

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

Application for Correction
the Coast Guard Record of:

BCMR Docket
No. 2001-006

FINAL DECISION

JOOST, 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 proceeding was docketed on October 31, 2000, upon the BCMR's receipt of the applicant's complete request for correction of his military record.

The final decision, dated October 11, 2001, is signed by the three duly appointed members who were designated to serve as the Board in this case.

REQUESTED RELIEF

The applicant, a lieutenant (junior grade) (LTJG), applied for a retroactive promotion to LTJG. He asked that the effective date of his promotion to LTJG should be _____, the date of applicant's graduation from the Physician Assistant (PA) school.

In _____, while the applicant was attending PA school, he was found qualified for advancement to either Master Chief Petty Officer (E-9) or to Chief Warrant Officer-med. He was rated _____ for advancement on both lists. He asked five "superiors" what, in their opinion, would be the best promotion for him in terms of career and financial opportunities. He was advised that he should accept the short-term loss of pay and perks of a Chief Warrant Office (CWO2-Med) and should reject the goal of becoming a Master Chief. If he did so, he would advance to LT (O-3) eighteen months earlier at a higher pay rate than that of a Master Chief. The applicant said that two CWOs who graduated from the PA program were tendered the grade of LTJG (O-2) upon graduation.

In _____, two months prior to graduation from PA school and 18 months after he made his decision, he was notified that his request to be a LTJG was denied. Upon graduation, he was tendered the rank of ensign (O-1). His request for reconsideration was denied in _____. He wrote that had he been informed that he “would not be promoted to LTJG upon graduation, [he] would have remained _____ on the E-9 list for advancement.”

VIEWS OF THE COAST GUARD

On March 2, 2001, the Commander of the Coast Guard Personnel Command (CGPC) recommended that “partial relief “ be granted to the applicant. On March 6, 2001, the Chief Counsel of the Coast Guard recommended that alternative relief be granted to the applicant “as a matter of equity.”

According to the Chief Counsel, the applicant failed to prove that the Coast Guard committed error in appointing him an ensign rather than a lieutenant junior grade upon graduation from PA school. “Only those members who held the grade of chief warrant officer for 21 months or more prior to the convening of the OCS class were eligible for appointment to the rank of lieutenant (junior grade) upon graduation.”

Article 1.B.5.b.8. of the Coast Guard Personnel Manual provides as follows:

Regular chief warrant officers with 21 or more months as a chief warrant officer on the published class convening date are eligible to apply for temporary commissions as lieutenant (junior grade). All chief warrant officers with fewer than 21 months on that date will be commissioned as ensigns.

According to the Chief Counsel, the Government is not estopped from repudiating erroneous advice given by one of its officials. Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917). The Chief Counsel explained that the “government could scarcely function if it were bound by its employees unauthorized representation. . . . [The] party must satisfy the requirements imposed by Congress.” Goldberg v. Califano, 546 F.2d 477 (2d Cir. 1976), denied sub nom. Goldberg v. Califano, 431 U.S. 937 (1977). The applicant in this case appears to have relied on the advice of a seemingly authorized government employee to his detriment. That advice misstated the requirements of the Service. The applicant cannot now claim an entitlement based on the actions taken based on the inaccurate information he received.

The Chief Counsel said that the Board should grant alternative relief “as a matter of equity.” The applicant asserted in his application “that had he been properly counseled as to the choice between accepting advancement to E-9 or appointment to Chief Warrant Officer in 1996, he “would have remained on the E-9 list for advancement” and accepted advancement to E-9.

The Chief Counsel said that the Coast Guard will not object to a BCMR order correcting applicant’s record to show he accepted advancement to E-9.

On March 2, 2001, CGPC recommended that the applicant be granted “partial relief.” On March 6, 2001, the Chief Counsel recommended that “alternative relief” based on equity be granted to the applicant. The outcome was the same.

