

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Application for Correction
of Coast Guard Record of

BCMR Docket
No. 51-96

**DECISION OF THE DEPUTY GENERAL COUNSEL
ACTING UNDER DELEGATED AUTHORITY**

I concur in the Board's finding that the Coast Guard committed error in failing to give applicant a pre-discharge interview before her 1994 discharge; and that it failed to make a page 7 entry, describing the exiting interview, as required by PERSMAN Art. 12-B-4.c & 4.d.

However, I disagree with the Board's conclusion that because of these errors, the applicant is entitled to her former rating as a Marine Science Technician Second Class (MST2), E-5. Neither the applicant nor the Board has shown a connection between the Coast Guard's failure to give her a pre-discharge interview and her being denied any lawful right or benefit.

Coast Guard Personnel Manual (PERSMAN) Art. 12-B-4 requires commanding officers or executive officers to conduct follow up interviews with enlisted members, who express a desire not to reenlist, during the 6 months prior to the end of their enlistment contracts. At the interview, the enlisted member is to be informed of "matters which are of interest to potential reenlistees such as: advantages of training, promotion, service schools, assignments, and retirement." Art. 12-B-4.c(1). Additionally, if the member indicates that he or she intends not to enlist immediately, "[t]he member should be advised that the provisions of [A]rticle 1-G-3b. will apply should there be a desire to reenlist other than on the day following discharge." Art. 12-B-4.c(2). Furthermore, Art. 1-G-3.b states: "Personnel not reenlisting on the day following discharge at the unit to which last regularly assigned shall be reenlisted in accordance with current directives applying to recruiting officers. Authority to reenlist in other rates or ratings must be obtained from the Commandant."

If the applicant had been interviewed in accordance with these three PERSMAN sections, applicant would have been told: (1) the benefits of a Coast Guard career and of reenlisting without a break in service; and (2) that, if applicant decided not

to reenlist within a day of discharge, then the Coast Guard's directives to its recruitment officers would determine what benefits and conditions she could expect when reenlisting.

Nothing performed or stated in the pre-discharge interview process -- when conducted properly -- would have entitled applicant to regain her rate of MST2, if she reenlisted later than one day after her discharge. Also, the regulations governing the interview do not require an officer to discuss the possibility or methods for a separated enlisted member to regain his or her rating as a condition of reenlistment.

Since a pre-discharge interview, if it were held, did not establish any right to her former rating upon later reenlistment, and since such an interview would not have informed her how to regain her former rating, I find that the failure to hold a pre-discharge interview did not cause the loss of her former MST2 rating.

Applicant raises a second argument to justify the return of her former rating. She argues that her recruiter did not properly counsel her:

If I had known this [i.e., regaining her former rating] was going to be a problem, I wouldn't have rejoined in the first place. My recruiter made it seem like I wouldn't have a problem returning to my rate. I didn't know any better because I wasn't counselled about it.

I find applicant's argument unconvincing on several grounds. First, applicant does not state what the recruiter said about regaining her former rate. Rather, applicant gives only her conclusion. Thus, I cannot determine whether the recruiter gave accurate or inaccurate information.

Second, applicant has not explained how she could reasonably believe that the Coast Guard promised a return of her former rate. On October 3, 1995, she signed a reenlistment contract that states in Section B, Agreements, Section 8.c:

The agreements in this section and attached annex(es) are all the promises made to me by the Government. **ANYTHING ELSE ANYONE HAS PROMISED ME IS NOT VALID AND WILL NOT BE HONORED.** (Initials of Enlistee/Reenlistee) /s/ _____

(Boldface type and capitalized sentence appear in the original.)

Section 8 contains only one condition: that applicant would begin in pay grade E-3. The remarks area of Section 8.b contains "None." A reference in Section B to additional details of her reenlistment in Section C and Annex(es) is classified as "N/A" for "not applicable."

In Section D, Certification and Acceptance, applicant signed her name to the following certification:

I certify that I have carefully read this document. Any questions I had were explained to my satisfaction. I fully understand that only those agreements in Section B of this document or recorded on the attached annex(es) will be honored. Any other promises or guarantees made to me by anyone are written below:

Filled in immediately below this certification is the entry: "Orders to CGC Lagare, Portsmouth VA. as paygrade E-3." Below that is the signature of the applicant. Thus, the applicant's initials and signature in Sections B and D are unchallenged evidence that applicant was not promised her former MST2 rate as a condition for reenlistment.

