DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2013-159

[redacted]

FINAL DECISION

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 Chair docketed the case after receiving the applicant's completed application on August 7, 2013, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 25, 2014, 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 was honorably retired from the Coast Guard on November 1, 2004, asked the Board to correct his record to show that he retired from the Coast Guard Reserve in pay grade E-6, instead of E-4. The applicant acknowledged that his rate had been reduced from E-6 to E-4 pursuant to the sentence of a court-martial in 2003. However, he stated, in 2003, he received an email from the Personnel Command stating that he would "probably" be retired in pay grade E-6 since he had served in the U.S. Navy in that grade. The applicant claimed that he relied on that information when he decided to submit his request to retire and so he asked the Board to correct his retirement pay grade to E-6. The applicant noted that his retired pay is correctly calculated.

The applicant alleged that he did not discover this error until July 2013, when he stopped trusting that his retirement processing had been done properly after a conversation with a Veteran's Service Officer. In support of his allegations, the applicant submitted a copy of his Navy DD 214, which shows that he was honorably discharged from the Navy in pay grade E-6 on March 18, 1992, and that he had held pay grade E-6 for almost four years, since April 16, 1989. His Coast Guard DD 214, which he signed, shows that he was retired from the Coast Guard as an E-4. The applicant also submitted a print-out of an email conversation he held with an employee of the Personnel Command. In his initial email, dated August 13, 2003, he noted that he had been reduced in grade pursuant to the court-martial and asked if he would be entitled to retirement as an E-6, the pay grade he had held in the Navy, if he retired from the Coast Guard in 2004 without advancing

again. He noted that someone had told him he might be retired in pay grade E-4 but receive the retired pay of an E-6 based on his Navy service. The reply he received states the following: "After consideration of your record for the highest grade held satisfactory, you will probably receive the pay grade E6 you served in the Navy."

VIEWS OF THE COAST GUARD

On December 30, 2013, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief. In making this recommendation, he adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

PSC stated that the application was not timely filed and that the applicant provided no rationale for his delay in challenging his pay grade upon retirement. PSC noted that the applicant was told what one civilian employee of the Personnel Command had said would *probably* be his pay grade upon retirement, and which is the pay grade on which his retired pay is based. The email, however, was not an official decision of the Personnel Command and does not comport with Coast Guard policy. In this regard, PSC noted that Article 12.C.15.e.2. of the Personnel Manual in effect in 2004 stated that "[i]n cases where a member has been reduced in grade by a court-martial, the highest grade satisfactorily held shall be no higher than the grade to which the member has been reduced by the court-martial, unless the member subsequently advances or is again reduced."

Therefore, PSC recommended that the Board deny the applicant's request because he was "correctly retired at the pay grade of E-4" following his reduction to that grade by sentence of a court-martial.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 18, 2014, the applicant responded to the views of the Coast Guard. The applicant disagreed with PSC's claim that his application was untimely since he had trusted his retirement processing at that time, and the error was not brought to his attention until July 2013. Regarding the merits of his case, the applicant alleged that the email indicates that one Headquarters office made a determination that his pay grade upon retirement should be E-6 but failed to communicate that determination to the office that handled his retirement paperwork. The applicant pointed out that the fact that the Personnel Command employee who advised him was civilian does not mean she was not high ranking within that command and in fact he was told that she was very high ranking. The applicant stated that he should have been able to rely on an email from a high-ranking civilian employee of the Personnel Command stating what probably would be the outcome "after consideration."

APPLICABLE LAW

Under 14 U.S.C. § 421, "[e]very commissioned officer, warrant officer, or enlisted member who is retired under any provisions of this title shall be retired with the permanent grade or rate held at the time of retirement, unless entitled to retire with a higher grade or rate under any provision of this title or any other law."

Under 14 U.S.C. § 362, "[a]ny enlisted member who is retired under any provision of section 353, 354, 355 [voluntary retirement with 20 years of service], or 357 of this title shall be retired from active service with the highest grade or rating held by him while on active duty in which, as determined by the Secretary, his performance of duty was satisfactory, but not lower than his permanent grade or rating."

Article 12.C.15.e. of the Personnel Manual in effect in 2004 states the following:

> 1. Any enlisted member who retires under any provision of 14 U.S.C. retires from active service with the highest grade or rate he or she held while on active duty in which, as Commander (CGPC-epm-1) or the Commandant, as appropriate, determines he or she performed duty satisfactorily, but not lower than his or her permanent grade or rate with retired pay of the grade or rate at which retired (14 U.S.C. 362).
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> 2. In cases where a member has been reduced in grade by a court-martial, the highest grade satisfactorily held shall be no higher than the grade to which the member has been reduced by the court-martial, unless the member subsequently advances or is again reduced. Where a member subsequently advances or is again reduced following a reduction by a court-martial, the highest grade satisfactorily held shall be no higher than the pay grade to which the member advanced or was reduced to following the court-martial.

The statutes governing the calculation of retired pay are in Chapter 71 of Title 10 United States Code. Under those statutes, a veteran's retired pay may be calculated based on his highest grade held, a prior pay grade, or his "high three," depending upon his date of entry and whether he was reduced in grade.

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's submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.[1] The applicant alleged that his rate and pay grade in retirement are erroneous because he had previously served honorably in the Navy in a higher pay grade. The preponderance of the evidence shows that the applicant knew that he had served in the Navy in a higher pay grade and knew that he was being retired from the Coast Guard in pay E-4 upon his separation date. Therefore, he knew all of the facts necessary to bring this claim to the Board in 2004, and his application is untimely.

3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.[2] In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without "analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review"[3] to determine whether the interest

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[1] 10 U.S.C. § 1552(b).

[2] 10 U.S.C. § 1552(b).

[3] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

of justice supports a waiver of the statute of limitations. The court noted 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."[4]

4. Regarding the delay of his application, the applicant explained that a Veteran's Service Officer recently said something to him that made him suspect the Coast Guard had made a mistake. The Board finds that the applicant's explanation for his delay is not compelling because he failed to show that anything prevented him from inquiring into his retired pay grade and seeking correction of it more promptly.

5. A cursory review of the merit of this case indicates that it lacks merit. While an enlisted member's retired pay is based on the member's entire military service, an enlisted member is retired from the Coast Guard in a Coast Guard rate and corresponding pay grade, not in a Navy rate and pay grade. The record shows that the applicant's Coast Guard rate and pay grade were reduced pursuant to the sentence of a court-martial in 2003, and he did not re-advance before he was retired from the Coast Guard in 2004. Therefore, in accordance with Article 12.C.15.e.2. of the Personnel Manual then in effect, his rate and pay grade on his DD 214 are correct. The email he submitted showing what one employee told him might happen and his claim that he relied on that advice when deciding to request retirement are insufficient to overcome the presumption of regularity or to prove that his Coast Guard rate and pay grade on his DD 214 are incorrect.[5] Based on the record before it, the Board finds that the applicant's claim cannot prevail on the merits.

6. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations. The applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

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[4] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

[5] 33 C.F.R. § 52.24(b); *see Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

ORDER

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

April 25, 2014

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