

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-161

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

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 upon receipt of the applicant's completed application on April 27, 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 February 4, 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 Coast Guard on December 12, 1990, asked the Board to correct his record to show that he was promoted to CWO3 before his retirement and retired at that rank. The applicant alleged that he was promoted to CWO3 while he was stationed in Italy. The applicant alleged that he was a CWO3 in Italy and throughout his processing for medical retirement in Houston, Texas, but a petty officer mistakenly typed CWO2 on his DD 214. He alleged that when he received his DD 214, he noticed the mistake and contacted the attorney who handled his medical processing. The attorney told him he would "take care of the matter." However, the error was not fixed. The applicant alleged that his retirement pay has been calculated based on his correct rank, CWO3, but that upon recent inquiry, someone told him that Headquarters had demoted him from CWO3 to CWO2 without cause. In support of his allegations, the applicant submitted copies of the following documents:

- Several photographs of the applicant in uniform do not clearly show his insignia indicating his rank. On two photos in which his insignia are shown clearly, the applicant wrote that the photographs were taken before his promotion from CWO2 to CWO3.
- An undated letter concerning the applicant's attainment of 20 years of satisfactory service for the purpose of retirement refers to him as a CWO2.
- A letter dated June 3, 1989, from a lieutenant commander to the applicant, a CWO2, welcoming him to his new unit in Italy.

- A letter from the commanding officer (CO) of Loran Station Sellia Marina, Italy, dated February 9, 1990, requests patient information for the applicant, who is referenced as a CWO3.
- A record of an electrocardiogram dated March 21, 1990, shows the applicant's rank as CWO3.
- Doctors' orders date stamped March 21, 1990, include the notation "CW3."
- A letter from a JAG attorney dated September 25, 1990, to the applicant, whom he addressed as a CWO3, concerns his processing under the Physical Disability Evaluation System (PDES).
- The applicant's rejection of the findings and recommendation of the Central Physical Evaluation Board (CPEB), dated November 24, 1990, shows that he signed the rejection as a CWO3.
- The applicant's DD 214, dated December 11, 1990, shows his rank as CWO2.
- A Certificate of Appreciation from the President to the applicant upon his retirement refers to the applicant as a CWO2.
- A letter from the commanding officer (CO) of the Marine Safety Office (MSO) in Houston to the BCMR dated August 20, 1991, states that the applicant, a CWO2, was assigned to the MSO during his medical "outprocessing." The CO wrote that the "medical board process was filled with inconsistencies, delays, lost paperwork, confusion, and culminated in his retirement while [a hospital] inpatient in serious condition. In addition, serious questions remain concerning his treatment following his illness and prior to the medical board process. ... In my opinion, a full review of CWO2 [the applicant] case is needed and remedial action taken."¹
- A letter dated February 24, 1992, from a commander to the BCMR states that the applicant, a CWO2, was a fevered, delirious, incoherent hospital inpatient in dismal condition with a left leg swollen to almost twice its normal size on his date of retirement.
- A letter from a JAG attorney, dated February 17, 1993, addresses the applicant as a CWO4, and concerns his processing under the PDES pursuant to the order of the BCMR.
- A Rapidraft Letter dated October 25, 1995, from MSO Houston concerns the applicant's entitlement to a Commendation Ribbon for his service "in the outload operations in support of Operation Desert Shield." It refers to him as a CWO2.

¹ Some of the documents submitted by the applicant concern his prior applications to this Board, BCMR Docket Nos. 367-91 and 120-93, as a result of which his disability rating was raised.

- An email exchange dated March 31, 2010, in which the applicant asks a woman whether she has any photographs of their time in Italy and mentions a “wetting down” (promotion) party for him at the base when he was promoted to CWO3. She responded, “Let me see, I think I have a few photos of you, when your foot got swollen (same time of the promotion?) and we were all there.”
- An email exchange dated April 2, 2010, in which the applicant asked a retired Navy chief if he had any photographs of the parties celebrating the applicant’s promotion to chief petty officer, appointment to CWO, and promotion to CWO3. The Navy chief stated that he would look through his photographs and that he remembered drinking at the applicant’s retirement party.
- The applicant also submitted several documents concerning his medical condition that do not mention or refer to his rank.

The applicant alleged that it is in the interest of justice for the Board to waive its three-year statute of limitations and consider his case on the merits “[b]ecause this has been an ongoing problem and I have tried to get the problem corrected without filing a [DD] 149.” He also stated that after his disability rating was corrected by the BCMR, he underwent open heart surgery and was busy recovering from that.