Third, there is a certification by the recruiter who accepted the reenlistment application:

On behalf of the United States ... COAST GUARD, I accept this applicant for enlistment. I have witnessed the signature in item 13b to this document. I certify that I have explained that only those agreements in Section B of this form and in the attached Annex(es) will be honored, and any other promises made by any person are not effective and will not be honored.

This certification was signed by an ADCS (E-8) service member and constitutes further unchallenged evidence that the Coast Guard's only promises to applicant on reenlistment were: (a) the pay grade of an E-3, and (b) assignment to the Coast Guard Cutter Lagare.

Finally, the Coast Guard's advisory opinion points out that, when applicant reenlisted, there were no immediate openings in applicant's military specialty as shown by the "open rate list." * Since applicant had four years of prior service and

* The Coast Guard Recruiting Manual, Chapter 3, subsection E.3.a, defines the open rate list:

The Open Rate List (ORL) is a list of rates for which the Coast Guard has immediate openings that may be filled by prior service personnel having those skills. The ORL maintained and periodically updated by MPC-epm [i.e., Military Personnel Command]. The ORL in effect on the date of enlistment is the official authority. MPC-rec will consider good-faith applications when the rate was removed from the ORL during processing.

For returning petty officers whose specialties are not on the open rate list, the Coast Guard Recruiting Manual, Chapter 3, subsection 2.f, "Former Coast Guard Petty Officers," describes a slower, alternate path for advancement back to the former rate:

Former Coast Guard active duty petty officers who reenlist as undesignated non-rates and desire to advance in their formerly held rating may submit a request to Commander, Military Personnel Command ... for advancement after completing 6 months active duty in their current enlistment if considered qualified by their commanding officers. These members will be placed on the class "A" school list of their formerly held rating. When their name [sic] is selected to attend school, [Military Personnel Command] will authorize advancement to Petty Officer Third Class. These members will not attend class "A" school.

was aware of the open rate list and its function in announcing which military specialties had critical shortages where separated petty officers could return to their former rates.

Considering the applicant's agreement to the reenlistment contract's conditions and disclosure statements, considering the recruiter's certification of disclosure of all Coast Guard promises and of his denial of any promises not written into the reenlistment contract, and considering the applicant's failure to rebut this evidence, I find that the Coast Guard had not promised applicant that she could return to her former rate of MST2 as a condition of her reenlistment.

In conclusion, I find that the applicant has not carried her burden of proving that the Coast Guard erred or committed an injustice by not returning her former rating of MST2 as a condition of her reenlistment.



ORDER

The application of
record is denied.

for correction of her military

DATE:

July 10, 1997



Deputy General Counsel
as designated to act for the Secretar

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction
of Coast Guard Record of:

BCMR Docket
No. 51- 96

FINAL DECISION

████████ Chairman:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on December 28, 1995, upon the BCMR's receipt of the applicant's application for correction of her military record.

This recommended final decision, dated January 3, 1997, is signed by the three duly appointed members who were designated to serve as the Board in this case.

Applicant's Request for Correction

The applicant asked the BCMR to direct that she be advanced in the Coast Guard to the grade that she held prior to her break in service.

The applicant initially enlisted in the Coast Guard on March 27, 1990. On August 1, 1993, she was promoted to marine science technician second class (MST2) at pay grade E-5). On March 25, 1994, while at MST2, she was released from active duty and placed in the inactive reserve.

On October 3, 1995, approximately one and 1/2 years later, she reenlisted in the Coast Guard and returned to active duty at pay grade E-3 without designation as a marine science technician (MST). She alleged that she deserved to be "reinstated" at MST2 at pay grade E-5 because she never received any counseling or administrative remarks entry informing her that she could not "return to the Coast Guard and keep [her] rating."

The applicant suggested that she had been misled by her recruiting officer because he "made it seem like [she] wouldn't have a problem returning to [her] rate." She also made an argument based on policy: "I feel that I could be a better asset to the Coast Guard in my old rating, because I'm fully qualified to do the job."

Views of the Coast Guard

On September 2, 1996, the Coast Guard recommended to the Board that it deny relief to the applicant.

