

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 1997-067

FINAL DECISION

Deputy Chairman:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14, United States Code. It was docketed on February 23, 1999, upon the Board's receipt of the applicant's complete application for correction of his military record.

This final decision, dated December 9, 1999, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a former yeoman third class (YN3; pay grade E-4) asked that his "date of enlistment [be] made retroactive to his original commitment." The applicant enlisted on November 24, 1980. He asked the Board to correct his record to show that he enlisted in the delayed enlistment program (DEP)¹ three months earlier than his actual enlistment date. He alleged that such a correction to his record would increase his retired pay.

The applicant was discharged from the Coast Guard on November 23, 1984, after serving 4 years on active duty. He is currently serving in the Army National Guard.

The applicant stated the following in support of his application:

I am concerned about the difference in overall compensation and reflecting on my own enlistment experience, am certain the recruiter in my case did not offer me the option of DELAYED ENTRY as a way to establish an earlier PAY BASE DATE. I remember this because I was originally scheduled to enlist in the summer of 1980, except that at the last moment there was no space available at Camp May, NJ Basic Training Center as had been promised.

¹ The delayed enlistment program, within the discretion of the Coast Guard, permits individuals who have made definite active duty commitments to enlist in the Reserve and to delay beginning their active duty commitments for a period of up to one year. This program is mainly used to recruit students in their last year of high school.

[S]ince I was ready and waiting for induction, and eventually did in fact enlist, it only makes common sense that had I been given the opportunity, I would have chosen to enlist early and start establishing an INITIAL PAY ENTRY DATE to accumulate longevity for pay purposes.

The applicant stated that he did not discover the alleged error until December 1998. He stated that it is in the interest of justice to waive the three year statute of limitations in his case because "[r]ecent efforts to restructure [the] [r]etirement [s]ystem have revealed that there are differences in the three-tier [r]etirement categories that [he had] been unaware of and was not informed of."

Applicant's Coast Guard Military Record

The applicant's enlistment contract indicates that he did not enlist in the Coast Guard's delayed enlistment program. The enlistment contract shows that he enlisted in the active duty Coast Guard on November 24, 1980.

An administrative remarks (page 7) entry dated November 24, 1980 states that the applicant enlisted this date for a period of four years and was immediately transferred to Training Center, Camp May for recruit training.

Views of the Coast Guard

On November 3, 1999, the Board received an advisory opinion from the Chief Counsel of the Coast Guard. He recommended that the Board deny relief in this case.

The Chief Counsel stated that this application should be denied because the applicant has failed to state a valid claim for relief that would merit the waiver of the statute of limitations. The Chief Counsel stated that the applicant alleged that he should have been counseled prior to his enlistment about the implementation of legislation that would reduce potential retirement benefits. The Chief Counsel further stated that the applicant alleged that if he had been properly counseled, he would have enlisted earlier or entered the delayed enlistment program prior to the effective date of any legislation that would cause a reduction in potential retired pay.

The Chief Counsel stated that the law affecting retirement, about which the applicant is concerned, became effective in 1980. Therefore, according to the Chief Counsel, the applicant should have been aware of the alleged error within three years of his November 23, 1984 discharge. The Chief Counsel stated that instead, the applicant waited approximately 12 years before filing his application with the Board.

The Chief Counsel stated that a cursory review of the merits reveals that the applicant has failed to establish that the Coast Guard had a duty to enlist him prior to

the implementation of the 1980 retirement legislation. The Chief Counsel stated that claims regarding enlistment rights and obligations are generally decided under the traditional notions of contract law. The applicant's enlistment contract does not contain a promise or condition indicating that he was enlisting for pre-1980 retirement benefits. The Chief Counsel argued that the applicant can only claim those benefits that inured to him as a result of his lawful entry on to active duty on November 24, 1980.

The Chief Counsel stated that under the delayed enlistment program (DEP), the Coast Guard has broad discretion to manage its active duty workforce by encouraging early enlistment according to service needs. Whether to use DEP to induce an enlistment at all, or to use it in a limited or broad fashion, was a matter entirely within the discretion of the Coast Guard. Thus, the implementing policy for the DEP did not provide any potential recruit entitlement or right to early entry.

Applicant's Response to the Views of the Coast Guard

On November 3, 1999, the applicant was provided with a copy of the views of the Coast Guard and told that he could submit a response. He did not submit a response.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's record and submissions, the Coast Guard's submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10, United States Code. The application was untimely.
2. To be timely, an application for correction of a military record must be submitted within three years after the discovery of the alleged error or injustice. See 33 CFR 52.22. The Board may still consider the application on the merits, however, if it finds it is in the interest of justice to do so. See Allen v. Card, 799 F. Supp 158 (D.D.C. 1992). In determining the interest of justice, the Board should consider the length of the delay, the reasons for the delay, and the potential for success on the merits. Id.
3. According to the Coast Guard and the applicant did not disagree, the legislation about which the applicant is concerned occurred in 1980. Therefore the applicant had sufficient opportunity, within three years after his discharge in 1984, to discover the alleged error or injustice with respect to his enlistment. His explanation that he did not discover the alleged error until December 1998 does not explain why he could not have discovered the alleged error sooner.
4. Moreover, based upon a cursory review of the merits, the applicant can not prevail. The only enlistment date established by the military record is November 24, 1980. In this regard, the applicant has presented no evidence that he was even considered for earlier enlistment through the delayed enlistment program. Even the

applicant states that the program was not offered to him. The fact that he was ready to be enlisted in the summer of 1980, does not mean that the Coast Guard was ready to enlist him or that the Coast Guard committed an error or injustice by not offering to place him into the delayed enlistment program. Enlistments in the delayed enlistment program are within the discretion of the Coast Guard and the applicant has not shown the Coast Guard improperly exercised that discretion.

5. Therefore, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case. Accordingly, his application should be denied.

ORDER

The application of [REDACTED] USCG, for correction of his military record is denied.

[REDACTED]