

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-098

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

This proceeding was conducted 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 upon receiving the completed application, including the applicant's military and medical records, on March 12, 2012, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 25, 2012, 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 retired from the Coast Guard Reserve on October 25, 1988, asked the Board to correct his record to show that he retired as a chief [REDACTED] in pay grade E-7, instead of as a [REDACTED] first class ([REDACTED] 1) in pay grade E-6.

The applicant stated that the Admiral's Association advised him that he should have retired as an E-7 because of his work, background, and the fact that he saved the Coast Guard Academy thousands of dollars through his work in the Academy's Public Works Department. The applicant stated that he discovered the alleged error in 2008 and that it is in the interest of justice for the Board to excuse the untimeliness of his application because he "feel[s] like [he] was a chief" when he retired, but he never thought about it because he was always working. The applicant submitted documents to support these allegations, including numerous documents concerning his meritorious service at the Academy, his receipt of a USCG Reserve Meritorious Service Ribbon and a USCG Unit Commendation, and his completion of courses pertaining to occupational health and safety, orientation, inspection procedures, excavation, and construction. He also submitted copies of documents that are included in the summary of the record below.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard Reserve as a [REDACTED] on May 7, 1973. Because of prior military service, his adjusted pay base date was October 2, 1967. On June 24, 1977, the applicant's District Commander responded to an inquiry from a congressman on behalf of the applicant. The District Commander stated that a review of the applicant's record had shown that he would be eligible to compete for advancement to [REDACTED] if he performed two weeks of active duty (annual training) for evaluation for advancement to pay grade E-7. The District Commander noted that the applicant's commanding officer (CO) was ready and willing to schedule the evaluation period and to recommend the applicant for advancement. He also stated that to become eligible for appointment to warrant officer, the applicant needed to pass the RSWE for advancement to E-7; to perform a two-week evaluation period on active duty; to complete a course in the Uniform Code of Military Justice; to attend an active duty leadership school; to complete at least four weeks of active duty in pay grade E-6 or above; and to be evaluated and recommended for the appointment by his CO.

On October 26, 1978, the applicant's congressman forwarded to the Coast Guard a letter from the applicant in which he described his service and again requested advancement to [REDACTED]. On November 6, 1978, the District Commander responded, stating that although the applicant completed the prerequisites and took the RSWE for advancement to [REDACTED] in October 1977, he had not received a passing score. The District Commander noted that the applicant had taken the RSWE again in October 1978 but the results were not yet known. With regard to the applicant's repeated request for an appointment to warrant officer, the District Commander stated that the applicant had not yet completed any of the prerequisites outlined in his prior letter.

On June 24, 1979, the applicant's CO recommended the applicant for advancement to E-7 because he had met the eligibility requirements in the Reserve Administrative Training Manual (RATMAN, CG-296). The CO wrote that the applicant had 12 years and 8 months of creditable service; 6 years and 8 months in his current, E-6 pay grade; and average performance marks as an E-6 (on a 4.0 scale) of 3.80 for proficiency in rate, 3.75 for leadership, and 4.0 for conduct. The CO also noted that the applicant was dedicated and conscientious, had completed the [REDACTED] correspondence course on May 21, 1977, and had received a USCG Reserve Meritorious Service Ribbon and a USCG Unit Commendation.

On June 25, 1981, the applicant's congressman forwarded to the Coast Guard a letter from the applicant in which he described his service and requested an appointment to warrant officer. In response, the Commandant advised the congressman that although the applicant's performance had been excellent and he had saved the Coast Guard time and money, his request for a direct appointment to warrant officer was not feasible because such appointments were made pursuant to a competitive process. The Commandant stated that the applicant would be fully advised of that process.

On September 16, 1986, the Commandant approved the applicant's request to remain in the Reserve past his 60th birthday so that he could accumulate enough years of service to retire.

On May 11, 1987, the Commandant responded to another letter from the applicant's congressman. The Commandant explained that although the applicant had been a member of the Naval Reserve from July 24, 1946, until July 23, 1950, he could only be credited with satisfactory service for the period before July 1, 1949, because as of that date, reservists had to earn 50 drill points per year to have a satisfactory year for retirement purposes but the applicant did not do so.

