DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction
of Coast Guard Record of:

[redacted]

BCMR Docket
No. 1999-049

FINAL DECISION

[redacted] Chairman:

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 application for correction was received on January 8, 1999 and the case was docketed on February 3, 2000, upon the Board's receipt of the applicant's Coast Guard military records.

This final decision, dated December 14, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

REQUESTED RELIEF

On January 8, 1999, the applicant asked the Board to correct the rate at which he was retired. He stated:

> I did not receive the highest rank that I shall have been at discharge.
>
> Please check my Personnel Files. I do not believe that I was discharged at my highest rate.

The applicant alleged in his application that his present pay grade was "seaman 1st class." He said that he discovered the alleged error or injustice in 1955 but "did not know it was possible to correct a DD214."

SUMMARY OF RECORD AND SUBMISSIONS

The applicant served in the U.S. Naval Reserve from May 18, 1944 to March 9, 1946. On February 26, 1948, he enlisted in the U.S. Coast Guard. On May 31, 1955, he was temporarily retired from the Coast Guard due to physical disability and he was placed on the Temporary Disability Retired List (TDRL) as a seaman. On April 26,

1960, he was permanently retired due to physical disability. He died on December 14, 1999.

The applicant's military record contains a card listing his rating for each vessel or base at which he served, from June 6, 1950 to June 1, 1955, while in the Coast Guard. His rate was "SN" for each of the 13 entries. The grade or rate at which he was serving was SN on June 6, 1950; March 12, 1951; June 22, 1951; July 13, 1951; September 14, 1951; February 26, 1952; March 6, 1952; March 7, 1952; October 1, 1952; March 31, 1953; September 18, 1953; April 29, 1954, and June 1,1955. The phrase "RET (TEMP DISAB)" was entered in the Remarks column next to the last entry, to record the date when he was retired on temporary disability. A separate statement of creditable service dated November 2, 1953, also listed him as an "SN".

The applicant was examined by a Physical Evaluation Board, the Physical Review Council, the Report of Medical Survey, periodic physical examinations, the Medical Division of the Coast Guard, and the Veteran's Administration, and there was a great deal of Coast Guard mail regarding him. (His medical problems stemmed in part from an automobile accident on the night of April 6, 1954.) His rating, where stated, was always SN or Seaman.

The Board did not receive any submission from the applicant other than the application for relief quoted above and a copy of his 1952 Coast Guard DD 214 which listed his highest grade at the time of entry to active service as "Seaman, apprentice." The Board did not receive a copy of his Navy DD 214.

The applicant was considered, but rejected, for advancement to Gunner's Mate Third Class. On November 15, 1954, the commanding officer of his command stated in a memorandum to the commander of the Third Coast Guard District that "[i]t is the opinion of this unit that subject man's advancement in rating from Seaman to Gunner's Mate Third Class is not justified due to performance of duty since date of recommendation."

VIEWS OF THE COAST GUARD

On March 9, 2000, the Commander of the Coast Guard Personnel Command (CGPC) recommended to the Commandant "that relief be granted" in this case. CGPC found that the "[h]ighest grade held [by the applicant, in the Navy] was Steward's Mate Second Class (STM/E5)".

On August 4, 2000, the Board received the views of the Chief Counsel of the Coast Guard. The Chief Counsel disagreed with CGPC and found that the application should be dismissed, on several grounds.

According to the Chief Counsel, an application for correction must be filed within three years of the date the alleged error was, or should have been,

discovered. 10 U.S.C. § 1552(b). In this case, the applicant alleged that he discovered the alleged error or injustice in 1955, but his application was not submitted until approximately 45 years later.

The Chief Counsel said that if an application is untimely, the applicant must set forth why it is in the interest of justice to accept it. The Chief Counsel said that the Board must deny relief unless the applicant provides sufficient evidence that it is in the interest of justice to consider it. In making that determination, the Chief Counsel said that the Board should consider the reasons or lack of reasons for the delay and make a cursory examination of the potential merits of the claim. Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir. 1995). According to the Chief Counsel, the case should be dismissed because the applicant failed to offer substantial evidence.

