

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-058

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. It was docketed on January 20, 2004, upon the BCMR's receipt of the applicant's completed application and military records.

This final decision, dated September 23, 2004, is 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 retired from the Coast Guard on December 1, 1972, asked the Board to correct his record to show that he was advanced to and retired ██████████ ██████████ in pay grade E-7, rather than as a ██████████ ██████████ in pay grade E-6.

The applicant alleged that prior to his retirement, he took and passed the service-wide examination (SWE) for advancement and was on the list for promotion to ██████████. However, the Coast Guard "changed the policy for advancement and did away with the chief's list." The applicant argued that he should have been advanced to chief under "the policy in effect at the time that I took, passed, and qualified for chief. Changing the rules after the fact [was] unjust." The applicant argued that his military records show that he was "honorable, patriotic, and unusually qualified for advancement to E-7."

The applicant argued that the Board should waive the statute of limitations because "[i]njustice—like murder—has no statute of limitations." He noted that he recently received a medal from the South Korean government 50 years late and so decided to see if the Government would "right this wrong."

SUMMARY OF THE APPLICANT'S RECORD

On November 26, 1956, the applicant enlisted in the Coast Guard as a [REDACTED]. He had previously served almost four years on active duty in the Navy. As a [REDACTED] the applicant spent almost his entire career assigned to cutters. On August 16, 1957, he advanced to [REDACTED]. In 1961, he took and passed a "C School" course for advancement. In 1965, while serving on the [REDACTED], the applicant advanced to [REDACTED]. From June 23, 1966, to June 20, 1967, the applicant served aboard the [REDACTED].

From August 12, 1967, to September 30, 1968, he served aboard the [REDACTED]. On both August 22, 1967, and July 29, 1968, his commanding officer recommended him for advancement to [REDACTED]C and nominated him to take the SWE for advancement. However, he was not advanced.

From October 6, 1969, to January 22, 1970, the applicant served temporary duty aboard the [REDACTED].

On January 25, 1970, the applicant was reported to the [REDACTED]. On March 3, 1970, the applicant's commanding officer (CO) on the [REDACTED] sent the Commandant the following message:

1. [The applicant] participated in service wide exams this date *upon my authorization only*. [Emphasis added.]
2. Form 1430/2 and diary entry not submitted due to confusion upon subject transfer to this command. We will submit these upon transfer of mail when relieving ... 6 March.
3. [The applicant's] performance and service record indicate to me that he is fully qualified.
4. Completed exam will be forwarded upon return to port on 4 April with remainder of our examinations.
5. Completed exam can be destroyed without submission if foregoing is not acceptable.

On March 6, 1970, the Commandant sent the CO of the [REDACTED] a message disapproving his action. A handwritten note accompanying this message in the applicant's record states that in October 1966, the applicant had been "found incompetent and given 10 day warning" by his CO on the [REDACTED]; that in August 1967 and July 1968, he had been recommended to take the SWE by his CO on the [REDACTED]; and that he had reported to the [REDACTED] on January 25, 1970. The note also states that the applicant "is 42 yrs old with 17 yrs of service. Has been [REDACTED]1 since 5-16-65. Finished last enlistment in 1966 with 3.49 [for proficiency on a scale of 4.0]; 3.48 [for leadership] and 4.0 [for] conduct. I don't feel CO [REDACTED] has had enough time to evaluate this man. Rec[ommend] disapprove his [message of March 3, 1970]. The note is initialed. On the back of the note, another officer wrote, "I agree. Disapproved," and signed his initials.

On July 10, 1970, the CO of the [REDACTED] recommended him for advancement to [REDACTED] C and nominated him to take the SWE. A similar notation was made in his record on August 21, 1970. The applicant took the SWE on September 9, 1970.

In November 1970, the applicant's wife became mentally ill. Her father transported her to a hospital near her parents' home, and she was diagnosed with paranoid schizophrenia. The applicant requested a humanitarian transfer to [REDACTED], so that he and their four children could live near her hospital. He was initially issued temporary humanitarian orders to a station near her hospital, where he performed non-[REDACTED] duties. When he requested permanent transfer orders, he was advised that they would be issued if he submitted a letter requesting a 20-year retirement, apparently because he was not serving as a [REDACTED] at that station. On May 17, 1971, the applicant requested permission to retire as of December 1, 1972. His request was approved and he was issued permanent transfer orders.

