

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-143

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

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 case on June 20, 2007, upon receipt of the completed application, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 10, 2008, 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 asked the Board to correct his military record by advancing him to chief machinery technician (MKC; pay grade E-7) in the Reserve retroactive to the 2000 Reserve SWE cycle.

The applicant stated that he discovered the alleged error on October 18, 2000, but the Board should waive the statute of limitations in the interest of justice because it has taken approximately seven years for anyone to listen to his problem.

APPLICANT'S ALLEGATIONS

The applicant is a machinist mate first class (E-6) in the retired Reserve (Ret-2) with over twenty years of Coast Guard service. He alleged that the education service officer (ESO) LTJG D¹ for the unit to which he was assigned for the period involved discriminated and retaliated against him by refusing to allow him to take the 2000 and 2001 Reserve service wide examinations (RSWEs).

¹ LTJG D was the ESO for the 2000 and 2001 RSWEs. She also served as the proctor. Therefore, LTJG D may be referred to in this decision as the ESO or the proctor.

With respect to the 2000 RSWE, the applicant stated that it was held in the galley from 0830 to 1100, with the ESO serving as proctor. The applicant stated that he arrived for the exam at 0815 and the proctor was instructing participants on how to complete the pre-exam forms. He stated that he told LTJG D that he had not received an exam, to which she allegedly replied that the applicant's exam was still in her office and that she would get it once the pre-exam phase was completed. The applicant claimed that when the pre-exam phase was completed, the proctor left the exam area to retrieve his exam and did not return until 1010. According to the applicant, the ESO then told him he had to complete the exam by 1100. The applicant stated that he objected to the shortened time and the ESO stated that he could take it or leave it. He then complained to his supervisor, MKCS B. According to a statement from MKCS B dated April 27, 2007, he spoke with LTJG D on behalf of the applicant and explained that the applicant would not have sufficient time to complete the exam. MKCS B stated that he offered to proctor the exam for the applicant, but LTJG D refused the offer. MKCS B also noted a problem with the applicant not taking the examination the following year, which he stated he brought to the attention of the engineering officer and the executive officer (XO).

Regarding the 2001 RSWE, the applicant stated that he received a letter in September 2001 stating that he was eligible to participate in the 2001 RSWE. He claimed that when he arrived to take that exam, LTJG D told him that because she had sent the incorrect social security number for him when ordering the examinations, the unit did not receive a test for the applicant. He stated that he complained about his lack of participation to MKCS B.

The applicant stated that he took the RSWE in 2002 but was not advanced from that list because he was below the cut-off for guaranteed advancement. According to the advisory opinion, he placed 80 out of 86, and the cut-off was 43.

In October 2003, the applicant stated that he was not allowed to take the RSWE by a different ESO because he did not have 24 months of service remaining prior to reaching his sixtieth birthday as of January 1 following the October 2003 RSWE. Reserve regulations require the removal of a reservist from the active reserve at age 60. Regulations also require a member to have 24 months of service eligibility remaining from January 1 of the year following the examination to compete for advancement to E-7 (chief petty officer).

The applicant explained his belief that LTJG D discriminated against him because in 2000 he reported her to the commanding officer (CO) for leaving the unit without checking out during an active duty training (ADT) event. The applicant claimed that the CO directed him to find LTJG D and to inform her to report to the CO. The applicant speculated that the CO reprimanded the LTJG, and he stated from that moment he felt that she did not have an interest in his career.

On January 20, 2006, the applicant wrote to his senator requesting an investigation into the actions of his command. On March 7, 2006, LCDR C of the Coast Guard Congressional and Governmental Affairs Staff responded to the senator. LCDR C stated that the Office of Reserve Affairs had conducted an informal inquiry and that, due to the lapse of time, recollections of the events were unclear. LCDR C told the senator that it was against Coast Guard policy to impede

the advancement of any member and that any such action would not be tolerated. LCDR C stated that since the applicant had retired, his only option was to petition the BCMR.

VIEWS OF THE COAST GUARD

On November 6, 2007, the Board received the views of the Coast Guard from the Judge Advocate General (JAG), stating that the Coast Guard adopted the analysis provided by the Commander, Coast Guard Personnel Command (CGPC) as the advisory opinion. CGPC recommended that the Board deny relief to the applicant.

CGPC obtained and submitted an email string from YNCM B of the Personnel Service Center. YNCM stated that the Coast Guard has no record that the applicant completed the October 2000 RSWE or 2001 RSWE. This individual stated that the applicant took the 2002 RSWE and placed 80 out of 86 candidates. The cut-off for the 2002 RSWE was 43. In addition, YNCM B stated that examinations are shipped automatically for eligible members and not "ordered." In this regard, YNCM B stated with respect to 2001 RSWE that "If [the applicant] was qualified [for the exam] it was shipped, and if it was shipped, he did not take it, as he's not on our list of members who completed the exam in 2001."