SUMMARY OF THE RECORD

On September 20, 1987, following many years of enlisted service in the Reserve, the applicant executed an Oath of Office pursuant to his appointment as a Reserve warrant officer (WO-1), which was authorized to be effective as of December 29, 1987. The applicant’s 20-year retirement letter (undated) refers to him as a CWO2.

From June 4, 1989, until his separation on December 11, 1990, the applicant served on extended active duty in the Reserve. He was assigned to a LORAN station in Italy.

On February 22, 1990, the command of Air Station Houston sent a message to Activities Europe concerning the medical status of the applicant, noted to be a CWO2. A Statement of Creditable Service dated August 20, 1990, also refers to the applicant as a CWO2.

On September 11, 1990, the CPEB reviewed the applicant’s medical condition. The CPEB referred to the applicant as a CWO2. In a letter dated November 20, 1990, the Commandant informed the applicant, addressed as a CWO2, that he would be retired because of a permanent disability on December 12, 1990.

On December 11, 1990, the applicant was admitted to a hospital. The admission record shows that he listed his occupation as W-2 but that his insurance card, issued on July 6, 1990, stated his grade as W-3. Although in the hospital, the applicant was retired on December 12, 1990. A Computation of Retirement Point Credits signed by a chief yeoman on December 5, 1990, shows that the applicant’s rank was CWO2 and that he had 21 years, 6 months, and 18 days of satisfactory service in the Reserve upon his retirement.

On August 21, 1992, the BCMR issued a decision in BCMR Docket No. 367-91 ordering that the applicant, noted as a CWO2, be reprocessed under the PDES because he had not been accorded a hearing as he had requested. On his signed application form, DD 149, and on the brief in support of his application, the applicant noted his rank as CWO2. All of the correspondence concerning Docket No. 367-91 and the documentation of the applicant's subsequent reprocessing under the PDES, including correspondence from the applicant himself and from his attorney, also refer to him as a CWO2.

On a Servicemen's Group Life Insurance Election and Certificate that the applicant signed on December 3, 1992, he noted his rank as CWO2.

A medical report dated December 4, 1992, bears a stamp including the notation "CW3."

On January 25, 1993, the applicant's attorney asked the president of the CPEB to have the CPEB reconsider its recommendation based on new information from the applicant. He referred to the applicant several times as a CWO2 and included a typed letter from the applicant, dated January 19, 1993, in which the applicant referred to himself as a CWO2.

On September 28, 1993, the BCMR issued a decision in BCMR Docket No. 120-93, in which the applicant asked the Board to correct his disability rating to the rating recommended by the CPEB on February 5, 1993. On his signed application form, DD 149, the applicant noted his pay grade as "CWO-2 (RET)." The Board, referring to the applicant as a CWO2, ordered the record corrected to show that he was retired on December 12, 1990, with a 40% disability rating. All of the correspondence concerning Docket No. 120-93, including correspondence from the applicant's attorney, refers to the applicant as a CWO2.

VIEWS OF THE COAST GUARD

On September 1, 2010, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. The JAG argued that the application is untimely and should be denied on that basis because the applicant did not provide "any rationale in support of his undue delay or evidentiary support for his delay in filing this application from 1990 until present." In making this recommendation, the JAG adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

The PSC stated that although the applicant claims he has been trying to get his rank fixed since his retirement, he submitted nothing to show what steps he took before filing his latest BCMR application. In addition, the PSC alleged that the applicant's DD 214 correctly reflects his rank as a CWO2. In this regard, the PSC submitted a copy of a page from the 1991 Register of Reserve Officers, which shows that the applicant, whose signal number was [XXX]9 was a CWO2 and that based on his signal number, his CWO2 date of rank was deemed to be August 25, 1987.² The page also shows that the applicant's "peers"—CWO2s with signal numbers

² Because Reserve officer promotions are based on signal numbers and the promotion dates of active duty officers, it is not unusual for a Reserve officer's date of rank to differ significantly from their actual date of appointment.

above and below his—also had August 25, 1987, dates of rank and dates of appointment in autumn 1987. The PSC also submitted two pages of the 1992 Register of Reserve Officers. The first shows that the CWO2s who were the applicant's peers on the register in 1991 were promoted to CWO3 on August 25, 1991, more than eight months after the applicant's date of retirement. Another page from the 1992 register shows that the applicant retired as a CWO2 on December 12, 1990.

The PSC also submitted a copy of a memorandum, dated March 22, 2010, from its Reserve Personnel Management branch, which states that “[a]fter a thorough review of our attainable records, the highest grade satisfactorily held by [the applicant] was Chief Warrant Officer 2 (W2). We could not find any evidence that he was presented to nor selected by a board for promotion to Chief Warrant Officer 3 (W3).”

