

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1999-035

FINAL DECISION

██████████ Attorney-Advisor:

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 BCMR docketed this case on December 16, 1998, upon receipt of the applicant's completed application.

This final decision, dated November 18, 1999, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, a xxxxxxxxxxxx on active duty in the Coast Guard, asked the Board to correct his record to show that he was advanced to xxxxxxxx on September 1, 199x and to award him back pay and allowances from September 1, 199x, to May 31, 199x, when he was promoted to xxxxxx. The applicant explained that because he was forced to decline advancement to xxxxxx in order to remain on the xxxxxxxxxxx list, he lost over \$3,300.00 in pay and benefits between September 1, 199x, and May 31, 199x, as well as the prestige of wearing the xxxxxxxx insignia, which he had worked hard to obtain.

APPLICANT'S ALLEGATIONS

The applicant alleged that in August 199x, when he was still a xxxxxxx, he was simultaneously above the cutoff on the list for advancement to XXXXX and

above the cutoff on the list for appointment to XXXXX.¹ On August 199x, he was chosen for advancement to XXXXX as of September 1, 199x. However, under Article 5.C.13.d. of the Personnel Manual (COMDTINST M1000.6A), he could not accept that advancement unless he declined appointment to XXXXX. The applicant alleged that he requested a waiver of this policy and that his request received a strong endorsement from his command. However, his request was disapproved.

The applicant alleged that the policy created by Article 5.C.13.d. should not have applied to his case because none of the reasons cited for the policy were applicable to his situation. For instance, he alleged that advancing him to XXXXX before appointing him to XXXXX would not have required the Coast Guard to transfer him more than once during the year. Normally, advancement to XXXXX would have caused him to be transferred, but the assignment officer told him that he would not be transferred if he took the advancement to XXXXX. Article 4.C.3.d. permits chief petty officers to be assigned to billets either above or below their rank, depending on the needs of the Coast Guard. The applicant alleged that because the position he then held aboard the Coast Guard cutter Xxxxx had seen high turnover, the assignment officer had already decided not to transfer him until the next transfer season. Therefore, he could have been advanced to XXXXX in September 199x prior to his appointment to XXXXX in June 199x without causing the Coast Guard to transfer him twice in one year.

The applicant also argued that his advancement to XXXXX would not have hindered "promotion flow" within the ranks by blocking someone else's promotion to XXXXX because the assignment officer intended to leave him in his billet on the xxxxxx and had no plans to transfer him to a XXXXX billet.

The applicant argued that Article 5.C.13.d. "unfairly discriminates against a very small number of high performing Coast Guard members who, because of the timing of the issuance of a list, are unjustly denied promotion. ... [T]here were nine people who ended up above the cutoff on both the Warrant Officer and Enlisted Advancement eligibility lists. Four of these people were advanced prior to the issuance of [the XXXXX appointment list] and were allowed to keep their advancements."

Finally, the applicant argued that it would not have been unfair to those members below him on the XXXXX advancement list to wait to be promoted until after he had been appointed to XXXXX because he had out-scored them. He

¹ Appearing above the "cutoff" on an advancement or appointment list means that one is guaranteed advancement or appointment to the next grade at some as yet unknown point in the future, usually within the next year or two.

asked, "Why should my career be sacrificed for the benefit of those who I outperformed?"

SUMMARY OF THE RECORD

- 7/31/95 The results of the Service Wide Exam for promotion to XXXXX were announced. The cutoff for guaranteed promotion was just 2, and the applicant, a XXX, was number 30 on the list.
- 4/25/96 The Coast Guard revised the cutoff for advancement to XXXXX from 2 to 35, thereby guaranteeing the applicant an offer of advancement to XXXXX.
- 7/12/96 The Coast Guard announced the results of an appointment board for selection of XXXXXs. The applicant ranked second on the list of xxxxxxxxxxxx chosen for future appointment.
- 8/22/96 The applicant became eligible for advancement to XXXXX on September 1, 199x, due to a vacancy.
- 8/26/96 The applicant wrote a letter to the Commandant requesting waiver of Article 5.C.13.d. so that he might be advanced to XXXXX without giving up his place on the XXXXX appointment list.
- 8/28/96 The applicant's command forwarded his request "strongly recommending approval."
- 1/23/97 The commandant informed the applicant that his request for waiver had been denied. The letter stated as follows:

1. After a thorough and careful review of your request for a waiver ... we must disapprove your request.

2. The eligibility lists contain the names of all Coast Guard personnel who have competed for either advancement or promotion and could be either advanced or promoted over a set period of time as vacancies occur throughout the Service. [Article 5.C.13.d. of the Personnel Manual] requires personnel to make a career path decision once they are presented with two equally probable career paths. Requiring members to commit to a career path helps meet several Service needs, primarily providing assignment officers a clearer and more up to date picture of assignment vacancies and personnel eligible to fill those vacancies. If we authorized these advancements, due to the [transfer] costs and the limitation on transferring members more than one time in a year, the billet for which the member was advanced might have to be left unfilled with a member in the appropriate pay grade. In

addition, requiring members to commit to a career path strengthens promotion flow within the enlisted workforce. If a member were allowed to take an enlisted advancement while waiting for a promotion to Warrant Officer, the member would in affect [sic] be occupying two billets at the same time. Due to the legislative ceilings on E-8s and E-9s, the individual below this member on the advancement list would be prevented from advancing until the member was promoted to Warrant Officer.