CGPC also obtained a statement from the ESO, LTJG D. She denied the applicant's allegations. In this regard, she denied that she was ever reprimanded by the CO and submitted her OER for the period to show that she performed her duties in an excellent manner. She stated that she proctored the October 2000 RSWE and could not remember whether she had the applicant's examination in hand when she started proctoring the exam. She stated that she could not imagine not bringing all of the RSWEs examinations that were locked in the safe because she knew that as the proctor she could not leave the area while members were taking the examination. The ESO denied that she left to get the applicant's exam and did not return until 1010 and that she told the applicant that he had until 1100 to finish the exam. She also denied that she discussed the issue of the applicant not having sufficient time to complete the exam with MKCS B. LTJG D also stated the following:

[The applicant] states "LTJG [D] informed me that she had sent the wrong SSN and that a test wasn't received." ESO's do not ORDER RSWE. They are sent by HRSIC only if the member has completed the necessary EOCTs and earned enough points to qualify. ESOs do not order EOCTs by SSN. However I believe [the applicant] had already taken all of the necessary rating exams if he sat for the Chief's RSWE the year before.

CGPC concluded the advisory opinion with the following:

The Coast Guard is presumed to have followed applicable policies with regards to this case and based upon the information presented by the applicant and the statement of the ESO the applicant has not substantiated that he was erroneously deprived of the opportunity to participate in the RSWE during 2000 and 2001. Additionally, had there been an error with the administration of the examinations, procedures allow for requesting a substitute examination which records revealed

was not requested by the applicant. Given the seven year delay in filing [the BCMR application] and the lack of any official records supporting the applicant's assertions, there is insufficient evidence to support any error or injustice on behalf of the applicant.

The applicant's basis that he should be promoted off of the October 2000 RSWE which he did not take is not supported. Given the applicant did not take either the October 2000 or the 2001 RSWE there is no factor that could be utilized to determine appropriate placement, and the applicant's subsequent RSWE multiple does not support that he would have had a sufficient score for advancement off of the previous RSWE.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 20, 2008, the Board received the applicant's response to the views of the Coast Guard. He disagreed with them.

The applicant restated many of the allegations made in his application. With respect to the Coast Guard's comment that it had no record of the applicant having taken the 2000 RSWE, the applicant stated that he did not take the exam because he was not allotted the full 3.5 hours to complete the exam. He stated that Coast Guard regulation states that "*There is currently no official policy which prevents a member from being allowed to start a SWE after the locally scheduled exam time. The policy only states that the test be administered in the 'a.m.' or 'p.m.' as announced in the SWE message for each cycle.*" (Emphasis in original.) He stated that he did not request a substitute exam because he was not aware he could do so. He argued that it was LTJG D's responsibility as the ESO to make sure that all steps were taken for each member to participate in the exam.

In response to LTJG D's statement that she could not remember whether she did or did not have the applicant's exam in her hand for the 2000 RSWE, the applicant stated that under the regulation LTJD D, as the ESO, was supposed to compare the list of candidates recommended for the exam against the list of examinations received, and that if a test for an eligible candidate was not received, she was supposed to notify PSC immediately.

The applicant further stated that under the regulation, upon receipt of the SWEs, the ESO must notify all candidates, in writing of the exam received, date, time and location of their test. The applicant asserted that he received notification of the exam date and time and reported accordingly.

Regarding, the 2001 RSWE, the applicant offered the following:

In September 2001, I received the letter from the service exam office in the mail at my home, informing me I was on track for the October 2001 service wide exam. When our duty weekend came around in October, I arrived at the Coast Guard station in San Pedro anticipating taking the service wide exam. After quarters, [and] after not hearing my name called by [the ESO] as one of the

eligible members who would be taking the service wide exam, I spoke with [the EO] about why my name had not been called. [The ESO] stated that she had accidentally sent the wrong social security number in for me and therefore no exam had been sent for me this year. I admit, I lost my bearing and called [the ESO] a liar. I told her that the test was sent, and that I had received notice from the service exam office. [The ESO] claimed this was not true, and that no exam had been sent for me this year.

The applicant alleged that an exam had been sent for him and that it was received by the ESO. He further alleged that the exam was returned to Kansas as not taken. He alleged that if the ESO did not receive an exam for him, she had sufficient time to notify Kansas and obtain one.

