

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-009

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XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Andrews, J.

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application on October 21, 2005, upon receipt of the applicant's completed application.

This final decision, dated August 9, 2006, is 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 asked the Board to correct the Coast Guard's calculation of his "sea time" in his rating, which is boatswain's mate (BM). He stated that in 2004 he was deemed eligible to take the servicewide examination (SWE) for advancement to chief petty officer and did in fact take the SWE in 2004. However, when he applied to take the SWE again in 2005, he was told that he was not eligible because he did not have sufficient sea time (one year) as a BM.

The applicant alleged that the Coast Guard's calculations are incorrect because he received the BM designator while serving on board the cutter *Dauntless* on April 1, 1994, after completing his Damage Control qualifications while serving aboard the cutter *Dependable*. At the time, the striker list for advancement to BM3/E-4 was very long, so many seamen, including himself, received the BM designator while still an E-3 (SNBM). Because of the long list, the applicant alleged, he remained an SNBM for well over a year and was not advanced to BM3 until July 1, 1995. The applicant attributed the problem to an

administrative error—i.e., someone’s failure to make the correct entry in a database.

The applicant stated that because he could not get his record fixed before the SWE, he requested a waiver of the requirement, and his command supported him in his request. However, his request was denied. He alleged that the denial of his request was “very opinionated and based on my career path and not [on] the evidence.”

In support of his allegations, the applicant submitted a series of emails concerning his request for a waiver of the sea time requirement. He also submitted the following:

- A Marks Sheet, dated November 22, 2000, shows that when he received his semi-annual performance evaluations in May 31, 1994; November 30, 1994; and May 31, 1995, his rating was SNBM.
- In a memorandum concerning the applicant’s qualification as a Boarding Team member dated April 24, 1995, he is referred to as an SNBM.
- A Personal Data Extract prepared for the applicant’s application for the 2004 SWE shows that he was “sea duty qualified” and had 1 year and 4 months of “sea time for points.”
- A Personal Data Extract prepared for the applicant’s application for the 2005 SWE shows that he was not “sea duty qualified” but still shows that he had 1 year and 4 months of “sea time for points.”

SUMMARY OF THE RECORD

On October 26, 1987, the applicant enlisted in the Coast Guard for a term of four years. On December 25, 1991, he was released from active duty into the Reserve. A Statement of Creditable Sea Service shows that he had completed three years and two days of sea service aboard a cutter, from December 29, 1987, through December 31, 1990, while still a non-rated seaman (E-3). He advanced to boatswain’s mate third class (BM3; E-4) on September 1, 1991. However, upon his release into the Reserve, he had completed no sea service in that rating. He did not drill or perform active duty while in the Reserve.

On December 13, 1993, the applicant reenlisted as a seaman. Prior to reenlisting, he signed an administrative entry (“Page 7”) with the following statement: “I have been advised that I will be required to compete for advance-

ment to pay grade E-4 and will not be assigned a designator based solely on my prior military service.”

A Statement of Creditable Sea Service shows that from December 16, 1993, through June 15, 1995, the applicant served aboard the *Dependable* with the rating SN. (However, for most of this period, he was serving aboard the *Dauntless*.) On July 1, 1995, following his transfer ashore, the applicant advanced to BM3/E-4. Since then, he has continued to be assigned to shore units and has performed no sea duty.

On March 15, 2005, the Coast Guard’s Personnel Service Center denied the applicant’s request for a waiver, citing Article 5.C.15.c., because he did not have 12 months of sea service in a pay grade higher than E-3.

APPLICABLE REGULATIONS

Sea Duty Requirements for Advancement

Article 5.C.15. of the current Personnel Manual governs minimum sea duty requirements for advancement in the Coast Guard. Advancement to boatswain’s mate first class (BM1/E-6)—the applicant’s current rate—requires a minimum of “6 months [sea duty] in any rating or pay grade.” For advancement to chief boatswain’s mate (BMC), the requirement is now different depending upon when one entered the designated rating. Article 5.C.15.c. states that, for members who entered the BM rating prior to February 1, 1994, eligibility for advancement from BM1 to BMC requires a minimum of “12 months above pay grade E-3 in designated rating.” Article 5.C.15.d. states that, for members who entered the BM rating on or after February 1, 1994, eligibility for advancement to BMC requires a minimum of “12 months in the designated rating in any pay grade.” This less strict requirement took effect on February 14, 2003, when the Commandant issued ALCOAST 082/03. Prior to February 14, 2003, however, the sea duty requirement for advancement to BMC was the same no matter when one entered the rating: “12 months above pay grade E-3 in designated rating.”