3. When [the cutoff for the XXXXX advancement list] was revised in April of 9x, you were guaranteed advancement to Senior Chief. Your guaranteed advancement reflected a vacancy and the service's expectation you would fill that vacancy. When [the XXXXX appointment list] was published in July 9x, again your future promotion to Chief Warrant Officer was guaranteed based on a vacancy and the expectation you would fill that vacancy. While it may appear unfair that you cannot be advanced to Senior Chief while awaiting [an] appointment as Warrant Officer, it is equally unfair for the member below you waiting to advance, once you are appointed. Therefore, the needs of the Coast Guard require you to make a decision as to your desired career path. By requiring members to make these decisions we are better able to efficiently manage both the officer corps and the enlisted workforce. ...

VIEWS OF THE COAST GUARD

On October 14, 1999, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request.

The Chief Counsel argued that the applicant's request was "unsupported by the record and barred by regulations." The Chief Counsel stated that "the Board would have to go far afield to conclude that a Chief Petty Officer with many years of military service who voluntarily applied to become a commissioned warrant officer was somehow the victim of an injustice" due to the proper implementation of Article 5.C.13.d. of the Personnel Manual.

The Chief Counsel argued that the provision in Article 5.C.13.d. that prevents personnel from being promoted to the rank of chief petty officer, senior chief petty officer, or master chief petty officer while awaiting appointment to warrant officer is "rationally based" and based on "equity to other service members and fiscal prudence." The Chief Counsel stated that the Board should defer to the Coast Guard's interpretation of its own administrative regulations under *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-4 (1984). "[B]ecause the Applicant has failed to prove by a preponderance of the evidence that the Coast Guard acted arbitrarily and capriciously in establishing Article 5.C.13.d. of the [Personnel Manual], the Board should find that Article

5.C.13.d. ... is a valid exercise of the Coast Guard's discretionary authority to implement workforce management regulations."

The Chief Counsel argued that the applicant voluntarily chose to compete both for advancement to XXXXX and XXXXX and that the regulations was applied to him impartially. "[N]o one forced him to seek this opportunity, and when faced with the choice of staying an enlisted member or choosing XXXXX, he chose XXXXX. ... His voluntary choice to seek commissioned officer status is neither an error or injustice." The Chief Counsel stated that the applicant could have accepted advancement to XXXXX but chose instead "the higher pay with greatly increased future promotion opportunities of Commissioned Warrant Officer status with the knowledge aforethought that he had to live by the provisions of Article 5.C.13.d."

The Chief Counsel stated that the application involves a "significant issue of Coast Guard policy." Therefore, any decision by the Board other than denial must be reviewed by the delegate of the Secretary.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 2, 1999, the BCMR sent the applicant a copy of the Chief Counsel's advisory opinion and invited him to respond within 15 days. On November 16, 1999, the applicant responded. He reiterated his arguments that the rationale behind the Coast Guard's policy in Article 5.C.13.d. did not apply in his case and that the policy was unfair to him and the small number of enlisted members who find themselves above the cutoff on both the advancement and appointment lists simultaneously.

APPLICABLE LAW

Article 5.C.13.d. of the Personnel Manual states the following:

Personnel who have been selected for promotion to chief warrant officer, above the cutoff on the XXXXX list, are ineligible for advancement to [chief petty officer, senior chief petty officer, or master chief petty officer]. Their names automatically will be removed from established enlisted eligibility list 60 days after publication of the officer eligibility lists, unless an individual concerned has notified Commander ... that they do not intend to accept the chief warrant officer appointment. If a member who has been selected is to be advanced to [chief petty officer, senior chief petty officer, or master chief petty officer] during the above 60 day window, the member must make a decision at that time, vice 60 days after publication, regarding their intentions to accept either advancement or appointment to XXXXX.

Under Article 4.C.3.d, a XXXXX may fill the billet of the grade below (XXX) or above (xxxxxxx (XXXx)), "when there are no qualified [Xxxxx or XXXxs] available for those assignments."

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. The applicant alleged that the Coast Guard's decision to require him to forgo advancement to XXXXX in order to retain his guaranteed promotion to XXXXX under Article 5.C.13.d. was unjust. He alleged that the requirement should have been waived because none of the rationale for the regulation applied to his case. He alleged that he should not have been prevented from advancing to XXXXX while awaiting appointment to XXXXX just because it might delay the advancement of members whom he had outperformed.

3. Article 5.C.13.d. prevents chief petty officers who are above the cutoff and waiting appointment to commissioned service as XXXXXs from accepting advancement in the enlisted ranks. The Coast Guard has determined that this rule decreases the frequency of transfers, reduces transfer costs, minimizes confusion in assignments, and improves the flow of promotions in the enlisted ranks.

4. The applicant's argument that he should have been advanced to XXXXX because he was not going to be transferred and so the administrative burdens of his advancement would have been less than usual is not persuasive. The Coast Guard has a strong interest in implementing its regulations uniformly and in advancing the careers of all its members to maintain their commitment to the service.

5. The applicant argued that he was treated unfairly in comparison with members who were advanced prior to the issuance of the XXXXX appointment list and were allowed to keep their new enlisted ranks until receiving their commissions. However, such members appeared higher on the enlisted advancement list than the applicant and were advanced before their names appeared on the XXXXX appointment list. The Board finds it is not unjust for the Coast Guard to permit such members to keep their new ranks rather than both-

ering to demote them, while refusing to advance members, such as the applicant, who appeared lower on the advancement list and were not advanced prior to the issuance of the XXXXX appointment list.

6. The applicant has not proved by a preponderance of the evidence that the Coast Guard committed error or injustice when it required him to choose between advancement in the enlisted ranks and remaining on the list of those guaranteed commissions as XXXXXs.

7. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application for correction of the military record of xxxxxxxx, USCG, is hereby denied.

