

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:



BCMR Docket
No. 2000-085

FINAL DECISION

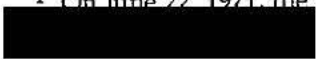

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was docketed on March 15, 2000, upon the BCMR's receipt of the applicant's complete application for correction of his military record.

This final decision dated January 25, 2001, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a retired chief warrant officer – W2 (CWO2), asked the Board to advance him to CWO4, effective the date of the Board's final decision in this case. He stated that he was not asking for back pay and allowances because of the length of time he has been retired. The applicant voluntarily retired on June 1, 1960, with approximately 22 years of service.

The applicant alleged that it had always been his intention to serve for 30 years on active duty, but he was unfairly forced to retire from the Coast Guard by his reporting officer when he had only 22 years of active duty. Approximately 33 years after his discharge, the applicant wrote two letters to the Commandant, dated December 21, 1993 and December 25, 1993, wherein the applicant explained his reasons for believing that the reporting officer forced him into retirement. In these letters, the applicant stated that he and his reporting officer were at odds over the reporting officer's improper conduct toward a civilian female and the reporting officer's improper use of his private vehicle while performing official functions. Although not clearly stated in these letters, the applicant implies that the reporting officer forced him to retire to keep him quiet about the reporting officer's alleged improprieties. (There is no evidence that the Commandant replied to these letters.) In the letter dated December 21, 1993, the applicant stated that his retirement grade should be changed to CW04. He claimed that these letters, although addressed to the Commandant, were meant for possible action by the BCMR.

The applicant claimed that if he had remained on active duty for another eight years, rather than retire in 1960, he would have received two additional promotions, and he would have been able to retire as a CWO4 (a higher rank than CWO2).

¹ On June 22, 1971, the applicant's name was legally changed from  

The applicant stated that he is currently totally disabled and is undergoing debt counseling and he would benefit from the increase in retired pay if his application were granted.

Views of the Coast Guard

On September 20, 2000, the Board received an advisory opinion from the Chief Counsel of the Coast Guard recommending that the Board deny relief to the applicant.

The Chief Counsel stated that the application should be denied because it was not timely. He stated that applicable regulations require that "an application for correction of a record must be filed within three years after the applicant discovered or reasonably should have discovered the alleged error or injustice." The applicant's correction application was filed approximately 37 years beyond the three-year statute of limitations period.

The Chief Counsel stated that it is not in the interest of justice to excuse the untimely filing. In this regard, the Chief Counsel stated that the BCMR's regulations require that an applicant filing an untimely request set forth reasons explaining why it is in the interest of justice to accept his application for correction. In making a determination whether to waive the statute of limitations, the Board must consider the reasons for the delay and make a cursory review of the potential merits of the claim. Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir 1995). The Chief Counsel stated that the applicant has failed to offer substantial evidence that he was forced to retire from the Coast Guard.

The Chief Counsel also asserted that this case should be denied due to laches. The Chief Counsel stated that because of the delay, the Coast Guard has been prejudiced by the lack of available evidence and witnesses. He stated that the applicant has not provided a valid excuse for not filing his application sooner. The Chief Counsel stated that "moreover, the burden of production is on the applicant who admits that he did not obtain any corroborating evidence because most of the personnel stationed with him at the time in question have 'expired.'"

The Chief Counsel stated that the evidence does not support the applicant's allegation that he was forced to retire from the Coast Guard after 22 years of service. He stated that a thorough review of the applicant's military record failed to reveal a single document that would corroborate the applicant's unsupported allegations of "harassment and misconduct" against him by his reporting officer. In the absence of evidence to the contrary, the Board, according to the Chief Counsel, should deny the application for lack of proof.

The Chief Counsel stated that not only has the applicant failed to submit sufficient evidence to establish an error, he has also failed to submit sufficient evidence of an injustice. He stated that the applicant voluntarily retired, but could have remained on active duty at his discretion, in 1960, as there was no pending disciplinary or administrative action pending against him.

The Chief Counsel stated that the applicant's statement outlining his medical and financial problems is an attempt to gain the Board's sympathy. He stated that the applicant's medical and financial problems are not relevant to this case.

Applicant's Response to the Views of the Coast Guard

On October 2, 2000, the Board received the applicant's response to the advisory opinion. He stated that he was not aware of the statute of limitations. He offered the following comments:

I have no objections to the findings and recommendations of the Chief Counsel, U.S. Coast Guard "memorandum" [dated] 9/15/2000. The findings are correct according to my personnel records.

I was not aware of the three year statute of limitations or I would not have initiated the original request after 40-years. Therefore, I rest my case on the Chief Counsel's decision based on true facts and figures.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10, United States Code.
2. The application was untimely. It was submitted to the Board approximately 37 years after the date of the alleged error or injustice. To be timely, an application for correction of a military record must be submitted within three years after discovery of the alleged error or injustice.
3. The Board may still consider the application on the merits, however, if the Board concludes that it is in the interest of justice to do so. See 33 CFR 52.22. The Board, in determining whether to waive untimeliness " should consider the reasons for the delay and the plaintiff's potential for success on the merits." Allen v. Card, 799 F. Supp. 158, 166 (D.D.C. 1992).
4. The applicant did not provide a persuasive reason for waiting approximately 37 years before filing his application with the Board. While he claimed that his 1993 letters addressed to the Commandant were meant for possible action by the BCMR, he did not ask for a correction to his military record in either of these letters or pursue the matter when he did not receive a reply to his letters from the Commandant. Moreover, even if the letters could be interpreted as a request for correction of his military record, such a request at that time would still have exceeded the statute of limitations by approximately 30 years. The applicant did not state what actions, if any, he took from the date of his discharge in 1960 until December 1993 to correct this alleged error.


5. With respect to the merits in this case, the Board finds that the applicant is not likely to prevail. He has submitted insufficient proof to establish that his retirement was involuntary rather than voluntary. He submitted no corroborating evidence in support of his allegation that he was forced to retire by his reporting officer. Moreover, realizing that his claim exceeded the statute of limitations, the applicant stated, in his reply to the advisory opinion, that he had no objections to the recommendation of the Chief Counsel of the Coast Guard that his case should be denied for untimeliness.

6. Accordingly, it is not in the interest of justice to waive the statute of limitations in this case.

7. Accordingly, the applicant's request for relief is denied.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of CWO2 
correction of his military record is denied.

