

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-124

**XXXXXXXXXXXXXX
XXXXXXXXXXXXXX**

FINAL DECISION

This proceeding was conducted 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 receiving the completed application on March 16, 2011, 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 January 12, 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 ALLEGATIONS

The applicant, who was retired from the Coast Guard Reserve as a first class petty officer on March 1, 2007, asked the Board to void his retirement and correct his record to show that he was discharged from the Reserve with an RE-1 reentry code (eligible to reenlist). The applicant stated that he does not want to receive any retired pay or benefits from the Coast Guard.

BACKGROUND

In a prior case, BCMR Docket No. 2009-169, the applicant alleged that he was unjustly forced to retire in 2007 after he failed two physical fitness tests (PTs) in 2006. He alleged that he was forced to retire because his command did not follow proper procedures in administering the tests, failed to take into account that he had stopped in the middle of his second test to help an injured petty officer, and threatened him with an other than honorable discharge if he did not submit a retirement request.

The Coast Guard recommended that the Board deny the applicant request in Docket No. 2009-169, and the Board denied relief because it found that the applicant had "failed to prove by a preponderance of the evidence that his retirement from the Reserve was coerced, unjust, or erroneous."

SUMMARY OF THE APPLICANT'S RECORD

On May 20, 1988, the applicant enlisted in the Coast Guard Reserve. He had previously served four years on active duty in the U.S. Navy. He gained a satisfactory year of service for retirement purposes every year thereafter, and on May 31, 2004, the Personnel Command sent him notification that he was eligible for Reserve retired pay when he turned 60 years old on December 27, 2012, because he had completed 20 years of satisfactory service for retirement purposes. For most of his Reserve service, the applicant drilled at xxxxxxxxxxxxxx. On May 9, 2006, the applicant reported for SELRES duty at a Port Security Unit (PSU) in xxxxxxxxx. After failing to pass PTs in the spring and fall of 2006, the applicant submitted a request to retire, and he was retired from the Reserve on March 1, 2007.

VIEWS OF THE COAST GUARD

On June 29, 2011, the Judge Advocate General (JAG) 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 by the Personnel Service Center (PSC) in an attached memorandum.

The PSC stated that the applicant's "current status is retired reservist awaiting pay (RET-2)" because he has qualified for Reserve retired pay but is not yet 60 years old. The PSC stated that relief should be denied because the applicant's records are correct and "[i]f the applicant does not request to receive retired pay at age 60, it is likely that he will not receive retired pay per 10 U.S.C. 12731(a)."¹ The PSC further stated that "[n]o law or policy supports discharging the applicant retroactive to his entering retired status."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

The applicant was granted an extension of the time to reply to the views of the Coast Guard and submitted his response on August 15, 2011. The applicant submitted statements that, he argued, prove that he was forced to retire. He stated that when he needed a top secret security clearance in 1991, it took just one month for the investigation to be completed. However, he needed a top secret clearance to work at the PSU and even though he completed the paperwork in early August 2006, the people he named as personal references were never interviewed by an investigator. In support of this allegation, two people submitted letters on behalf of the applicant stating that they had known him for a long time and had expected to receive inquiries from an investigator pursuant to the applicant's application for a security clearance in 2006 but never did.

The applicant also alleged that, although he was required to have a military passport so that he could be deployed from the PSU and applied for the passport in June 2006, his command did not follow up when the applicant notified them that he had not received the passport. The applicant argued that the fact that his top secret security clearance application and military passport application were never processed is evidence that his command was biased against him and

¹ Under 10 U.S.C. § 12731(a), a reservist who has completed 20 years of satisfactory service pursuant to § 12732 is entitled to retired pay upon attaining age 60, but under § 12731(b) the eligible reservist must actually apply for retired pay.

coerced him to retire. The applicant also submitted a copy of the Wikipedia article “USS Iowa turret explosion” as evidence of malfeasance and cover-up in the military.

The applicant stated that he is requesting an honorable discharge and RE-1 reentry code, in lieu of RET-2 status, because he believes he “will never be dealt a fair hand regarding this issue. . . . It was personal and I will never be able to prove it.”

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 10 U.S.C. § 1552.
2. 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 the alleged error or injustice in his record. The applicant in this case knew of his retirement in March 2007, applied to be reinstated in the Reserve in May 2009, and after that request was denied in May 2010, submitted this request for different relief—an honorable discharge and RE-1 in lieu of RET-2 status—in March 2011, more than four years after his retirement. Therefore, the application is untimely because it was submitted more than three years after the applicant knew that he had been retired and would be eligible for retired pay upon attaining age 60 (RET-2).
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. The applicant did not explain his delay in requesting discharge, but the Board believes that he did not consider requesting discharge in lieu of RET-2 status until the Board denied his request for reinstatement.
5. The Board’s review of the merits of this case indicates that the applicant submitted a retirement request and was duly retired in RET-2 status in March 2007. He is eligible for retired pay when he is 60 years old in December 2012 and will presumably receive it if he applies for it at that time in accordance with 10 U.S.C. § 12731(b). Under 33 C.F.R. § 52.24(b), these military records are presumptively correct, and the applicant bears the burden of proving that his RET-2 status is erroneous or unjust and that he should be discharged with an RE-1 reentry code, instead. The record shows that the applicant wishes to reject the retired pay and benefits he earned long before he ever transferred to the PSU because he is very unhappy with how he was treated by the PSU command in 2006 and 2007. It is very unfortunate that after numerous satisfactory years of service, the applicant’s last experience in the Coast Guard was so

bad that he plans not to accept the retired pay and benefits he earned. However, he has not persuaded the Board that his mere eligibility for retired pay and benefits constitutes an error or injustice in his record because he may reject his retired pay and benefits simply by not applying for them. Nor is the Board persuaded that his reentry code should be changed from RE-2 (retired) to RE-1 (eligible to reenlist) since his correct status is RET-2. Based on the record before it, the Board finds that the applicant's claim cannot prevail on the merits.

6. The applicant alleged that the fact that his military passport application and top secret security clearance application were not processed quickly in 2006 supports his claim in his prior case, Docket No. 2009-169, that his retirement was coerced. The Board finds, however, that the fact that the applicant's military passport application and top secret security clearance application were apparently not processed quickly in 2006 is not evidence that he was coerced to retire because there are many other factors that could have delayed the processing of his applications.

7. 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 xxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, Retired, for correction of his military record is denied.

Philip B. Busch

Reagan N. Clyne

Dorothy J. Ulmer