On March 2, 1972, the applicant again took the SWE for advancement to [REDACTED] C.

On August 24, 1972, the applicant asked that his retirement date be postponed from December 1, 1972, to July 1, 1973, for personal reasons. On September 19, 1972, his request was disapproved, although Headquarters noted that if he agreed to be re-assigned to another unit where he could serve as a [REDACTED] his retirement orders would be cancelled. The applicant was retired as of December 1, 1972, upon completion of 20 years of active duty.

IEWS OF THE COAST GUARD

On May 11, 2004, the Judge Advocate General (TJAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the application "for failure to timely file, laches, and/or lack of merit and proof."

TJAG argued that the application should be denied for untimeliness because the applicant submitted his application "more than thirty-one (31) years [sic] after the Statute of Limitations expired." TJAG pointed out that the applicant "offered no justification for his failure to timely file except to declare he was unaware that such a process existed and to disagree with Congress's wisdom in establishing a three-year statute of limitations." Furthermore, TJAG argued, the applicant "has failed to offer any evidence that the Coast Guard committed either an injustice or error in not promoting him to [REDACTED] C] aside from his own assertion that he had passed the [SWE] and was on the list for promotion." TJAG pointed out that "[a]bsent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (1990); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). TJAG concluded that the Board should not waive the statute of limitations because the applicant "offers no substantive reason for the 31-year delay in taking action and lacks any reasonable chance of prevailing on the merits."

TJAG also argued that the doctrine of laches should bar the applicant's claim because the applicant's "rating chain is no longer on active duty and documents that might have been relevant to an investigation of [his] claim are no longer available for review" because of the applicant's delay. TJAG also stated that because of the long delay, the Coast Guard can no longer contact key witnesses or review "key unit documents that may have been destroyed or disposed of under the paperwork disposition regulations." TJAG argued that the applicant "should not be rewarded in any way for his failure to process his claims in a timely fashion."

TJAG argued that the Coast Guard committed no error or injustice in granting the applicant's request for retirement and in not promoting him to ■■■ C. TJAG stated that "[p]romotions are based on the needs of the service and are carried out in accordance with policies in effect at the time. Those policies are always subject to change based on the needs of the service. Applicant has presented no evidence to support his allegation that he was treated unjustly; this case does not constitute 'treatment by military authorities that shocks the sense of justice.'" *See Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577 (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976)).

TJAG included with his advisory opinion a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC). CGPC pointed out that the applicant "fails to provide sufficient information to determine with certainty what sudden change in 'policy' led to his removal from an advancement eligibility list," much less evidence that he was actually on such a list or removed from it. CGPC noted that the applicant might be referring to the Commandant's decision not to grade the SWE that his CO allowed him to take in March 1970 or to his own decision to retire, because "[l]ong-standing Coast Guard policy states that members with approved retirement requests shall no longer be eligible for advancement and shall have their names removed from any advancement list." CGPC stated that it does not know when this latter policy was enacted and that it could be the policy change of which the applicant complains. However, CGPC stated, even assuming this is the policy change that allegedly caused the applicant's name to be removed from an advancement eligibility list, there is no evidence that the applicant was singled out or treated unfairly in any way.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 11, 2004, the Chair forwarded a copy of the views of the Coast Guard to the applicant and invited him to respond within 30 days. The applicant's response was received on June 8, 2004.

The applicant stated that this matter has been on his mind for years and that it was better to apply late than never. He alleged that he had passed the SWE and that his advancement should have been "grandfathered" in despite the policy change. He

stated that he is not asking to receive retirement pay retroactively and that he never knew his SWE had been destroyed. He alleged that he was told he would not be advanced because the entire eligibility list had been destroyed. He alleged that he was told he had passed the SWE and that the chiefs on his cutter knew before he did and gave him several items of uniform clothing to begin his new chief's seabag.

The applicant alleged that the handwritten note regarding his SWE should not be in his record and asked the Board to remove it from his military record. He pointed out that the note indicates that he may have been a victim of age discrimination.

