing the pay grade listed on his DD 214. On February 28, 1994, he received a response from Coast Guard personnel stating that "[i]n

accordance with [Article 12-C-15 . . . of the Personnel Manual], it was determined that your service as a CWO2 (ELC) was satisfactory. Therefore, your rate upon retirement is CWO2 (ELC).”

The applicant stated that he discovered the alleged error on February 28, 1994. He stated that although his retired pay was corrected at the time he received the letter, it is in the interest of justice to correct his DD 214 to show his correct pay grade and rank for his family and himself.

VIEWS OF THE COAST GUARD

On August 8, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in accordance with a memorandum submitted by the Commander, Personnel Service Center (PSC).

PSC stated that the application should be denied because it is untimely. PSC also stated that the applicant petitioned the Board to restore his rank in an earlier application, BCMR No. 405-91, and the Board denied the application. PSC stated that the applicant has presented no new evidence to cast doubt on the decision of the Board in that case. PSC argued that the Coast Guard is presumptively correct and the applicant has failed to substantiate any error or injustice.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 23, 2012 the Board received the applicant’s response to the advisory opinion. He agreed that his application was not filed in a timely fashion. He stated that he had no objection to the findings in the advisory opinion.

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* 33 CFR 52.22. The applicant admitted that he discovered the alleged error on February 28, 1994 but did not file his application with the Board until March 12, 2012. His application is untimely.

3. The applicant argued on his application that it is in the interest of justice to waive the untimeliness because his DD 214 should accurately reflect his rank and pay grade for the sake of himself and his family. However, this reasoning does not explain to the Board why the applicant did not file his application within three years after he discovered the alleged error in 1994.

4. Although the application is untimely, 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 is not likely to prevail. The Commandant's determination that CWO2 was the highest grade satisfactorily held by the applicant upon his retirement¹ does not mean that the enlisted rate and pay grade on his DD 214 is incorrect. Chapter 1.E. of COMDTINST M1900.4D. (Certificate of Release or Discharge from Active Duty, DD Form 214) states that the commissioned grade may be shown on a DD 214 for an officer who is reverting to enlisted status if the reversion and the separation due to retirement are effective on the same date. In this case, the applicant's CWO appointment was terminated by his discharge from active duty on May 31, 1991 and he received a DD 214 at that time that showed his rank and pay grade as CWO2. The applicant reenlisted on June 1, 1991 and his retirement occurred approximately three years later. He was separated due to retirement on January 30, 1994. Therefore, under the regulation governing the DD 214, upon his retirement, the applicant was not entitled to a DD 214 that showed CWO2 as his rank and pay grade because his reversion to enlisted status and his retirement became effective on different dates.

6. Additionally, paragraph 4.a. of COMDTINST M1900.4D states that the DD Form 214 *is a concise record of a period of service* with the Armed Forces at the time of the member's separation, discharge or change in military status. At the time of his separation due to retirement, the applicant was an ETC, pay grade E-7. His retired pay is calculated based upon that of a CWO2 because the Commandant determined that was the highest grade he held satisfactorily while serving on active duty. The DD 214 had no bearing on the applicant's retired pay calculation.

7. The application should be denied because it is untimely and because it lacks merit.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

¹ Article 12-C-15e. of the Personnel Manual then in effect stated that "Any enlisted member who is retired . . . shall be retired from active service with the highest grade or rate held while on active duty in which as determined by the Commandant, performance of duty was satisfactory, but not lower than his/her permanent grade or rate, with retired pay of the grade or rate with which retired."

ORDER

The application of XXXXXXXXXXXXXXXXXXXXXXXXXXXXX), for correction of his military record is denied.

Christopher M. Dunne

Randall J. Kaplan

Jennifer A. Mehaffey