

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-106

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 completed application on February 18, 2010, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 3, 2010, 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 was discharged from the Coast Guard with severance pay on September 27, 1974, for a 10% disability rating due to congenital scoliosis. At the time of discharge, he had served on active duty for three years and one day. The applicant asked the Board to correct his military record to show that he was discharged in pay grade E-4 (MK3) instead of pay grade E-3 (FNMK). The applicant stated that as a result of a non-judicial punishment (also known as captain's mast) he was reduced from MK3 to FNMK for a six-month period.

The applicant injured his back on April 2, 1974, and underwent a medical board and a physical evaluation board. He stated that "[w]hen I was injured and it was determined that I would be discharged, nobody bothered to reinstate my rank." He stated that at the time of discharge, his rank seemed unimportant because there was not much difference between the severance disability pay for a MK3 and that for a FNMK. He now asserts that after surgery on his back at the Department of Veterans Affairs (DVA), he is expecting a higher disability rating and having the higher rank would make a difference in his compensation. He stated that he served with honor and pride and worked hard for his "bird" and deserved to have it restored.

The applicant stated that he discovered the alleged error on September 27, 1974, and that it is in the interest of justice to consider the application because when he was discharged he was told that he would not get any monthly benefits until the DVA had recouped the amount of his severance pay, which he calculated to be about five years. He stated that his DD 214 states that

he “has executed a claim for compensation, pension, or hospitalization to be filed with the Veterans Administration,” but the yeoman did not file the claim with the DVA and he lost several years of compensation. The applicant alleged the failure to reinstate his rank and the failure to file his claim with the DVA demonstrate a pattern of negligence by Coast Guard personnel assigned to attend to such duties.

Relevant Excerpts from the Applicant’s Military Record

The applicant’s military record shows that he was punished at captain’s mast on six different occasions. The first punishment occurred on December 20, 1972 for concealing a loaded weapon on board a Coast Guard base. He was reduced in rate to FNMK. On April 5, 1973, the CO set aside the punishment and the applicant’s rank (MK3) was restored. However, at his fifth captain’s mast on September 18, 1973, for failure to make morning muster on three different dates, the applicant’s punishment was a reduction in rate to pay grade E-3 (FNMK). There is nothing in the record indicating a suspension of the reduction in rate for the September 18, 1973 punishment.

On August 9, 1974, the Commandant’s designee approved the findings of the Central Physical Evaluation Board (CPEB) that the applicant be separated from the Coast Guard with severance pay. The applicant was discharged on September 27, 1974 with severance pay for a disability rated as 10% disabling.

VIEWS OF THE COAST GUARD

On June 18, 2010, the Board received the views of the Coast Guard from the Judge Advocate General (JAG), recommending denial of the applicant’s request.

The JAG stated that the Coast Guard adopted the analysis provided by the Commander, Personnel Service Center (PSC) as the advisory opinion. PSC recommended that the Board deny relief to the applicant. In this regard, PSC stated that the application was not timely and should be denied for that reason. PSC also stated that there is no evidence in the applicant’s record that he was ever restored to MK3 after being reduced in rank at the September 18, 1973 captain’s mast. Therefore, he was properly discharged in pay grade E-3 (FNMK). PSC concluded by stating that the Coast Guard was presumptively correct, and that the applicant failed to prove any error or injustice with regard to his military record.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 22, 2010, the Board sent the applicant a copy of the views of the Coast Guard and provided him an opportunity to respond to them. The Board did not receive a reply from the applicant to the Coast Guard’s views.

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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code.

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 at the time of his discharge from the Coast Guard in 1974. Therefore, his application was submitted approximately 33 years 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 did not offer a reason for not submitting a timely application, except to say that Coast Guard personnel were negligent in failing to file his claim for compensation with the DVA and were also negligent in failing to reinstate his rank. However, the applicant's explanation does not explain to the Board why he could not have filed a timely application, and therefore, does not persuade the Board to excuse the untimeliness.

5. With respect to the merits, the Board finds that the applicant is not likely to prevail. He presented no evidence that his CO or any other person in the Coast Guard determined that his MK3 rank should be restored after his September 18, 1973 captain's mast reducing him in rank to pay grade E-3. Nor did he present any evidence that he was entitled to such reinstatement under any Coast Guard regulation.

6. Accordingly, the applicant's request should be denied because it is untimely and because of its lack of merit.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Lillian Cheng

Randall J. Kaplan

James E. McLeod