Waiver Regulations

Article 5.C.15.a.1. of the current Personnel Manual states that the minimum sea duty requirement will not be waived “except in cases where [the] candidate is presently serving at sea or is under orders to sea duty and will meet the sea duty requirement by the effective date of the advancement eligibility list.” Article 5.C.15.a.2. states that “[i]f a member is transferred from a sea duty assignment before completing the required sea duty for advancement due to the needs of the Service, the sea duty requirements for advancement may be waived. The waiver will be documented in the orders of the member.”

Designators

Article 5.C.29.a. of the Personnel Manual in effect in 1994 stated that the “assignment of designators provides a means to identify:

“(1) Personnel serving in pay grade E-3 who have received formal Class “A” School training;

“(2) Personnel serving in pay grade E-3 who place above the cutoff on eligibility lists resulting from Servicewide competition; and

“(3) Those rated personnel who have successfully completed all requirements for an approved change of rating. Personnel who have been assigned a designator shall be assigned the duties of the rating for which designated.

“(4) Those previously rated personnel who were discharged from the Coast Guard and reenter the Service as an E-3 or E-2 after being out for more than 24 hours.”

COMDTNOTE 1430, issued on June 6, 1994, states that the cutoff for advancement on each eligibility list is marked by an ampersand, and on the BM3 candidate list, the ampersand appears at #534, whereas the applicant’s name is #599.

In 1994, Article 5.C.29.b.(2) stated that for personnel above the cutoff on established eligibility lists, “Commanding officers, upon receipt of eligibility lists resulting from Servicewide competition for advancement, shall assign appropriate designators to those E-3 personnel who place above the cutoff.” This regulation remained in effect until 1997. Article 5.C.29.b.2. of the current Personnel Manual states that only the commanding officer of the Personnel Service Center “shall assign appropriate designators to those E-3 personnel who place above the cutoff on the striker list.”

VIEWS OF THE COAST GUARD

On July 22, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief.

The JAG stated that under ALCOAST 102/93, which went into effect on October 25, 1993, “members on the striker eligibility list would not have their designations assigned until their names appeared above an established cutoff point. Applicant’s name did not appear above the established cutoff point for BM strikers until release of the eligibility list signed on January 27, 1995.” The

JAG argued that the evidence submitted by the applicant "is insufficient to overcome the presumption of regularity afforded the Coast Guard."

The JAG also adopted the facts and analysis included in a memorandum on the case prepared by CGPC. CGPC stated that when reenlisting in the Coast Guard in 1993, the applicant acknowledged in writing the fact that he would not be assigned a BM designator on the basis of his prior service. CGPC submitted a copy of a Career Summary from its Direct Access database, which shows that the applicant received the designator SNBM on January 27, 1995. CGPC stated that the applicant received the designator on January 27, 1995, because he was "above the cut" on the November 1994 eligibility list for advancement to BM3. Because the applicant's last day of sea duty was June 15, 1995, CGPC stated, the applicant never completed 12 months of sea duty while having the designator. CGPC stated that the applicant has "4 months and 19 days of rated sea time." Therefore, he does not have the minimum "12 months [of sea duty] in designated rating in any pay grade," required for advancement under Article 5.C.15.d. of the Personnel Manual.

CGPC alleged that the Marks Sheet dated November 22, 2000, which the applicant submitted, is erroneous insofar as it shows his rating to be SNBM on May 31, 1994, and November 30, 1994. CGPC opined that the error was likely made by the applicant's command and "corrected upon full migration of the CG Employee Review system." CGPC stated that although the applicant claimed that his unit assigned him the designator, only the commanding officer of the Personnel Service Center was authorized to do so. CGPC submitted a copy of an Enlisted Marks Summary printed on December 5, 2005, which shows that the applicant was still a seaman without a designator when he received his evaluations on May 31, 1994, and November 30, 1994, and that his first evaluation dated May 31, 1995, was the first that he received as an SNBM.

CGPC alleged that an administrative error led to waiver of the sea duty requirement for the applicant in 2004 and allowed him to compete for advancement in the 2004 SWE. CGPC submitted a copy of the message by which the applicant's request for a waiver dated March 15, 2004, was granted on March 22, 2004. CGPC alleged that the applicant's request for waiver in 2004 should have been denied because he did not meet the parameters for waiver under Article 5.C.15.a. of the Personnel Manual. CGPC alleged that the applicant's request for waiver in 2005 was properly denied.