The applicant stated that after he retired in 2006, he spoke with a Department of Veterans Affairs representative about the situation and was advised to contact his Senator's office, which he did. He stated that the Senator's staff told him that exams were sent out automatically for each eligible member and that the exam sent to the command for him in 2001 was returned unused. The applicant indicated that an investigation was done as a result of his contact with the Senator's office, but he was not provided with a copy of it.

The applicant alleged that the ESO's treatment of him with respect to the RSWEs amounted to discrimination, retaliation, and a misuse of authority. He stated that he complained to his command by speaking with his supervisor, MKCS B. He stated that at no time did the command perform a formal investigation. The applicant stated that he sought help from other officers and senior enlisted members within the command but no one could do anything to help him.

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. The first issue to be resolved is whether the applicant's application regarding the 2000 and 2001 RSWEs was timely. To be timely, an application for correction of a military record must be submitted within three years after the applicant discovered or should have discovered the alleged error or injustice. See 33 CFR 52.22. Between 2000 and 2006, the applicant performed approximately one year of active duty, which under Detweiler v. Pena, 38 F.3d 591 (D.C. Cir. 1994) tolled the statute of limitations for that period of active duty. With Detweiler in mind, the Board finds that the applicant's issue with respect to the 2000 RSWE is untimely by two years and the issue with respect to the 2001 RSWE is untimely by approximately one year.

3. The applicant stated that although he discovered the alleged error in 2000 (and presumably the other in 2001) he could not get anyone to take his claim seriously until he

contacted his Senator's office in 2006. There is evidence in the record that the applicant complained to MKCS B in 2000 and 2001 about what he perceived to be unfair treatment with regard to the RSWE. There is also some evidence that he complained to others in the Coast Guard about alleged unfair treatment, although the dates on which these contacts were made are unclear. The Board is persuaded that the applicant made some effort to correct the alleged errors prior to filing his application with the Board. However, making good faith attempts to correct an alleged error is an insufficient basis *per se* on which to waive the three year statute of limitations. The Board may waive the statute of limitations in the interest of justice, which is determined by taking into consideration the reasons for and the length of the delay and the likelihood of success on the merits of the claim based upon at least a cursory review. See Allen v. Card, 799 F. Supp. 158, 164 (D.D.C. 1992).

4. With respect to the merits, the Board finds that the applicant has submitted insufficient evidence to prevail upon any of his allegations. The applicant has submitted no evidence, except for his own allegation, to prove that the ESO was motivated to retaliate and discriminate against him by denying him the opportunity to participate in the 2000 and 2001 RSWE because she was reprimanded by the CO based upon a report that the applicant made to the CO. The ESO denied that she was reprimanded and MKCS B stated that he had no proof of wrong doing and would not ascribe negative motives to the command. In addition, the ESO submitted a copy of her OER for the period April 1, 2000 to July 31, 2001, which showed that the rating chain's evaluation of her performance was commendable. The applicant has failed to submit sufficient evidence to prove that his non-participation in the 2000 and 2001 RSWEs resulted from discrimination or retaliation against him by the ESO.

5. Nor has the applicant proved that the Coast Guard committed any other error or injustice with respect to his non-participation in the 2000 and 2001 RSWEs. The applicant has provided insufficient evidence for the Board to determine whether his non-participation in the 2000 RSWE was due to Coast Guard error. There is evidence in the record to show that the applicant reported for the 2000 examination, but the record is silent, except for applicant's contentions, as to why he did not take the exam. The applicant did not submit proof that he was eligible to take the 2000 examination. The fact that the applicant showed up for the examination does not mean he was eligible to participate or that HRSIC had sent an examination for him. The applicant could have submitted his Personnel Data Extract, which is the document he would have received from HRSIC informing him whether he had met all eligibility requirements for the RSWE. Without this document or some other proof, the Board has no way of knowing whether the applicant was even eligible for the 2000 RSWE.

6. Additionally, the applicant provides no corroboration for his allegation that the examination, including the muster and pre-test matters, was scheduled to begin at 0830 and to end at 1100. In this regard, Article 5.D.7.d. of the Coast Guard Personnel Manual states that the exact time schedule is left to the discretion of the CO, but stated that the following schedule shall apply unless deviation is considered necessary:

0800 Candidates with ID cards and proctors muster.

0810 Distribution of sealed examination envelopes and all other material required for administration.

0820 Reading of "Verbatim Instructions to Candidates" provided with examinations, and filling in of required information, if needed.