On October 21, 1988, the Commandant informed the applicant that he would be retired on October 25, 1988, because he had more than 20 years of service and was immediately eligible for retired pay. On October 31, 1988, after the applicant passed the mandatory retirement age of 62, the Commandant advised him in a letter that he had been retired as of October 25, 1988, and that his retired pay would be based on his pay as a [REDACTED]. The applicant was provided a Certificate of Retirement showing that he was retired as a [REDACTED] with more than 21 years of service.

In 1989, the applicant sent a letter to the Commandant and his congressional representatives in which he alleged that in October 1981, after he passed the End of Course test for advancement to [REDACTED], a warrant officer told him that his would be "the last of the grandfathered advancements." A year later, just before his civilian employer, the U.S. Post Office, transferred him from [REDACTED], his unit's CO and Training Officer told him to tell his new Reserve unit command that he had passed the [REDACTED] End of Course test and wanted to take the upcoming Reserve Servicewide Examination (RSWE) for advancement to [REDACTED].

The applicant alleged in the letter that he did as instructed when he reported to his new unit and also gave them a package of advancement recommendations and qualifications. However, when the RSWE was given, they did not let him take it. "Headquarters said that they had forgotten. They tried to squeeze me in at the last minute, but to no avail." Later, someone called him and accused him of trying to take the RSWE under false pretenses. He explained to her about the "grandfather clause," but she said there was no such clause and that his friends had been promoted "under false statements." The applicant stated that his unit's Training Officer also forgot to include him in the RSWE in January 1982 and for no apparent reason kept telling him to take an E-6 examination instead. The applicant alleged that he was denied advancement to E-7 because of such mistakes and that if he had the E-7 rating, he "could still keep my head up with pride and rest in peace knowing that the Coast Guard had not forgotten me." Finally, the applicant wrote that he did not challenge his E-6 pay grade sooner because at the time, when he complained to an active duty Coast Guard Training Officer, he was told "not to make waves between the Regulars and the Reserves" and then he "decided to wait until retirement to press this issue. I did not want to jeopardize 20 years of service."

On August 10, 1989, a congressman forwarded the letter the applicant had sent to the Commandant and congressional representatives to the Coast Guard and asked the Coast Guard to investigate the matter and reply. The Commandant acknowledged the congressman's letter on August 30, 1989, and responded in full on October 1, 1989. He explained the circumstances of the applicant's case as follows:

On May 7, 1973, [the applicant] enlisted in the Coast Guard Reserve as a Petty Officer First Class. He was enlisted in this pay grade because his civilian experience and skills closely related to those required for that grade. He completed the Chief Petty Officer rating correspondence course on

May 21, 1977. He first took the Chief Petty Officer Servicewide Exam in October 1977, but did not receive a passing score. There is no record of him taking the October 1978 exam. He passed the October 1979 exam but was not promoted due to the limited number of vacancies. During that period, if the member was not promoted within three years of completion of the rating correspondence course, the member had to retake the rating correspondence course. Absent a new Chief Petty Officer rating correspondence course completion, his eligibility expired on May 21, 1980.

Servicewide Exam participation requirements were set forth in the Reserve Administration Manual with Commandant Notices issued six months prior to each scheduled exam to give members additional information for the upcoming or future exams. Commandant Notices were issued on May 14 and December 3, 1980, May 13 and December 1, 1981, and April 15, 1982, all stating that:

Commencing with the October 1981 Servicewide Exam all Chief Petty Officer candidates must have completed the appropriate First Class Petty Officer rating correspondence course as well as the Chief Petty Officer rating correspondence course. This requirement will ensure that personnel entering the Coast Guard Reserve at the First Class Petty Officer level will have completed the highest level technical non-resident course within their rating prior to competing for advancement to Chief Petty Officer. This requirement applies to all Chief Petty Officer candidates regardless of their enlistment program or what the advancement requirements were at the time of their enlistment.

The section in the Reserve Administration Manual that applied to prerequisites for participation in Servicewide Exams was changed in September 1982 to reflect this requirement.

[The applicant] reenrolled in the Chief Petty Officer rating correspondence course on August 21, 1981, and completed it on September 17, 1982. Since requirements had been changed in 1981 and announced well in advance, [the applicant] had to meet the new requirements prior to taking a Servicewide Exam. He never completed the Petty Officer First Class rating correspondence course and, therefore, he was not eligible to take the Chief Petty Officer Servicewide Exam.

