

DEPARTMENT OF TRANSPORTATION  
BOARD FOR CORRECTION OF MILITARY RECORDS


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Application for Correction of  
Coast Guard Record of:

BCMR Docket  
No. 53-96

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**FINAL DECISION ON REQUEST FOR RECONSIDERATION**

 This proceeding, BCMR No. 53-96, has been conducted pursuant to the provisions of section 1552 of title 10, United States Code, and section 52.67 of title 33 of the Code of Federal Regulations. It was commenced on January 2, 1996, upon the BCMR's receipt of the applicant's request for reconsideration of the final decision in BCMR No. 194-94.

This final decision on the request for reconsideration, dated January 17, 1997, is signed by the three duly appointed members who were designated to serve as the Board in this case.

**BACKGROUND**

**First Proceeding:**

On November 20, 1978, the applicant, a retired chief warrant officer (CWO2) in the Coast Guard, submitted an application for correction of his military record. He alleged, inter alia, that he was retired as CWO2 rather than as CWO3, a grade which he held for more than 15 months before retirement. He further alleged that he was denied his rights to a hearing by the Physical Disability Appeals Board (PDAB).

This proceeding was docketed as BCMR No 139-78. On December 4, 1979, the BCMR granted this application by directing that the applicant received notice of a temporary promotion to CWO3, on May 16, 1971, and by showing that the applicant was entitled to receive back pay, as a result of this change. (This decision had no effect on the grade at which the applicant was retired.) The decision was approved by the delegate of the Secretary.

**Second Proceeding:**

On August 11, 1994, approximately 15 years after the decision in the first proceeding, the BCMR accepted an application for reconsideration of the 1979

decision. The applicant asked the Board to show that he did not retire on September 1, 1972, that he holds the grade of CW3 (Ret.) rather than CWO2 (Ret), and that he is entitled to a 20% disability plus back pay and allowances. The proceeding was docketed as BCMR Docket No. 194-94.

On December 8, 1995, the Board changed the applicant's record to show that the applicant retired on September 1, 1972, at the rank and in the pay grade of Chief Warrant Officer W-3 (CW03). The remainder of the applicant's requests in this proceeding were denied.

### **Third Proceeding:**

On January 2, 1996, the applicant sent a memorandum to the BCMR on the subject "Unresolved errors by The BCMR; correction request." He stated that "the Board did not correctly or effectively address in dockets 139-78 and 194-94, the issues [the applicant] presented." On January 4, 1996, the memo was docketed as the basis for a third proceeding which was docketed as BCMR Docket No. 53-96.

### **Issues Raised in the Third Proceeding:**

The applicant, in his third proceeding, said that his "main dispute" was that the BCMR "did not correctly" address the issues he presented. These disputes primarily related to the manner in which his claim was processed by the physical disability evaluation system. Specifically, he claimed he had a "right to counsel of [his] choice;" he alleged that the Physical Disability Appeal Board (PDAB) acted illegally; he alleged that he had no notice of the PDAB meeting; and he contended that he "never should have been retired."

The applicant also asked for reconsideration on broader grounds:

"The rhetoric contained in The BCMR verbiage, such as 'without merit' and 'relief denied,' . . . closely echoed the same implausible arguments of the Coast Guard. [T]hey must not have reviewed the rebuttal arguments I presented. The aroma of collusion is growing in this docket.

". . . I am appealing to the sense of fairness and impartiality from the BCMR. I contend that these rebuttal documents completely contradict the submissions of The Coast Guard."

On February 9, 1996, the BCMR received another submission from the applicant. It included, inter alia, the following statements:

"Under no circumstances should officials of the Government accept the poor adversarial excuses of The Coast Guard for constitutional rights violations, using CFR 52: 67(b) as justification.

"The values and views of The BCMR and The Coast Guard differ markedly from what the Constitution states in the 5th ammendment (sic). This is a gross usurpation on what is right just and fair."

On March 26, 1996, the applicant alleged that the "Coast Guard deprive[d] [him] of all [his] rights, and entitlements, but they completely abused and tainted the due process laws established in the 5th ammendment (sic) to The Bill of Rights. . . . In [his] review, The Coast Guard attempted to retire [him] on 31 July 1972. "

He also made the following allegation. "Being a Coast Guard officer, [he] was entitled to, and had a right to, a full and fair hearing; to be notified; to be present with counsel of [his] choice; and to be accorded all [his] rights." He stated that "[a]ll persons, even criminals, have rights; why not a U.S. Coast Guard Officer?"

