

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-115

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

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 upon receipt of the applicant's completed application on April 9, 2012, 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 February 1, 2013, 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 retired from the Coast Guard on March 2, 1995, asked the Board to correct his record to show that he advanced to chief petty officer (AEC/E-7) before his retirement. The applicant stated that he was eligible for advancement under Article 1.C.12.f.(3) of COMDTINST M1000.4. The applicant alleged that at the time of his retirement, his name was second on the AEC advancement list,¹ and he would have advanced but for his disability separation. He alleged that he was medically retired because during a physical examination in October 1994, he was diagnosed with xxxxxxxxxxxx.

The applicant alleged that he discovered this error on March 17, 2011, and that the Board should consider his claim because he was never counseled by a lawyer about his options and the Coast Guard overlooked his right to advancement. In support of his allegations, the applicant submitted a copy of Article 1.C.12.f. of the Coast Guard's Military Separations Manual, COMDTINST M1000.4, which was issued in September 2011. Article 1.C.12.f., titled "Grade on Retiring for Physical Disability," states the following:

¹ Under Articles 5.C.3.b. and 5.C.31.a. of the Personnel Manual in effect in 1995, following the SWE in May each year, the candidates for advancement to a particular rate, such as AEC, are ranked on an advancement list according to a calculation that assigns points for each candidate's SWE score, performance marks, time in service, time in present pay grade, medals and awards, and sea duty. Article 5.C.31.c. states that the "effective period of the advancement eligibility list will be published with the list. Normally, each list will remain in effect until superseded by a new eligibility list resulting from a later SWE competition. When the new list is published all candidates above the cutoff on the superseded list will be carried over to the top of each new list."

Unless entitled to a higher grade under some other provision of law, any Coast Guard member who retires for physical disability or is placed on the temporary disability retired list (TDRL) under 10 U.S.C. §61 is entitled to the grade or rate equal to the highest of:

- (1) The grade or rate in which the member served on the date his or her name was placed on the TDRL or, if his or her name was not carried on that list, on the date when the member retires.
- (2) The highest grade or rate in which the member served satisfactorily, as the Commandant determines.
- (3) The permanent regular or Reserve grade or rate to which the member would have been promoted had it not been for the physical disability for which he or she retired and which was found to exist as a result of the member's physical examination.
- (4) The temporary grade to which the member would have been promoted had it not been for the physical disability for which he or she retired, if eligibility for that promotion was based on cumulative years of service or years of service in grade and the disability was discovered as a result of his or her physical examination for promotion (10 U.S.C. §1372).

SUMMARY OF THE RECORD

The applicant first enlisted on April 26, 1971. He advanced to first class petty officer, AE1/E-6, and in May 2004, he took the servicewide examination (SWE) for advancement to chief petty officer, AEC/E-7.

On January 27, 1995, the Commandant reissued the AEC advancement list resulting from the May 1994 SWE. The applicant was #16 on the list, and the cutoff for advancement was #9.² The Commandant's notice states that only those personnel whose names appeared above the cutoff (##1-9) were guaranteed advancement.

On February 21, 1995, the Military Personnel Command issued the applicant physical disability retirement orders, which state that the applicant would be retired with a 100% disability rating as of March 21, 1995. At the applicant's request, his separation date was changed to March 3, 1995, and he was medically retired with a 100% disability rating on that date.

VIEWS OF THE COAST GUARD

On September 6, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum on the case prepared by

² Article 5.C.3.a.2. of the Personnel Manual states that a "cutoff point is established for each rating and rate based upon vacancies anticipated at the time the eligibility list is compiled. Personnel who are below the cutoff point should plan on participating in subsequent SWEs in order to maintain eligibility." Article 5.C.31.b. states that "[c]utoff points on eligibility lists will be established by Commander, CGPC, according to the number of advancements anticipated during the effective period of the respective lists. The cutoff point on each list is shown by a mark adjacent to the rank-order number of the last name above the cutoff, e.g., 21. Only those personnel [whose] names appear above the cutoff are assured of advancement."

the Personnel Service Center (PSC).