The PSC concluded that the applicant's “record does not support that he was ever properly promoted beyond the rank of CWO2, notwithstanding the few occurrences where he is incorrectly referred to as a CWO3 or CWO4 in various correspondences. Likewise, the pictures the applicant provided of himself wearing the uniform of a CWO3 or references the applicant made to a “wetting down” ceremony are not tantamount to an authorized promotion in rank and should never be construed as such.” The PSC stated that it is unclear why the applicant was ever under the impression that he was a CWO3 because the record “in no way supports this assumption.”

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 29, 2010, the applicant responded to the views of the Coast Guard. The applicant stated that “[w]hile it is true it has been 19 years after I retired, it was noted that I did contact the Command and my Counsel within a month, and your records show I was in the hospital on the day I was retired and it would have been impossible to file a complaint.” The applicant stated that when he inquired about his rank in 1996, he was advised to contact the National Personnel Records Center and he did so but never heard back. Then in 1999, he underwent a heart bypass and valve replacement operation, and “everything else [went] on the back burner.” When he contacted the records center again, he was told to submit information, which he did, and ultimately received back a DD 149 BCMR application form. The applicant stated that he is not seeking money from the Coast Guard but that his rank is a matter of pride.

On January 7, 2011, the applicant submitted a copy of ALDIST 173/89, which was issued on September 2, 1989, and published the results of the Reserve CWO selection boards for temporary and permanent promotions to CWO2, CWO3, and CWO4. The list shows that the applicant was selected for “W-2 (PERM) WITH CONCURRENT SELECTION TO W-3 (TEMP).” The most of CWOs listed above and below the applicant on the list are the same CWOs who were listed above and below his name on the 1991 Register of Reserve Officers.

APPLICABLE REGULATIONS

Regulations about Promotions

Chapter 7-B-2 of the Reserve Administration Manual (RATMAN) in effect in 1990 provided the following definitions:

- a. Date of Promotion – Is the date when all requirements for promotion have been completed, and the Commandant exercises promotion authority. Pay and allowances begin on the date of promotion in the grade to which an officer has been appointed, if in a pay status, and the insignia of the higher grade may first be worn on that date.
- b. Date of Rank – Is the date used in computing eligibility for subsequent promotions. This date will be the same as or earlier than the date of promotion.

Chapter 7-B-4.a. of the RATMAN stated the following regarding permanent promotions of CWOs:

Permanent warrant officers are eligible for permanent promotion to the next higher pay grade as follows:

- (1) W-1 to W-2 – three years service from date of rank as permanent W-1
- (2) W-2 to W-3 – six years service from date of rank as permanent W-2
- (3) W-3 to W-4 – six years service from date of rank as permanent W-3

Chapter 7-B-5.a. of the RATMAN stated the following regarding temporary promotions of CWOs:

Eligibility for temporary promotion of warrant officers will occur in accordance with the following schedule:

- (1) W-1 to W-2 – Enlisted personnel who accept appointment as a permanent W-1 will immediately be promoted to the temporary grade of W-2 with the same date of rank
- (2) W-2 to W-3 – four years service from date of original appointment as W-1
- (3) W-3 to W-4 – eight years service from date of original appointment as W-1

Chapter 7-B-6.b. of the RATMAN states that the “zone” of warrant officers eligible for selection for promotion by a selection board includes those warrant officers

who become eligible for promotion to permanent W-2 and temporary and permanent W-3 and W-4 as defined in 7-B-4 and 7-B-5, between 1 October of the calendar year in which the board is held and 30 September the following year. Since warrant officers are considered for promotion in both their permanent and temporary grades simultaneously, the following schedule applies:

- (1) Chief warrant officers will be in their second year of service for promotion to permanent CWO2. Selection for permanent W-2 will result in a concurrent selection for temporary W-3. ...
- (2) Chief warrant officers will be considered in their seventh year of service for promotion to temporary W-4. Selection for temporary W-4 will result in a concurrent selection for permanent W-3. ...
- (3) Chief warrant officers will be considered in their fourteenth year of service for promotion to permanent W-4. ...

- (4) Promotion to temporary and permanent grades will be made after selection and upon completion of the years in grade specified in 7-B-4 and 7-B-5.

Chapter 7-B-10 of the RATMAN lists the following requirements for promotion:

- a. be on a promotion list,
- b. complete time in grade requirements of 7-B-4 or 7-B-5,
- c. be physically qualified as evidenced by a current approved physical examination documented by PMIS data base entry,
- d. be in an active status, [and]
- e. character of service since selection has been satisfactory.

Chapter 7-B-12.a. of the RATMAN states that CWOs “will be notified of promotion by the ROPAL as described in paragraph 7-A-9.e. of this instruction,” which in turn states that “Reserve officers will be notified of their promotions through the Reserve Officer Promotion Authorization Listing (ROPAL).”

