DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-238

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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 August 22, 2010, 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 3, 2011, 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 medically retired from the Reserve on November 24, 2004, asked the Board to re-advance his rate and pay grade from SK3/E-4 to SK2/E-5. In support of this request, he submitted a copy of a chit, dated January 12, 2002, in which he asked for his rate to be reinstated, and a copy of an email he sent to a lieutenant on February 4, 2003. The chit bears no signature other than the applicant's. In the email, the applicant stated that when he was punished at mast in September 2000, he was told that his reduction in rate from SK2 to SK3 would be temporary but, despite numerous requests and inquiries through his chain of command, his rate had never been restored. The applicant also stated that although he had previously been told that he could simply request reinstatement, he had recently been told by a master chief petty officer that he had to re-compete for advancement. He also complained that a determination as to whether he was fit for duty had been greatly delayed.

The applicant stated that he discovered the alleged error on January 12, 2002, but that it is in the interest of justice for the Board to excuse the untimeliness of his application because he has previously taken all steps to get this matter corrected but only recently learned about the Board.

SUMMARY OF THE RECORD

On July 27, 1987, after having served in the National Guard since July 1984, the applicant enlisted in the regular Coast Guard as a seaman/E-3. He advanced from SN/E-3 to SK3/E-4 in 1990 and to SK2/E-5 in 1992. He was honorably discharged January 23, 1996.

On April 16, 1996, the applicant enlisted in the Coast Guard Reserve. As a reservist, he drilled regularly and completed satisfactory years of service for retirement purposes for a few years. However, on October 27, 2000, the applicant received non-judicial punishment (NJP) at a mast conducted pursuant to Article 15 of the Uniform Code of Military Justice (UCMJ). Documentation of the applicant's misconduct states that after reporting for a drill and being ordered to participate in an unscheduled urinalysis, the applicant instead left the unit without authorization or justification. His punishment for this misconduct apparently included reduction in rate from SK2/E-5 to SK3/E-4 although his record contains no Court Memorandum documenting his sentence. All of the military and medical documents in the applicant's record dated after the mast refer to him as an SK3.

On September 14, 2004, the Central Physical Evaluation Board (CPEB) recommended that the applicant be permanently retired from the Reserve with a 40% disability rating due to back pain resulting from intervertebral disc syndrome. The applicant accepted the findings and recommendation of the CPEB and did not demand a hearing. The CPEB's recommendation was approved on October 25, 2004.

On October 27, 2004, the Personnel Command issued orders placing the applicant on the permanent disability retired list as of November 24, 2004, with a 40% disability rating. Upon his separation from the Reserve on November 23, 2004, the applicant had 15 years, 5 months, and 27 days of satisfactory service for retirement purposes.

VIEWS OF THE COAST GUARD

On December 17, 2010, the Judge Advocate General of the Coast Guard recommended that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

The PSC stated that the application is untimely and should be denied on that basis because the applicant did not justify his delay.

Regarding the merits of the application, the PSC stated that under Article 5.C.33.b. of the Personnel Manual, after a member's rate has been reduced at mast, the member is "subject to the normal advancement system, unless they are considered by their commanding officers to be deserving of special advancement." The PSC stated that there is no evidence in the record that the applicant successfully competed for advancement after his reduction in rate; that his commanding officer considered him deserving of special advancement; that his reduction in rate was intended to be temporary; or that his punishment was vacated. Given this lack of evidence, the PSC concluded that the applicant has failed to rebut the presumption of regularity or to prove that his SK3 rate upon retirement is erroneous or unjust.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 4, 2011, 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.

APPLICABLE LAW

Chapter 7.C.18. of the Reserve Policy Manual, entitled "Advancement After Reduction," stated the following:

> The policy contained in the Personnel Manual COMDTINST M1000.6 (series) shall apply to Reserve enlisted members with the following modifications:
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> a. When the reduction was made for sub-standard performance as distinguished from reduction as punishment, the individual may be recommended to compete in a Service Wide Examination, if required, after serving one-half the normal number of required months in pay grade and in the SELRES.
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> b. Members who voluntarily request a reduction in rate for the purpose of going on EAD will have their rate restored on the day following termination of active duty.