The Coast Guard Personnel Manual and the Recruiting Manual contain a number of provisions relevant to members who are discharged and a number that apply to persons who do not choose to reenlist for a period of time and the ratings at which such persons can subsequently reenlist. See, e.g., Articles 12-B-4.c., 4.d., and 4.e., and Article 1-G-3.b. of the Personnel Manual and Paragraphs E.2.d. and E.2.f. of the Recruiting Manual.

Article 12-B-4c. provided that an eligible member who does not intend to reenlist will be interviewed by her commanding or executive officer. The Coast Guard suggested that the Service did not meet this requirement with respect to the applicant, but it claimed that the error was a "harmless" one. "[T]here is no evidence that if the failure to provide reenlistment counseling was an error or injustice, that the error or injustice caused the harm that the Applicant now asserts." The Coast Guard declared that these provisions "were implemented for the benefit of the Coast Guard itself, not to create a right in any of its members." The Service declared that "[a]ny failure by the Coast Guard to comply with those regulations does not, in and of itself, provide Applicant a cause for relief."

The Coast Guard also stated that the applicant "provided no evidence that she would have remained on active duty had she received reenlistment counseling." According to it, the duty to counsel members on reenlistment "exists for the benefit of the Coast Guard itself - to aid in retaining trained personnel." According to the advisory opinion, the "purpose of the counseling is . . . to gain a benefit for the Coast Guard by keeping this trained person on active duty."

PERTINENT COAST GUARD REGULATIONS

Article 12-B-4c. Followup Interviews

"When a member who is eligible for reenlistment has indicated intentions not to reenlist, followup interviews will be held by the commanding officer or executive officer. During these interviews:

"(1) The members shall be fully informed of matters which are of interest to potential reenlistees"

Article 12-B-4d. Personnel Data Record Entries

"The following information shall be entered on CG-3307 [Page 7 entry] of the member's Personnel Data Record.

"(1) The date of interview:

"(2) The member's expressed intention regarding enlistment. . . ."

FINDINGS AND CONCLUSIONS

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

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10, United States Code.

2. The applicant initially enlisted in the Coast Guard on active duty on March 27, 1990. On March 25, 1994, after approximately four years, she was released from active duty at the rate of MST2 and the pay grade of E-5. On October 3, 1995, she reenlisted on active duty at undesignated pay grade of E-3.

3. There is no indication in her military record that she was granted a "follow up" interview prior to her release from active duty in March of 1994.

4. The Coast Guard Personnel Manual directs a member's commanding officer or executive officer to conduct "followup interviews" with respect to a member who has indicated an intention not to reenlist. Article 12-B-4c., Personnel Manual. In such interviews, according to the Manual, "[t]he member shall be fully informed of matters which are of interest to potential reenlistees." As a potential enlistee, one of the matters that would be apt to be of interest to the applicant was the rate at which she could reenlist.

5. The Personnel Manual also requires the Coast Guard to make a Page 7 entry as to the date of the interview and the member's intention regarding reenlistment. Article 12-B-4d. Personnel Manual. There is no Page 7 entry in her military record that sets forth the information required by such Article 12-B-4d.

6. The Coast Guard committed an error in failing to provide the applicant with a followup interview and in failing to insert a relevant page 7 entry in her military record.

7. The Coast Guard also committed error in concluding that Articles 12-B-4c. and 12-B-4d. are provisions for the "benefit of the Coast Guard - to aid in retaining trained personnel." These provisions, like others in the Coast Guard Personnel Manual, are indeed for the benefit of the Coast Guard, but they are also provisions for the benefit of enlisted members.

8. It is an incorrect interpretation of the required-counseling regulations to say that they are intended "to gain a benefit for the Coast Guard by keeping this trained person on active duty." The intent of Congress, in section 1552 of title 10, United States Code, was to correct error; it was not to come up with reinterpretations that avoid a finding of error.

9. In any case, the Coast Guard has not submitted any corroboration (e.g. legislative history) to support its interpretation of these Articles.

10. The error in the applicant's record can only be corrected by granting the applicant's application .

ORDER

The application of _____, USCG, for correction of her military record, is granted. Her military record shall be corrected to indicate that her pay grade was E-5 since October 3, 1995 and that her rating has been MST2 since that date. The Coast Guard shall pay the applicant any amounts due.