To advance to pay grade E-7 in the Coast Guard Reserve, a member must complete a number of prerequisites including passing a servicewide exam. Even when all requirements are met, advancements are limited by the number of vacancies. Candidates who qualify but are not advanced in any given year must requalify in succeeding years if they want to be considered in those years. Our intent is to advance the best qualified personnel when vacancies occur.

VIEWS OF THE COAST GUARD

On August 8, 2012, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny the requested relief.

The JAG stated that the application should be denied for untimeliness. He noted that the applicant waited 30 years to complain to the Board about not being permitted to take the RSWE in 1982 and failed to submit any documentation or justification explaining his lengthy delay. The JAG noted that the applicant complained to a congressman about his failure to advance after he retired in 1988 but still waited 24 years after his retirement to file his application with the Board. The JAG argued that with no justification for the long delay and no evidence of error by the Coast Guard, the Board should not waive the statute of limitations and should deny relief.

Regarding the merits of the case, the JAG stated that the applicant's pay grade upon retirement is presumptively correct and that he has not overcome this presumption by submitting

convincing evidence to support his claim that he should have been advanced to E-7. The JAG stated that the record shows that the applicant was ineligible to take the RSWE before October 1981 because he had not completed the pre-requisite chief petty course, and he was not eligible to take the RSWE in October 1981 or thereafter because he did not complete the new pre-requisite first class petty officer correspondence course. The JAG stated that the new pre-requisite that went into effect in October 1981 was announced several times in Commandant Notices beginning in 1980, and there is no evidence of any “grandfather clause.”

The JAG stated that if there was some type of “grandfather clause” that would have allowed the applicant to take the RSWE for advancement to [REDACTED] without first passing both the first class and chief petty officer correspondence courses, then his unit’s refusal to let him take the RSWE might qualify as an injustice to warrant correction. However, he stated, the applicant submitted no evidence of such a clause, and the Coast Guard knows of none. Furthermore, the JAG noted, that the applicant’s claim was investigated after the Commandant received his congressman’s inquiry in 1989, and the investigation “flatly rejected his assertions.” The JAG concluded that “without any compelling reason for delay, and without any reasonable chance of prevailing on the merits,” the Board should not waive the three-year statute of limitations and should deny the applicant’s request.

The JAG also adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC), which also recommended denial of relief. PSC stated that the record shows that the applicant’s claim was investigated within a year of his retirement, and the specific causes that contributed to the applicant’s failure to advance were explained in detail to the applicant’s congressman. PSC said that it adopts the findings and conclusions provided to the congressman because no new evidence has been submitted to cast doubt on them.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 21, 2012, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond in writing within 30 days. No response has been received.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant’s 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. Under 10 U.S.C. § 1552(b), an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice. The applicant alleged that she discovered the error in his record in 2008. However, the preponderance of the evidence shows that he knew in October 1988 that he had not advanced to [REDACTED] and was being retired in pay grade E-6. Therefore, the Board finds that the application is untimely.

3. Pursuant to 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; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. The applicant provided no explanation that justifies his long delay in applying to the Board.

5. The Board’s cursory review indicates that the applicant’s case cannot prevail on the merits. In this regard, the Board notes that the Coast Guard repeatedly reviewed the applicant’s eligibility for advancement at the request of his congressmen while the applicant was a member of the Reserve and in 1989, after he retired. Each review showed that the applicant had not met certain requirements for advancement or, if he qualified for advancement by passing the RSWE, was not advanced because there were not sufficient vacancies. Being recommended for advancement by one’s CO is just one criterion a member must satisfy to take the RSWE and be placed on the advancement list, so the fact that the applicant’s CO recommended him for advancement does not prove he was ever entitled to advancement. The applicant’s military records showing that he was properly retired as ██████E-6 are presumptively correct under the Board’s rules at 33 C.F.R. § 52.24(b). The applicant has not submitted sufficient evidence of error or injustice to overcome this presumption.

6. Accordingly, the Board will not excuse the untimeliness of the application. The applicant’s request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG (Retired), for correction of his military record is denied.

