

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-247

XXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

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 after receiving the applicant's completed application on September 6, 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 June 7, 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, a retired senior chief aviation machinist's mate, asked to be properly reimbursed for his travel from Air Station Elizabeth City in North Carolina to Air Station Barbers Point in Hawaii, in 1988. In addition, he alleged that although he was authorized 11 days travel time, travel pay, and allowances for himself and his wife, the authorization was revoked and he was unjustly charged leave for those days. The applicant alleged that although the command in Elizabeth City authorized his travel, shipment of his personal vehicles, and travel time, the command in Hawaii unjustly and erroneously revoked the authorizations, costing him money and days of leave, all because one of his vehicles was shipped from Virginia to Hawaii.

Regarding the timing of his application, the applicant alleged that he submitted his application in 1988 and when he inquired about the status of his application in 1990, he was told "they were still working on it" but he never heard back. In support of his allegations, the applicant submitted his application on a DD 149 form that was in effect in 1988. He also issued a copy of his travel orders, which show the following:

- On March 23, 1988, he was issued orders to transfer from Air Station Elizabeth City to Air Station Barbers Point, Hawaii, no later than July 1, 1988.
- Travel by private conveyance was authorized but travel by Government transport was required, where available, beyond the continental United States.

- Travel by POV [privately owned vehicle], a 1972 Ford pickup, was authorized from Elizabeth City to San Francisco with 8 days of travel time and 4 days of proceed time.
- He was authorized 3 months of advanced pay “to be liquidated over 12 months.”

On May 3, 1988, the CO made the following “memorandum endorsement” to the orders:

1. Authorized GTR [Government Travel Rate] for member & 1 dependent [name and date of marriage]. Authorized MALT [monetary allowance in lieu of transportation] & PER DIEM for dependent. Authorized travel via POV from Elizabeth City, NC to San Pedro, CA. POV: 1986 Buick Authorized shipment of 1972 FORD PICK-UP from Norfolk, VA to Honolulu, HI.
2. Authorized 28 days [leave], 04 days proceed time, 08 days travel time.

The applicant submitted an Endorsement on Orders showing that he reported for duty in Hawaii on June 10, 1988. A revised copy of the endorsement, dated July 18, 1988, states: “Corrected to adjust leave and travel time. MBR shipped two vehicles to HI and is only entitled to one day travel.”

A form concerning dependent travel shows that the applicant’s wife was traveling in a POV from Elizabeth City to Long Beach and was authorized MALT and an allowance that is not visible on the copy submitted.

A travel voucher shows that the applicant was given a travel advancement of \$1,712.20 while still in Elizabeth City and that he left Elizabeth City on May 23, 1988, arrived in San Diego on June 4, took leave until June 10, when he drove to Los Angeles International Airport and flew to Hawaii the same day. The applicant claimed 5 days of leave from June 5 through 9, 1988.

Another document notes the cost of Government (SATO) one-way airfare for two and the applicant’s actual modes of travel, and concludes that “per JFTR U5105 and U5116 and MSG 030045ZJUN87, no per diem due MBR on TLA.” This document also shows that because of an advance he received, the applicant was deemed to owe \$49.80. The applicant also submitted a Personnel Action form and a Disbursement and Expenditure Document showing that \$49.80 was recouped from his pay in October 1988.

Finally, the applicant submitted an approved request chit showing that on December 12, 1988, he asked to meet with his commanding officer to discuss inequities in his travel reimbursement.

SUMMARY OF THE MILITARY RECORD

The applicant retired on October 1, 1990, with more than 27 years of service. His record contains one BCMR decision showing that the Board corrected his position on an advancement eligibility list in 1985. Other documents show that after training to become an aviation machinist’s mate, the applicant served and trained in many places, including at air stations in Kodiak, Alaska (1972-75), the District of Columbia (1975-79), Elizabeth City (1979-81), Hawaii (1981-84), Elizabeth City (1984-88), and Hawaii (1988-90). There are no documents in his official

military record received from the National Archives that shed additional light on the applicant's travel authorization, leave, and reimbursement pursuant to his transfer to Hawaii in 1988.

VIEWS OF THE COAST GUARD

On January 13, 2012, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny the requested relief. The JAG stated that the Board should deny relief because the application is untimely, because there is no compelling reason to excuse the delay, and because of "the probable lack of success on the merits."