In support of its allegations, CGPC submitted copies of three emails. On April 21, 2005, Mr. Rose, the Assistant Chief of the Advancements Branch at the Personnel Service Center, wrote to the Officer in Charge (OIC) of the applicant's unit regarding the denial of the applicant's request for waiver that he had

retrieved the archive file of the Headquarters Master Eligibility Lists, COMDT-NOTE 1430, dated 06 JUN 94 (May 94 SWE) and 27 JAN 95 (Nov. 94 SWE). Paragraph 5.d. of the COMDTNOTE states:

“Each list also contains a designator point which is indicated by the ampersand sign (&). All personnel below this point are **not** designated, and shall not be assigned their designator until their names appear above the cutoff point or on the Enlisted Personnel Advancement Announcement.”

Members above the (&) cut on these older lists were allowed to be assigned a designator as of the date the list was signed and released. The Eligibility List for the May 94 SWE was signed and released on 06 JUN 94. Promotions from the list began on 01 JAN 95 and expired in JUN 95. [The applicant] is #599 and the official cut and the (&) sign is set at #534. [The applicant] was not promoted from this list nor was he authorized to receive a designator from this list as he was below the cut.

The Eligibility List for the NOV 94 SWE was signed and released on 27 JAN 95. Promotions from that list began on 01 JUL 95 and expired in DEC 95. [The applicant] is number 599 on that list and is above the cut which was #652. He would have been authorized to be designated as an SNBM as of the date the COMDTNOTE was signed which was on 27 JAN 95. ...

On April 22, 2005, the OIC replied and stated that it “is truly unfortunate that this member’s Commanding Officer on the DAUNTLESS back on May 31, 1994, and November 30, 1994, made the mistake of marking him as a SNBM It is my belief that [the applicant] planned his career with this mistaken information. I would have thought the same thing. This mistake was no fault of his, and I feel this should be taken into consideration.”

On April 25, 2005, Mr. Rose replied as follows:

[T]he requirement from 1994 up until the release of ALCOAST 082/03 (Released on 14 FEB 03) was that a BMC candidate have “12 months above grade E-3,” meaning BM3 and above. Since departing the DAUNTLESS on 15 JUN 95 [the applicant] new that he would need 12 months sea time above E-3 to qualify for E-7 and had none. In the subsequent years following departure from the DAUNTLESS it appears very little effort was made to go afloat or leave Texas. It was not until ALCOAST 082/03, due to the [Joint Rating Review] merger program, that the opportunity opened for him to use any SNBM time, which he thought he had. That does not remove the fact that for the eight years previous to the ALCOAST he was not qualified for E-7 and did not go afloat when it would have been required. Based on this and the fact that [the applicant] only has 4 months and 19 days of rated sea time, a waiver of 7 months and 11 days is denied.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 13, 2006, the Chair forwarded a copy of the views of the Coast Guard to the applicant and invited him to respond. No response was received.

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 over this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. From December 13, 1993, when the applicant voluntarily reenlisted in the Coast Guard as a seaman in pay grade E-3, until February 14, 2003, when ALCOAST 082/03 was published, the applicant knew or should have known that he was not eligible for advancement to BMC because he had served absolutely no sea duty above the pay grade E-3. For all that time, advancement from BM1 to BMC required a minimum of "12 months above pay grade E-3 in designated rating." Therefore, until February 14, 2003, the applicant could not have been misled about his eligibility for advancement to BMC because all of his sea duty had been performed in pay grade E-3 or below.

3. Under ALCOAST 082/03, the sea duty requirement for advancement to BMC was changed for members entering the rating after February 1, 1994, from "12 months above pay grade E-3 in designated rating" to "12 months in the designated rating in any pay grade." The applicant argued that he meets the new criterion because the commanding officer of the *Dauntless* assigned him the designator sometime before May 31, 1994, when he received his performance evaluation marks as an SNBM. In support of this allegation, the applicant submitted a summarized Marks Sheet, dated November 22, 2000, which shows that when he received his semi-annual performance evaluations in May 31, 1994; November 30, 1994; and May 31, 1995, his rating was SNBM. The Marks Sheet dated November 22, 2000, therefore somewhat supports the applicant's allegation that his commanding officer assigned him the designation prior to May 31, 1994.

