

**DEPARTMENT OF TRANSPORTATION  
BOARD FOR CORRECTION OF MILITARY RECORDS**


---

Application for Correction  
of Coast Guard Record of:

BCMR Docket  
No. 1998-053

---


**FINAL DECISION**

 Chairman:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on February 3, 1998, upon the BCMR's receipt of the applicant's request. The case was docketed as BCMR Docket No. 1998-053.

The final decision, dated March 16, 1999, is signed by the three duly appointed members who were designated to serve as the Board in this case.

**RELIEF REQUESTED**

The applicant, a  (pay grade E-7) retired, asked the Board to correct his military record to show that he was advanced to chief warrant officer. He was listed on the May 1, 1990 eligibility list for chief warrant officer, effective June 1, 1990.

**SUMMARY OF RECORD AND SUBMISSIONS**

The applicant was scheduled for a physical examination, including his annual AIDS test, at about the same time he was listed as eligible for appointment to be a warrant officer. The AIDS test came back positive, with an unacceptable diagnosis code of 043.7 and a diagnosis of HIV Antibody Positive (No Underlying Disease). On June 25, 1990, the applicant was placed on the Temporary Disability Retired List (TDRL) with a combined disability of 30%.

On June 25, 1990, the applicant was rated a combined percentage of disability of 30%, which was later raised to 80%. On June 17, 1993, his medical reviewer recommended, and the CPEB acted to continue him on the TDRL, after his 18 month re-evaluation of a positive HIV test.

On September 2, 1994, the following entry was made for the applicant's 18 month re-evaluation of a positive HIV antibody test: "[I]t is the opinion of the

HIV and Infectious Disease Physicians that the patient had Armed Forces Disease Classification 3, Navy Class, CDC Group III."

On March 27, 1995, the Coast Guard granted the applicant permanent physical disability while removing him from the TDRL. He was found unfit to perform the duties of his rate by reason of permanent physical disability. His combined percentage of disability was 80%.

### VIEWS OF THE COAST GUARD

On February 4, 1999, the Chief Counsel of the Coast Guard recommended that relief be denied in this case, the Chief Counsel found that the Coast Guard properly retired the applicant at the grade of E-7 rather than at the rank of chief warrant officer.

The applicant failed to apply for relief within three years of the alleged error, June 25, 1990, the date he was placed on the TDRL at the grade of E-7. According to the Coast Guard, the application was more than 4 years and 7 months untimely.

The Chief Counsel stated that the applicant was properly retired at grade E-7, rather than at the rank of warrant officer, because he "was never physically qualified for appointment" and as a result "was never appointed to warrant officer status." The Chief Counsel quoted 14 U.S.C. § 213(b) to the effect that "[n]o person shall be appointed a warrant officer under this section until his mental, moral and professional fitness to perform the duties of a warrant officer has been established under the regulations as the Secretary shall prescribe." He also cited the Coast Guard Medical Manual which requires a complete physical within 12 months prior to appointment as warrant officer.

The Chief Counsel disagreed with the applicant's allegation that he should be advanced to warrant officer upon assignment to the TDRL, because his name would appear on the promotion list for warrant officer. The provision cited by the applicant (10 U.S.C. §1372) grants a higher grade to those who have been "promoted." The section, however, applies to an "officer whose name appears on an approved list of officers selected for promotion." 14 U.S.C. 294. The provision cited by the applicant "permits officers on a promotion list to be retired at the higher grade; it does not permit enlisted members . . . to be retired in an officer status."

The Chief Counsel cited the Board's final decision in BCMR No. 1997-177. The Chief Counsel stated that the Board held in that case that "all personnel receiving commissions must be physically qualified to serve."

## APPLICANT'S RESPONSE TO COAST GUARD VIEWS

On February 5, 1999, the Board sent a copy of the views of the Coast Guard to the applicant, together with an invitation to respond. The Chairman wrote that "[y]our response should explain why you disagree with the Coast Guard's recommendation." No response was received from the applicant.

## FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction of the issues raised in this matter under section 1552 of title 10, United States Code. The matter was untimely.

2. An application is timely if it is filed within three years after the alleged error or injustice. 10 U.S.C. §1552(b). June 25, 1990 was the date of the alleged error or injustice because that was the date he was placed on the TDRL at the allegedly wrong grade. He was removed from the TDRL after five years and permanently retired, as of April 24, 1995. His application was received by the Board seven years and seven months after the date of the alleged error, which was almost five years untimely. (The applicant could not have been advanced within the three year timeliness period after he was temporarily or permanently retired during that period.)

3. The Board has the authority to waive timeliness in the interest of justice. Allen v. Card, 799 F. Supp. 158, 166 (DDC 1992) sets forth a test for determining whether it is in the interest of justice to waive the statute of limitations. "The BCMR should consider the reasons for the delay and the plaintiff's potential for success on the merits, based on a cursory review, as factors in the interests of justice analysis."

4. The applicant failed to provide a reason for the four-year seven-months delay, other than that he only recently became aware of a relevant statute. He also failed to respond to the Coast Guard views with respect to timeliness.

5. Cursory examination of the record indicates that the applicant did not meet the requirements for appointment as a warrant officer. Section 213(b) of title 14, United States Code provided that "[n]o person shall be appointed a warrant officer under this section until his mental, moral, physical, and professional fitness to perform the duties of a warrant officer . . . ." Section 3.A.7. of the Coast Guard Medical Manual requires a complete physical examination within 12 months prior to appointment to warrant officer, and section 3.F. of the Coast Guard Medical Manual provides that a diagnosis of code 043.7 is a physical disqualification barring appointment as a warrant officer.

6. On March 9, 1990, an Initial Medical Board (IMB) recommended that the applicant be placed on the TDRL on the basis of a diagnosis code of 043.7. On May 1, 1990, the applicant was placed on the CWO final eligibility list, effective June 1, 1990. A diagnosis code of 043.7 was unacceptable for a person who seeks a place on a final eligibility list for appointment as a Chief Warrant Officer.

7. Upon cursory examination, the applicant has not established that the Coast Guard committed an error or injustice in placing him on the TDRL at the enlisted grade of E-7 rather than with the rank of warrant officer. The applicant did not meet the qualifications for appointment as a warrant officer prior to his placement on the TDRL.

8. Since the applicant has not established his potential for success on the merits, the defense of untimeliness should not be waived

9. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application for correction of the military record of [REDACTED]  
[REDACTED] (Ret.), is denied.