The JAG adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC). PSC also stated that the application should be denied due to its untimeliness. PSC alleged that the Government would be unable to pay the applicant's claim due to the Barring Act, 31 U.S.C. § 3702, which states the following in pertinent part:

(a) Except as provided in this chapter or another law, all claims of or against the United States Government shall be settled as follows:

(1) The Secretary of Defense shall settle—

(A) Claims involving uniformed service members' pay, allowances, travel, transportation, payments for unused accrued leave, retired pay, and survivor benefits ...

(b)(1) A claim against the Government presented under this section ... must be received ... within 6 years after the claim accrues except—

(A) as provided in this chapter or another law ...

• • •

(e)(1) The Secretary of Defense may waive the time limitations set for in subsection (b) or (c) in the case of a claim referred to in subsection (a)(1)(A). In the case of a claim by or with respect to a member of the uniformed services who is not under the jurisdiction of the Secretary of a military department, such a waiver may be made only upon the request of the Secretary concerned (as defined in section 101 of titled 37).

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 13, 2012, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

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), an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice in his record. Given the December 12, 1988, request that the applicant submitted, the Board finds that he clearly knew upon his retirement in 1990 the results of his travel reimbursement request and should have applied to the Board within three years of that date. Although the applicant alleged that he filed a BCMR application about this matter 1988, the Board has no record of receiving that application. The

only BCMR case in the applicant's and the Board's files is a 1985 case concerning his placement on the ADCS advancement list. Therefore, this application is 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 (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."¹ 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."²

4. Regarding the delay of his application, the applicant provided no compelling explanation for why he could not have submitted his application sooner. Even if, as the applicant alleged, he did submit an application in 1988 that went astray, the applicant's failure to pursue the matter for more than 20 years is unjustified.

5. A cursory review of this case shows that insufficient evidence exists to conclude that the applicant's military record is erroneous or unjust and should be corrected. The documents submitted by the applicant show that the command in Elizabeth City authorized 8 days of travel time, shipment of one POV from Virginia to Hawaii, and travel by a second POV to San Pedro, California, and by air from California to Hawaii. The command in Hawaii found that he was due only 1 day of travel time because both vehicles were shipped to Hawaii. This document appears to assume that the applicant and his wife flew directly from Virginia or North Carolina to Hawaii and so were entitled to only one day of travel time. The Hawaii command also found that the applicant's travel advance was \$49.80 more than he was owed and cited paragraphs U5105 and U5116 of the Joint Federal Travel Regulations (JFTR). U5105 of the JFTR states that a member may choose to travel by a privately owned vehicle or a common carrier, such as an airline, unless the member is traveling outside the continental United States (OCONUS), in which case U5116 applies. U5116 provides that a member traveling OCONUS who chooses to travel by mixed means may not be reimbursed in travel expenses and per diem for more than the cost and per diem of traveling to the destination by Government procured common carrier. Thus, it appears that the applicant may have owed the Government \$49.80 because his mixed travel costs and allowances, for which he received an advance, totaled more than what the Government would have paid for two flights from Virginia or North Carolina to Hawaii and one day of per diem. However, travel regulations are very complex and change over time. The record shows that the applicant met with his commanding officer to contest these matters in December 1988. Any actual errors regarding the applicant's leave or reimbursement under the JFTR were presumably corrected at that time.³ There is insufficient evidence in the record for the Board to conclude that these matters were not correctly resolved in accordance with the JFTR. Based on the record before it, the Board finds that the applicant's claim cannot prevail on the merits.

¹ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

² *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

³ 33 C.F.R. § 52.24(b) (requiring the Board to accord Coast Guard records and officials the presumption of regularity); *see Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

6. The Board notes that the Coast Guard erroneously argued that the Barring Act, 31 U.S.C. § 3702, would prevent it from reimbursing the applicant for a claim more than six years old. This argument is erroneous because 31 U.S.C. § 3702(e)(1) expressly authorizes waiver of the six-year limitation when the Secretary requests it, and paragraph (c) of the BCMR statute, 10 U.S.C. § 1552, states that “[t]he Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant” However, this argument is moot because the applicant’s claim cannot prevail on the merits.

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]