CGPC phrased its recommendation as follows: “Since applicant chose promotion to CWO versus the higher paying Master Chief Petty Officer based on incorrect counsel that he would graduate from PA school as a LTJG versus (sic) an ensign, the Coast Guard is not opposed to granting Applicant partial relief. The Coast Guard recommends that Applicant be offered the opportunity to have his promotion to CWO voided and replaced with advancement to Master Chief Petty Officer.” CGPC recommended paying compensation for “saved pay” but did not recommend back-dating his appointment as an LTJG.

APPLICANT’S RESPONSE TO THE COAST GUARD’S VIEWS

On March 6, 2001, the Chairman sent the applicant a copy of the views of the Coast Guard and invited him to respond within 15 days. The applicant responded with a request for a 30-day extension of the 15-day deadline (which was granted).

On April 18, 2001, the Board received from the applicant a “Rebuttal to Coast Guard’s Recommendation to BCMR Docket 2001-006.”

The applicant ignored the Chief Counsel’s proposal (alternate relief) and disagreed with the CGPC proposal (partial relief). “To the casual reader it would appear that the Coast Guard is making a good faith effort to correct an injustice,” but he alleged that this is not so. He alleged that the Coast Guard’s proposal to retroactively promote him to master chief petty officer only partially correct his financial losses and failure to grant full relief would negatively affect his family, active duty career and retirement pay.

He also alleged that the 21 month service requirement, as a CWO, in order to advance to lieutenant (junior grade) was not consistently applied in the past. One of the two so advanced only had 17 months of active duty. He quoted the following sentence from Article 1.B.5.b.8 of the Personnel Manual: "All chief warrant officers with fewer than 21 months on that date will be commissioned as ensigns."

On August 10, 2001, the Chairman received copies of his OERs for the period ending September 30, 2001 and the period ending January 31, 2001. He received a mark of "7," the highest possible mark, on the comparison scale for both OERs.

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 section 1552 of title 10 of the United States Code. The application was timely.

2. Article 1.B.5.b.8. of the Coast Guard Personnel Manual provides as follows: "Regular chief warrant officers with 21 or more months as a [CWO . . .] are eligible to apply for temporary commissions as [LTJG]. All [CWO]s with fewer than 21 months on that date will be commissioned as ensigns.

3. The applicant and the officers whom he consulted for advice apparently were not aware of the provisions in Article 1.B.5.b.8 of the Personnel Manual. Erroneous advice by a government official is not binding on the government. Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917). CGPC wrote that the applicant did not meet the criteria for appointment to O-2. The Chief Counsel concurred with CGPC. He said that the applicant failed to prove that the Coast Guard committed error in appointing the applicant an ensign, rather than a lieutenant junior grade, upon his graduation from physician assistant school.

4. Although the Coast Guard did not err in commissioning the applicant as an ensign, the applicant has experienced an injustice. Every official he consulted advised him that he would graduate from PA school as an LTJG if he accepted appointment as a CWO. CGPC said that in view of the fact that he

chose promotion to CWO as a result of incorrect counsel, rather than to the higher paying E-9 (master chief) position, "the Coast Guard is not opposed to granting Applicant partial relief." The Chief Counsel concurred in recommending "alternative relief based on the equities presented."

5. The applicant stated that he would lose certain benefits if the Board granted the alternative relief proposed by the Chief Counsel rather than the relief he requested. However, it is the Board's policy to return an applicant to the position he would have been in had the injustice never occurred. In this case, if the applicant had been properly advised, he would have chosen advancement to E-9.

6. Accordingly, the alternative relief proposed by the Coast Guard should be granted.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of _____, USCG, for correction of his military record is granted as follows:

The applicant's record shall be corrected to show that he remained on the E-9 advancement list and was advanced to E-9 (rather than to CWO-2) on the date he would have been advanced to E-9 had he originally chosen to stay on the E-9 advancement list. His commissioning as a CWO shall be null and void. His commissioning as an ensign shall remain unchanged.

The Coast Guard shall pay the applicant any back pay and allowances which he may be due as a result of this correction.

All other relief is denied.

Mark A. Holmstrup

Sherri L. Pappas

Cynthia B. Walters