Article 5.C.33.b. of the Personnel Manual provides the rules for advancing members after they have been reduced in rate as punishment and states the following:

> 1. Members who have been reduced in rate, except those who fall within the provisions of Articles 15(d) and 15(e) of the Uniform Code of Military Justice, are subject to the normal advancement system, unless they are considered by their commanding officers to be deserving of special advancement.
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> 2. Commanding officers who consider enlisted members to be deserving of restoration to a formerly held rate, or deserving of advancement, but to a rate lower than formerly held, may recommend such restoration or advancement by letter to Commander, (CGPC-epm). In making such a recommendation, the present commanding officer shall set forth in detail a full justification of the action recommended based on at least five, but not more than 36 months observation of performance of duty by the member concerned since reduction in rate. …

Article 15 of the UCMJ (10 U.S.C. § 815) states the following regarding punishments awarded at mast:

> (d) The officer who imposes the punishment authorized in subsection (b), or his successor in command, may, at any time, suspend probationally any part or amount of the unexecuted punishment imposed and may suspend probationally a reduction in grade or a forfeiture imposed under subsection (b), whether or not executed. In addition, he may, at any time, remit or mitigate any part or amount of the unexecuted punishment imposed and may set aside in whole or in part the punishment, whether executed or unexecuted, and restore all rights, privileges, and property affected. He may also mitigate reduction in grade to forfeiture or detention of pay. … When mitigating reduction in grade to forfeiture or detention of pay, the amount of the forfeiture or detention shall not be greater than the amount that could have been imposed initially under this article by the officer who imposed the punishment mitigated.

(e) A person punished under this article who considers his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The superior authority may exercise the same powers with respect to the punishment imposed as may be exercised under subsection (d) by the officer who imposed the punishment. …

Title 10 U.S.C. § 1372, entitled "Grade on retirement for physical disability: members of armed forces," states the following:

Unless entitled to a higher retired grade under some other provision of law, any member of an armed force who is retired for physical disability under section 1201 or 1204 of this title, or whose name is placed on the temporary disability retired list under section 1202 or 1205 of this title, is entitled to the grade equivalent to the highest of the following:

(1) The grade or rank in which he is serving on the date when his name is placed on the temporary disability retired list or, if his name was not carried on that list, on the date when he is retired.

(2) The highest temporary grade or rank in which he served satisfactorily, as determined by the Secretary of the armed force from which he is retired.

(3) The permanent regular or reserve grade to which he would have been promoted had it not been for the physical disability for which he is retired and which was found to exist as a result of a physical examination.

(4) The temporary grade to which he would have been promoted had it not been for the physical disability for which he is retired, if eligibility for that promotion was required to be based on cumulative years of service or years of service in grade and the disability was discovered as a result of a physical examination.

Chapter 8.D.5. of the Reserve Policy Manual, entitled "Grade on Retirement for 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 the member was serving when placed on the TDRL, or retired

b. The highest temporary grade or rank in which the member served satisfactorily

c. The permanent regular or Reserve grade to which the member would have been promoted had it not been for the physical disability which was found to exist as a result of a physical examination for promotion

d. The temporary grade to which the member would have been promoted had it not been for the physical disability, if eligibility for that promotion was required to be based on cumulative years of service in grade and disability was discovered as a result of that member's 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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.

2. An application to the Board must be filed within three years after the applicant discovers, or reasonably should have discovered, the alleged error in his record.[1] The applicant knew he had not been re-advanced to SK2/E-5 when he was retired from the Reserve in 2004. Therefore, his application is untimely.

3. Under 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."[2]

4. The applicant stated that he did not previously apply to the Board because he was unaware of its existence. This explanation is not compelling as nothing prevented the applicant from complaining about his pay grade and discovering the existence of the Board sooner.

5. A cursory review of the merits of this case shows that it lacks potential merit. The record shows that the applicant was reduced in rate from SK2 to SK3 at mast as punishment for evading a urinalysis.[3] Nothing in the record suggests that the applicant was advanced to SK2, authorized advancement, or entitled to advancement under applicable regulations[4] at any point between the date of his mast and the date of his retirement. Nor was he entitled to advancement upon his disability retirement under applicable laws.[5] The applicant's retirement as an SK3/E-4 is presumptively correct,[6] and he has not submitted sufficient evidence to overcome the presumption. Therefore, the Board finds that his claim cannot prevail on the merits.

6. 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]

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[1] 10 U.S.C. § 1552(b); 33 C.F.R. § 52.22.

[2] *Allen v. Card*, 799 F. Supp. 158, 164-65 (D.D.C. 1992); *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

[3] A positive urinalysis result would most likely have resulted in the applicant receiving a swift general discharge for misconduct, rather than retention and a disability retirement. Personnel Manual, Article 12.B.18.b.4. (stating that "[a]ny member involved in a drug incident … will be processed for separation from the Coast Guard with no higher than a general discharge").

[4] Reserve Policy Manual, Chapter 7.C.18; Personnel Manual, Article 5.C.33.b.

[5] 10 U.S.C. § 1372; Reserve Policy Manual, Chapter 8.D.5. The Personnel Manual authorizes temporary appointments as commissioned and warrant officers, but not petty officers. *See* Personnel Manual, Articles 5.A. and 5.B.

[6] 33 C.F.R. § 52.24(b); *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.").

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is denied.

Andrew D. Cannady

Nancy L. Friedman

Dorothy J. Ulmer