0830 Commence examination. TIME LIMIT: THREE-AND-ONE-HALF (3 1/2) hours:

7. Moreover, Article 5.D.8.a. of the Personnel Manual states that on the date scheduled for the examination, the examining board will muster the candidates and seat them in the room according to the planned arrangement. After distributing the required examination material, a member of the examining board will read the "verbatim instructions to the candidates" furnished by the Coast Guard Institute. The applicant stated that he arrived at 0815 for the test. The applicant's arrival time is critical because if he was late, the ESO, as the single proctor for the RSWE, could not have obtained the applicant's examination from her office, if there was indeed one for the applicant, until she had collected the tests already distributed. Article 5.D.8.b. states that at least one member of the examining board will be present at all times during the administration of the examinations. The applicant has presented no evidence that there was more than one proctor for the RSWE. The Board further finds that even if MKCS B offered to proctor the examination for the applicant, the ESO's refusal would have been in accordance with the Personnel Manual. First, the MKCS was not a member of the examining board and therefore could not serve as a proctor. See Article 5.D.6. of the Personnel Manual. Second, Article 5.D.7.d. of the Personnel Manual states that the time scheduled for administering the examinations shall not be exceeded.

8. The applicant indicated that fifteen other individuals took the 2000 RSWE, but he submitted no statements from any of them to corroborate his allegations. The applicant has the burden of proof before the Board. He has failed to prove that he was eligible for the 2000 RSWE, that HRSIC sent an examination for him, or that assuming he was eligible and had a designated test from HRSIC, he was on time for the scheduled muster and start of the examination process.

9. Again, with respect to the 2001 RSWE, the applicant has failed to submit sufficient evidence to prove that his lack of participation in that exam was due to error or injustice on the part of the Coast Guard. The applicant alleged that he received notification that he was on track to take the exam but did not submit proof of that to the Board. He alleged that the ESO told him at the time of examination that she did not have an examination for him because she submitted an incorrect social security number for him when ordering the tests. However, the ESO stated that exams are not ordered but are sent directly from Human Resources Service and Information Center (HRSIC) for each individual eligible to take the examination. The ESO's statement is corroborated by YNCM B that exams are shipped automatically for eligible members. This individual stated that "If the [applicant] was qualified [an exam] was shipped, and if it was shipped, [the applicant] did not take it, as he's not on our list of members who completed the exam in 2001." Moreover, Article 5.C.4.f. of the Personnel Manual states that the CO, HRSIC is responsible for preparing, printing, distributing, accounting, and scoring SWEs. The applicant

claimed, but failed to prove, that an examination was sent for him and returned unused to HRSIC. In light of the above, the applicant has failed to prove that his non-participation in the 2001 RSWE was due to any error or injustice by the ESO.

10. It is not clear from the record whether the applicant is claiming that he was unfairly denied an opportunity to participate in the 2003 RSWE. Article 8.C.1. of the Reserve Policy Manual sets 60 as the mandatory retirement age for reservists. Article 7.C.5.a. of the Reserve Policy Manual states that E-7, E-8, and E-9 candidates must have at least two years of Selected Reserve (SELRES) eligibility remaining as computed from the 1 January terminal eligibility date to be eligible for advancement. The applicant would have reached his maximum retirement age of 60 on October 14, 2005, and therefore did not have two years of eligibility remaining as of January 1, 2004. Therefore, the Coast Guard complied with the regulation in not permitting the applicant to participate in the 2003 RSWE.

11. The applicant stated that he wanted the matter of his non-participation in the RSWEs investigated. LCDR C in a 2006 letter to the applicant's Senator stated that the Coast Guard performed an informal investigation, but nothing could be determined because memories as to what happened had faded. The Board notes that the applicant has the burden of proving his case by a preponderance of the evidence. In addition under the Board rules the applicant is responsible for procuring and submitting such evidence, including official records, as the applicant desires to present in support of his application. See 33 CFR § 52.24. In this case, the applicant has failed to produce the necessary evidence to prove that the Coast Guard committed an error or injustice with respect to the 2000, 2001, or 2003 RSWE.

12. The Coast Guard raised the issue that no substitute examinations were requested for the applicant for the 2000 and 2001 RSWEs. Article 5.D.3.b. of the Personnel Manual states that the CO must justify requests for substitute examinations by showing that a member was fully qualified for the SWE and that the member's absence from the regularly scheduled examination must have been through no fault of his or her own and that it was due to emergency leave, illness or hospitalization, or operational commitments. The applicant has not established that he met the requirements for a substitute examination for any of the RSWEs in which he did not participate.

13. The Board also notes that that without proof of an error or injustice in the RSWE process, there is no basis on which to consider advancing the applicant retroactively to pay grade E-7. In addition, the Board is not aware of any manner in which the applicant could be advanced retroactively even if error had been proven since he did not participate in the advancement process in 2000, 2001, or 2003.

14. Accordingly, the applicant's request should be denied because of its untimeliness and apparent lack of merit.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Dorothy J. Ulmer

Thomas H. Van Horn

Darren S. Wall