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

Application for the Correction of
the Coast Guard Record of:

**BCMR Docket No. 2008-070**

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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 on February 8, 2008, upon receipt of the applicant's completed application, and assigned it to staff member [redacted] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 30, 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 AND ALLEGATIONS

The applicant, who was honorably discharged from the Reserve on April 5, 1961, asked the Board to correct his military record to show that his rate upon discharge was ESG2 (second class petty officer), rather than ESG3 (third class petty officer). The applicant alleged that he was advanced from ESG3 to ESG2 in February or March 1961, prior to his discharge, but that the advancement is not reflected on his discharge papers and other military records. The applicant alleged that he discovered this error on November 11, 2005.

### SUMMARY OF THE RECORD

On April 6, 1953, the applicant enlisted in the Coast Guard Reserve as a seaman recruit. He had prior military service in the Army and the Navy. In the Reserve, he advanced to seaman apprentice in 1954, to seaman in 1955, and to ESG3 in 1956, and his record contains documentation of examinations and recommendations for those advancements. All of his enlisted performance marks, orders for active duty training, and other military records dated from December 1956 until his discharge in 1961 indicate that he remained an ESG3.

In a letter dated February 20, 1961, the applicant asked the District Commander, via his commanding officer, for a waiver of the annual training requirement. He noted his own rate as ESG3. In a message dated March 22, 1961, the Commandant approved the applicant's request. The applicant's rate on this message is noted as ESG3.

On April 5, 1961, the applicant was honorably discharged from the Reserve. His "Record of Discharge, Release from Active Duty, or Death" form dated April 5, 1961, shows his rate as ESG3. His final performance marks dated April 5, 1961, which were signed by an officer at his unit, show that he was evaluated as an ESG3.

## VIEWS OF THE COAST GUARD

On June 25, 2008, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. He argued that the application should be denied because of its untimeliness and lack of supporting evidence. The JAG stated that the applicant knew or should have known about the rate shown on his discharge papers in 1961 and that, even if the Board found that the application was timely, the case should be barred under the doctrine of laches because the applicant's long delay in filing his application has prejudiced the Coast Guard's ability to investigate his claim. The JAG further noted that the applicant submitted no evidence to support his claim and so has not overcome the presumption of regularity accorded his official military records.

The JAG also adopted the findings and analysis of the case provided in a memorandum by the Coast Guard Personnel Command (CGPC). CGPC stated that a comprehensive review of the applicant's military record revealed no support for his claim that he was advanced to ESG2 prior to his discharge.

## APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 23, 2008, the applicant responded to the views of the Coast Guard. He disagreed and stated that he received his discharge certificate while he was packing to move from Cleveland to Sandusky, Ohio, and although he opened the envelope to verify that the certificate was inside, he did not stop to read it. Later, he mislaid the certificate during a subsequent household move and did not find it for many years, at which point he read it and noticed the error. He stated that the records of his Reserve unit, ORTUPS 09-163, or the testing unit that scored his examination should reveal that he passed the test and was advanced to ESG2. He alleged that he remembers being called into his lieutenant's office, being told of his advancement, and being told to obtain and wear his new insignia to a meeting the following week.

## 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. 10 U.S.C. § 1552(b); 33 C.F.R. § 52.22. Although the applicant claims to have discovered the alleged error

in November 2005, the Board finds that he reasonably should have discovered the alleged error upon receipt of his discharge certificate in 1961. Therefore, his application was 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." *Id*. at 164, 165; s*ee also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. The applicant's excuse for not filing his application sooner is not compelling.

5. The applicant is asking the Board to change his records to show that he was advanced from ESG3 to ESG2 in 1961 based upon his own memory and word. His application and official military record contain no evidence whatsoever in support of his claim. Under the Board's rules at 33 C.F.R. § 52.24, the Board begins every case presuming that an applicant's official military record is correct, and the applicant bears the burden of finding and submitting sufficient evidence to prove by a preponderance of the evidence that his record is erroneous or unjust. Although the applicant believes that there may still be records in existence—perhaps somewhere in the National Archives—to prove his case, he has not submitted any such records. Neither the Coast Guard nor the Board is required to do this research for him.

6. Given the lack of any evidence supporting the applicant's allegation, the Board finds that his case cannot prevail upon the merits. Accordingly, the Board should not waive the statute of limitations in this case. The applicant's request should be denied.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

## ORDER

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