According to the Chief Counsel, the applicant submitted no evidence of satisfactory service in the military in a higher grade than the grade at which he was retired. He said the applicant's records contain one reference to him as an "Ex-STM2, V6, USNR", but that one reference to a higher grade does not, in itself, "constitute sufficient evidence of satisfactory service in that rank or grade required by United States law." It does not even prove he actually held that grade in the Navy. The Chief Counsel said that:

> [A] Form DD-214, which would have been issued to Applicant upon the conclusion of his naval service, and which would have provided evidence of the highest grade satisfactorily held, was not submitted by Applicant, nor was one located in his record. Moreover, Applicant submitted no other evidence of satisfactory service, including ... any indicia of satisfactory service as a Second Class (E-5) Petty Officer in the United States Navy. Moreover, Applicant's relatively brief service in the Navy (less than 2 years) makes it seem unlikely he actually ever advanced to the grade of Second Class Petty Officer in the Navy. It was incumbent on applicant ... to provide satisfactory service.

The Chief Counsel concluded that the claim should be denied because of lack of proof.

The Chief Counsel also urged the Board to deny the requested relief on the equitable ground of laches. The Chief Counsel said that if "an applicant's unexcused delay has caused substantial prejudice to the government, the claim for relief is generally barred by the equitable doctrine of laches." Sargisson v United States, 12 Cl. Ct. 539, 542 (1987). In the applicant's case, the Chief Counsel said that the government was "extremely" prejudiced by the lack of evidence and witnesses caused by time and the death of the applicant, and the applicant presented no valid excuse for his 45-year delay in presenting his claim. The applicant's failure to act for

almost 45 years, during which he said he knew of the alleged error, does not "mark his case as worthy of redress by the Board for equitable purposes."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

The Board sent a copy of the views of the Coast Guard to the applicant on August 9, 2000, with an invitation to him to submit a response within 15 days. No response was received from him. (The applicant died on December 14, 1999.)

APPLICABLE LAW

10 U.S.C. § 1372:

> .... Unless entitled to a higher grade under some other provision of law, any member of an armed force who is retired for physical disability ... or whose name is placed on the temporary physical disability retired list ... is entitled to the grade equivalent of the highest of the following: (2) The highest temporary grade or rank in which he served satisfactorily, as determined by the Secretary of the armed force from which he is retired.

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 submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code.

2. This matter is not timely. Section 1552(b) of the United States Code provides that a claim for correction of a military record shall be made within three years after the discovery of an alleged error or injustice, unless the Board concludes that it is in the interest of justice to waive untimeliness and adjudicate the application on the merits.

3. An application for correction of the applicant's discharge was received by the BCMR almost 45 years after the date of the alleged error or injustice. The applicant's justification for the 45-year delay was that he did not know that a DD-214 could be corrected.

4. The applicant did not submit a DD Form 214 for his Navy service. He did submit a copy of his 1952 DD 214, which showed he entered Coast Guard service in 1948.

5. In 1992, the United States District Court for the District of Columbia said that the Board should conduct a "cursory review" of the merits of an application as part of its examination of the question of whether it was in the "interest of justice" to waive untimeliness and adjudicate the application on the merits. Allen v. Card, 799 F. Supp. 158 (D.D.C. 1992).

6. Cursory examination of the merits of this application indicates that it is in the interest of justice to waive untimeliness because the CGPC found that he served at a higher grade in the naval reserve than that at which he was retired by the Coast Guard.

7. The applicant has not, however, supplied any evidence that he served satisfactorily as an STM2.

8. Accordingly, the application should be denied without prejudice to the right of the applicant's widow or other next of kin to apply to the bureau of naval records for a copy of his navy records in order to seek some evidence that he served satisfactorily as an STM2.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application to correct the military record of former [redacted] deceased) is denied without prejudice.

[redacted]