4. In 1994, Article 5.C.29.b.(2) of the Personnel Manual stated that "Commanding officers, upon receipt of eligibility lists resulting from Service-wide competition for advancement, shall assign appropriate designators to those E-3 personnel who place above the cutoff." The Board has reviewed the eligibility list issued on June 6, 1994, for the May 1994 SWE and the applicant's name appears at #599, whereas the cutoff was #534. Therefore, under Article 5.C.29.b.(2), the applicant's command was not authorized to assign him the BM

designator until January 27, 1995, when the results of the November 1994 SWE were approved and released and the applicant's name appeared above the cutoff. In light of this evidence, the Board agrees with CGPC that the applicant's "rated sea time" consists of the 4 months and 19 days from January 27, 1995, through June 15, 1995, when he left the *Dauntless*. Therefore, although the Marks Sheet dated November 22, 2000, somewhat supports the applicant's allegation that his commanding officer assigned him the designation prior to May 31, 1994, the Board finds that the applicant was not actually authorized to have the designator until January 27, 1995. Thus, he does not have sufficient sea time in his rating to be eligible for advancement to BMC under Article 5.C.15.d. of the Personnel Manual because he does not have "12 months [of sea duty] in the designated rating in any pay grade."

5. As stated in Finding 2, above, before the publication of ALCOAST 082/03 on February 14, 2003, the applicant could not have been misled about his lack of eligibility for advancement to BMC. Moreover, he could not have hoped to acquire eligibility without performing a full year of sea duty since he had none in a pay grade above E-3. It is possible that upon publication of ALCOAST 082/03, the applicant mistakenly believed that he was eligible under the new, less strict minimum sea duty requirement if, as he alleges, the commanding officer of the *Dauntless* erroneously assigned him the designator before he placed above the cutoff on the November 1994 SWE. However, the Marks Sheet submitted by the applicant does not prove that the commanding officer assigned him the BM designator prior to May 31, 1994, as the applicant argued. The eligibility list for the May 1994 SWE was not approved and released until June 6, 1994. Therefore, even if, as the applicant alleged, his commanding officer assigned him the designator, there was no event that would have occasioned such an error until June 6, 1994. Moreover, the Board finds that the Marks Sheet alone is insufficient to prove that his commanding officer, contrary to a clear regulation, assigned him the designator even though his name appeared below the cutoff on the eligibility list issued on June 6, 1994.

6. CGPC submitted a copy of a message showing that in March 2004, the applicant requested and was granted a waiver of the minimum sea duty requirement for advancement to BMC. Although the applicant may have harbored hopes of being eligible following the release of ALCOAST 082/03 on February 14, 2003, his need for a waiver of the requirement in 2004 put him on notice that he did not in fact have sufficient sea time to be eligible.

7. The applicant argued that he should have been granted another waiver of the minimum sea duty requirement in 2005. However, he was not serving at sea or under orders to report for sea duty when he requested the waiver, as required under Article 5.C.15.a.1. of the Personnel Manual. Article

5.C.15.a.2. states that “[i]f a member is transferred from a sea duty assignment before completing the required sea duty for advancement due to the needs of the Service, the sea duty requirements for advancement may be waived. The waiver will be documented in the orders of the member.” When the applicant finished his tour aboard the *Dauntless* on June 15, 1995, he was still an E-3 and so, under the regulations then in effect, had not accrued even a single day of rated sea time in a pay grade above E-3 toward eligibility for advancement. Under such circumstances, the Board does not believe that the Coast Guard erred in not granting the applicant a permanent waiver of the requirement when it transferred him off the *Dauntless*.

8. The applicant alleged that the denial of his request for a waiver in 2005 was unjust. “Injustice” as used in 10 U.S.C. § 1552(a) is “treatment by the military authorities that shocks the sense of justice, but is not technically illegal.” *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); Decision of the Deputy General Counsel, BCMR Docket No. 2001-043. “The BCMR has the authority to decide on a case-by-case basis if the Coast Guard has committed an error or injustice.” Decision of the Deputy General Counsel, BCMR Docket No. 2002-040. Although the applicant accrued more than 4 years of sea time as a seaman and 4 months and 19 days as an SNBM, the Board finds that the Coast Guard’s refusal to grant the applicant a waiver of the minimum sea duty requirement for advancement to BMC does not shock its sense of justice. While the applicant may have been confused about his eligibility for a short time following the publication of ALCOAST 082/03, for most of his career he knew or should have known that he could not advance to BMC unless he performed additional sea duty. There is no evidence in the record that he actively pursued and was unfairly denied the opportunity to perform additional sea duty.

9. Accordingly, the applicant’s request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of BM1 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

Stephen H. Barber

Dorothy J. Ulmer

Eric J. Young