The applicant also wrote about his experience in the Navy during the Korean War and his experience in being used as a "guinea pig" observer for four nuclear explosions, during which he was exposed to ionizing radiation. He pointed out that he qualified as both in port and underway officer of the deck and was a qualified ship handler.

APPLICABLE REGULATIONS

Under Article 5-C-31 of the Personnel Manual in effect in 1972, after the annual SWE for pay grade E-7, the Commandant would establish an eligibility list of "all personnel who met the eligibility requirements for advancement ... and who successfully passed the appropriate examination. ... Personnel placed on the eligibility lists will be advanced or have their rating changed in order, as vacancies occur. ... An individual's name may be removed ... for good and sufficient reasons." In addition, each list has a cutoff point set at "the number of advancements anticipated during the remaining effective period of the respective lists." Only the members whose names are above the cutoff point are guaranteed advancement. The list expires when a new list is created following the next annual SWE.

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. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record.¹ The applicant clearly knew that he had not been advanced to ████C at the time of his retirement on December 1, 1972. Therefore, he should have applied to the BCMR by November 30, 1975. His application

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

was not filed until more than 28 years after the statute of limitations expired. Therefore, it was not timely.

3. Pursuant to 10 U.S.C. § 1552(b), the Board may waive the three-year statute of limitations if it is in the interest of justice to do so. To determine whether it is in the interest of justice to waive the statute of limitations, the Board must consider the length and reasons for the delay and conduct a cursory review of the merits of the case.²

4. The applicant failed to justify his delay and opined only that there should be no statute of limitations. The Board is not persuaded by this argument.

5. The applicant asked the Board to advance him to [REDACTED]C. He alleged that at some unstated time prior to his retirement, he passed the SWE and his name was on the [REDACTED]C advancement eligibility list. He alleged that, because of an unidentified policy change, the list was abolished and he was not advanced.³ The applicant has not submitted any evidence that supports these allegations. Although there is evidence in his military record that he was allowed to take the SWE for advancement to [REDACTED]C several times, there is no evidence that his name was ever on a [REDACTED]C advancement eligibility list or that it was removed from such a list. Nor is there any evidence in the record of a policy change that abolished a list. Because the applicant waited so long to press his claim, the people and documents that might have shed light on this matter are no longer available. Without evidence supporting the applicant's allegations, the Board is required to presume that his military records and current rating of [REDACTED]1 are correct and that Coast Guard officials acted correctly and in good faith with respect to his rating and pay grade.⁴

6. The applicant asked the Board to remove the handwritten note in his record that concerns his CO's decision to allow him to take the SWE. In his March 3, 1970, message to the Commandant, the CO admitted that he had acted on his own authority and had not followed proper procedures in allowing the applicant to take the SWE. The handwritten note is initialed by two officials and provides the explanation for the Commandant's decision on March 6, 1970, to disapprove the CO's action and invalidate the applicant's SWE. Although the applicant complained that the note is handwritten, unsigned, and undated, being handwritten, unsigned, and undated does not render a document erroneous and it does not invalidate it for inclusion in a military record. The note is apparently initialed by whoever had authority to approve or disapprove the CO's action, and the Board does not consider it erroneous or invalid simply

² *Dickson v. Sec'y of Defense*, 68 F.3d 1396 (D.D.C. 1995); *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

³ The Board notes that under Article 5-C-31 of the Personnel Manual then in effect, all eligibility lists expired when new ones were established and that only members whose names were above the special cutoff point were normally guaranteed advancement. The Personnel Manual then in effect does not mention whether members with approved retirement requests could be advanced.

⁴ 33 C.F.R. § 52.24(b); *Arens v. United States*, 969 F.2d 1034, 1037 (1990); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

because that official did not type, date, or sign it with his full name. Nor is the Board persuaded—based on the mere mention of the applicant’s age—that his SWE was invalidated because of age discrimination. In any event, since the SWE was invalidated, this incident is clearly unrelated to the applicant’s allegation that (presumably a year later when he allegedly passed the SWE) his name was on but then removed from a ■■■C advancement eligibility list.

7. Because the applicant has failed to justify his long delay in applying to this Board and has failed to submit any evidence to support his allegations of error and injustice, the Board finds that it is not in the interest of justice to waive the statute of limitations in his case and that his application should be denied.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

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