Regulations about Retirement

Chapter 12-D-5 of the RATMAN, 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 he or she was serving when placed on the Temporary Disability Retired List, or retired,
- b. The highest temporary grade or rank in which he or she served satisfactorily,
- c. 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.

Chapter 12-C of the RATMAN concerned the retirement for reasons other than disability of Reserve CWOs serving on inactive duty and referred the reader to the Personnel Manual for the rules governing Reserve CWOs being retired from extended active duty. Chapter 12-C-15.c.(2) of the Personnel Manual, entitled “Grade or Rate in Which Retired,” stated the following:

Unless entitled to a higher retired grade under some other provision of law, a chief warrant or warrant officer retires, as determined by the Commandant, in the permanent chief warrant or warrant grade, if any, that he/she held on the day before the day of his/her retirement, or in any higher warrant officer grade in which he/she served on active duty satisfactorily, as determined by the Commandant, for a period of more than 30 days.

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 submission, 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, or reasonably should have discovered, the alleged error or injustice. The applicant was retired as a CWO2 in December 1990 and signed several documents as a CWO2 following his retirement. Therefore, he clearly knew of the alleged error in his record soon after his retirement, and his 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, 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. Regarding the delay of his application, the applicant stated that he has tried to have his rank corrected without applying to the BCMR and that after the BCMR corrected his disability rating, he had to undergo open heart surgery and was in recovery. The Board finds, however, that if the applicant believed his rank was erroneous, he should have and could have filed an application about it when he filed his first two applications to this Board. In the early 1990s, the facts about his rank would have been readily available to the Personnel Command. The fact that the applicant underwent open heart surgery in the mid 1990s does not justify his 20-year delay in applying to this Board. Nor has he submitted anything to show that during the last 20 years, he has diligently been trying to get his rank corrected in another way. The Board finds the applicant's delay in seeking relief to be unjustified in the record.
5. In addition, the Board's review of the merits of this case indicates that it cannot prevail on the merits. The record shows that the applicant was appointed a warrant officer (W-1) with a retroactive date of rank of August 25, 1987, based on his signal number. In accordance with Chapter 7-B-5.a.(1) of the RATMAN, he became a temporary W-2 with the same date of rank as soon as he was appointed to W-1. In 1989, he was *selected* for promotion to permanent W-2 and for promotion to temporary W-3, in accordance with Chapter 7-B-6.b.(1). Chapter 7-B-4.a.(1) stated that a member had to complete three years of service as a W-1 before being permanently promoted to W-2. Chapter 7-B-5.a.(2) stated that a member had to complete “four years service from date of original appointment as W-1” to receive the promotion to temporary W-3. Therefore, the applicant received his promotion to permanent CWO2/W-2 on August 25, 1990, exactly three years after his date of rank, and he would have received his promotion to temporary CWO3/W-3 on August 25, 1991, four years after his date of rank, had he remained in the Service. However, the applicant was retired on December 12, 1990, before his temporary promotion

was authorized. Thus, the record shows that although the applicant was selected for promotion to temporary CWO3/W-3 at the same time that he was selected for permanent promotion to CWO2/W-2, he remained in the Service long enough to have the time in grade for his promotion to permanent CWO2/W-2 but not long enough to have the time in grade required for his promotion to temporary CWO3/W-3. This conclusion is supported by the fact that his peers on the Register of Reserve Officers have W-3 dates of rank of August 25, 1991—exactly four years after their date of rank as a W-1.

6. Under Chapter 12-D-5.a. of the RATMAN, the applicant was properly retired at his permanent W-2 rank at the time he retired. Although he had been selected for promotion to temporary W-3, he was never promoted to that rank, so paragraph b of Chapter 12-D-5 does not apply. Because he was never selected for promotion to permanent W-3, paragraph c does not apply. Under paragraph d, his selection for promotion to temporary W-3 would only have warranted his retirement as a W-3 if his disability had been discovered during the physical examination required for the promotion. There is no evidence that the applicant's disability was discovered during the physical examination required for the promotion.

7. The Board also notes that the vast majority of the documents in the record show that the applicant was a CWO2/W-2 upon his retirement. Moreover, he referred to himself as a CWO2/W-2 in his two applications to the BCMR following his retirement; on his life insurance certificate dated December 3, 1992; and on a letter he wrote dated January 19, 1993. Based on all of the documentary evidence and the regulations in effect at the time regarding permanent and temporary promotions and time-in-grade requirements, the Board finds that the applicant's claim cannot prevail on the merits.

8. 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 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCGR (Retired), for correction of his military record is denied.

Philip B. Busch

Nancy L. Friedman

Lynda K. Pilgrim