#### **Views of the Coast Guard:**

On December 3, 1996, the Coast Guard submitted recommendations from the Chief Counsel of the Coast Guard and the Commander of the Coast Guard Personnel Command, as its advisory opinion with respect to the applicant's request for reconsideration of BCMR No. 194-94, which was itself a reconsideration of BCMR No. 139-78.

The Coast Guard declared that the application does not meet the standard for reconsideration set forth in the regulations of the Board for Correction of Military Records of the Coast Guard. Under the applicable regulation, 33 CFR § 52.67, a request can be reconsidered only if the applicant presents evidence or information that was not previously considered by the Board; that could result in determination other than that originally made; and that could not have been presented to the Board prior to its original determination in the exercise of reasonable diligence. A request can also be considered if the Board or Secretary "committed legal or factual error" that could have resulted in a determination other than that made.

The Coast Guard said that the applicant has not presented any evidence or information that was not previously considered, not has he showed that the Board erred in any of its previous decisions. The Personnel Command stated that the applicant has merely reiterated arguments already presented to the BCMR and has provided nothing that would result in determinations other than those originally made. "His petition should therefore be denied on the basis that he has not provided any newly discovered evidence or information not previously considered by the [BCMR].

### Response of the Applicant to the Views of the Coast Guard

On December 17, 1996, the applicant responded to the views of the Coast Guard, as part of the applicant's request for additional time in which to respond. The applicant stated that the Coast Guard is "attempting again to argue their case rather than presenting The Board with facts, compelling evidence in support of their views, while still withholding information critical to this docket."

On December 26, 1996, the BCMR received another response from the applicant to the views of the Coast Guard. The applicant termed the Coast Guard response "totally factless [and] lacking details or specifics." The applicant also stated that the BCMR finding that a particular conclusion was harmless error was "inappropriate," in the final decision in BCMR No. 139-78.

### REGULATION REGARDING RECONSIDERATION

Paragraph (a) of § 52.67 of the BCMR's rules provides that "[r]econsideration of an application for correction of a military record shall occur if an applicant requests it and the request meets the requirements set forth in paragraph (a)(1) or (a)(2) of this section."

Under paragraph (a)(1), reconsideration shall occur if the applicant presents "evidence or information that was not previously considered by the Board" that could result in a determination other than the one originally made. Evidence or information may only be considered if it could not have been presented to the Board in its original determination if the applicant has exercised "reasonable diligence" (emphasis added). Under (a)(2), reconsideration shall occur if the applicant presents evidence that the Board "committed legal or factual error" in the original proceeding that could have resulted in a different determination.

Paragraph (b) directs the Chairman to determine whether to docket a request for reconsideration. It provides that if neither of the (a)(1) or (a)(2) requirements is met, "the Chairman shall not docket such request."

Paragraph (c) provides the "[t]he Board shall consider each application for reconsideration that has been docketed."

### FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusion on the basis of the applicant's military record and submissions, the Coast Guard's submissions, the final decision in BCMR No. 194-94, the final decision in BCMR No. 139-78, and applicable law:

1. The Board has jurisdiction of the case pursuant to section 1552 of title 10, United States Code.

2. The applicant's application is for reconsideration of the decision in BCMR No. 194-94, which was for reconsideration of the original decision in BCMR No. 139-78.

3. There are three requirements for reconsideration of an application under § 52.67 of the Board's rules:

a. The first is that the applicant presented evidence or information that was not previously considered by the Board, or that the Board committed legal or factual error in the preceding determination or in the original determination;

c. The second is that the new evidence or information or the legal or factual error "could have resulted in a determination other than that originally made;" and

d. The third is that the new evidence or information "could not have been presented to the Board prior to its original determination if the applicant had exercised reasonable diligence."

4. The applicant was retired from the Coast Guard on September 1, 1972 at the rank and in the pay grade of CWO2. In the proceeding that is here being reconsidered, BCMR No. 194-94, the applicant's record was corrected to show that he retired from the Coast Guard on September 1, 1972 in the rank and in the pay grade of CWO3. The Board ordered that he receive pay and allowances accordingly.

5. No new evidence or information has been introduced which could have resulted in a determination other than that made in BCMR No. 194-94, nor has the applicant shown any legal or factual error on the part of the Board.

6. The Board has considered docketed application BCMR No. 53-96 in light of § 52.67(c), and it has found that the application fails to meet the standard for reconsideration set forth above. Accordingly, the request for reconsideration should be denied.

ORDER

The request for reconsideration of the final decision of the proceeding of No. 194-94, has been considered, and is herewith denied. The request does not meet the standard for consideration under § 52.67.