PSC stated that the application is untimely and should be denied for that reason. PSC noted that the AEC advancement list resulting from the May 1994 SWE was first published on June 6, 1994, and republished on January 27, 1995. PSC stated that its investigation revealed that of all the AE1s who took the May 1994 SWE, the applicant placed 16th. However, the cutoff for guaranteed advancement was above his name at #9 and in fact only those members at #2 through #10 were advanced off the list. Therefore, even if the applicant had not been retired, he would not have advanced to AEC off that advancement list, and he would have had to re-compete for advancement by taking the SWE again to try to advance.

The JAG agreed with PSC and stated that the applicant has failed to show why it is in the interest of justice for the Board to excuse his 16-year delay in seeking advancement to AEC. He noted that the applicant failed to submit any evidence to support his claims that he was #2 on the advancement list when he retired and that he would have advanced from the list had he not retired. The JAG argued that “[w]ithout any substantive reason for the sixteen plus 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.

Moreover, the JAG argued, even if the Board finds that it is in the interest of justice to waive the statute of limitations in this case, the Board should deny relief because the applicant has failed to submit substantial evidence to overcome the presumption of regularity accorded his military records or to prove by a preponderance of the evidence that he would have advanced to AEC off the advancement list resulting from the May 1994 SWE had he not retired due to a physical disability on March 3, 1995.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 7, 2012, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a response within 30 days. No response was received.

APPLICABLE REGULATIONS

Article 12-C-15 of the Personnel Manual in effect in 1995, titled “Grade on Retirement for Physical Disability,” states the following:

Unless entitled to a higher grade under some other provision of law, a member retired for physical disability ... is entitled to the highest of the following:

- a. The grade or rank in which he or she was serving when placed on the Temporary Disability Retired List, or ... on the date when the member is retired.
- b. The highest grade or rate in which the individual served satisfactorily, as determined by the Commandant.
- c. The permanent regular or Reserve grade or rate to which the member would have been promoted had it not been for the physical disability for which he/she is retired and which was found to exist as a result of the individual’s physical examination for promotion.
- d. The temporary grade to which the member would have been promoted had it not been for the physical disability for which he/she is retired, if eligibility for that promotion was required to be

based on cumulative years of service or years of service in grade and disability was discovered as a result of his/her physical examination for promotion.

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 10 U.S.C. § 1552.
2. Under 10 U.S.C. § 1552(b), an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice in his record. The applicant was retired as an AE1/E-6, rather than an AEC/E-7, in March 1995 and surely knew his paygrade at that time and knew that he had taken the SWE in May 1994 and so was on the advancement list. Although he alleged that he discovered the error in his record in 2011, the preponderance of the evidence shows that he knew of the alleged error in his record—the fact that he was being retired as an AE1/E-6 even though his name was on the AEC advancement list—upon his retirement in March 1995. Therefore, his application is quite 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. Regarding the delay of his application, the applicant stated that he was never advised by an attorney about the rules determining what pay grade members being separated due to a physical disability should receive upon retirement. However, the applicant knew his pay grade and knew that he was on the AEC advancement list in 1995, and the rules that determined his pay grade upon retirement have not materially changed since 1995.³ The applicant has not shown that anything prevented him from investigating the rules in a timely manner. Therefore, the Board finds the applicant's delay in seeking relief to be unjustified in the record.
5. In addition, the Board's review of the merits of this case indicates that it cannot prevail on the merits. The record shows that as of January 27, 1995—about five weeks before the applicant retired—he was in 16th place on the AEC advancement list and the cutoff for guaranteed advancement shown on the list is #9. Advancements in the Coast Guard result from vacancies, and cutoffs are established based on expected vacancies.⁴ The Coast Guard has stated

³ Compare Article 12-C-15.f. of the 1995 Personnel Manual, COMDTINST M1000.6A, with Article 1.C.12.f. of COMDTINST M1000.4.

⁴ Article 5.C.1. of the Personnel Manual in effect in 1995 states that the objective of the advancement system is to ensure that the most proficient members are advanced to fill vacancies that occur at the next higher rate. Article 5.C.31.b. states that cutoffs will be established by CGPC “according to the number of advancements anticipated during the effective period of the respective lists.”

that its records show that only the members at #2 through #10 actually advanced, and the applicant has submitted nothing to show that the person below him on the list at #17 advanced to AEC off the list. Therefore, the Board finds that the applicant's claim cannot prevail on the merits.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Troy D. Byers

Lillian Cheng

Frank E. Howard