DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2000-169

FINAL DECISION

[redacted] **Attorney-Advisor:**

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on July 25, 2000, upon the BCMR's receipt of the applicant's completed application.

This final decision, dated May 31, 2001, 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, who resigned his commission as a XXXXXXXXX in the regular Coast Guard on December 1, 1964, asked the Board to correct the errors and injustices in his record caused by his failure to be selected for promotion to commander in the Coast Guard Reserve in 1971. He alleged that the Coast Guard's errors and unjust actions denied him the right to continue serving in the Reserve and receive retirement pay upon reaching age 60 in December 1990.

The applicant alleged that his non-selection for promotion to commander was a mistake. He alleged that the error is proved by the highly positive comments in his fitness reports. He alleged that his erroneous and unjust failure of selection was caused by a mark made by his district commander to a selection board in 1970. He alleged that the district commander, when forwarding the applicant's own letter to the board, erroneously and unjustly scored the applicant as "average" in comparison with his contemporaries, instead of "outstanding," "superior," "excellent," or "above average."

The applicant alleged that the selection board was supposed to choose officers for promotion on the basis of who was "best qualified." He argued that, under the

"best qualified" standard, he should have been selected because he was a graduate of the Coast Guard Academy and Naval Postgraduate School, had ten years of active duty experience in several operational fields, had outstanding fitness reports, and was "in the zone" for promotion. He alleged that the other Reserve officers he knew who were selected for promotion had fewer qualifications and less active duty experience.

The applicant alleged that after he was passed over for promotion the first time in February 1971, he sent the Commandant a letter asking in what way his service was deficient so that he might improve. He alleged that he received, in response, excerpts from the selection board's precept with guidelines for determining which officers were "best qualified," such as duties, education, fitness reports, citations, etc. He stated that under these guidelines, he was not deficient in any area of performance.

The applicant alleged that after he was passed over for promotion a second time in June 1971, his congressman wrote the Commandant on his behalf. In response, the Acting Commandant told his congressman that no law prescribes exactly how a selection board must determine which officer is best qualified for promotion. The Acting Commandant stated that a review of the applicant's record indicated that he had completed only two satisfactory years of service during his six years in the Reserve and that this may have been a factor in his failure to be promoted. The Acting Commandant further stated that the applicant's failure to be promoted did "not mean that [he] was not excellent. It means that, after careful consideration, the selection board concluded that there were other officers more qualified for promotion."

The applicant alleged that his failure to accumulate more than two satisfactory years for retirement purposes was an old, invalid criterion and was not in the board's instructions for selecting officers on a "best qualified" basis.[1] He alleged that because the selection board used a criterion that was no longer valid for selecting officers for promotion, he was discharged on October 1, 1970, after having accumulated 12 years, 6 months, and 4 days of federal service. His discharge "eliminat[ed] any opportunity to work toward retirement pay." He alleged that it was also an injustice that, upon resigning his commission in 1964, he was transferred into a voluntary training unit of the Reserve rather than a paid unit.

The applicant stated that he did not apply for relief sooner because he only discovered the existence of the BCMR in 1999. He stated that "the sheer magnitude alone of the injustice in [his] case warrants consideration of this application."

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[1] In support of this allegation, the applicant submitted a 1976 fact sheet pertaining to proposed legislation, H.R. 12940, which stated that the attainment of a minimum number of retirement points had not been considered a valid criteria for promotion since the "best qualified" standards were instituted in September 1970.

SUMMARY OF THE APPLICANT'S RECORD

The applicant graduated from the Coast Guard Academy and received his commission in 195X. Most of his active duty fitness reports indicate that he was considered a "very fine officer" in comparison with other officers. Most of his performance evaluation marks were 6s, 7s, or 8s (on a scale of 1 to 9, with 9 being best).

On December 1, 1964, the applicant resigned his commission and was transferred to a voluntary training unit of the Ready Reserve. His record indicates that he had submitted letters of resignation at least twice before but had withdrawn them. His letters and his command's endorsements indicate that he was very dissatisfied with his Coast Guard career, particularly his assigned billets and the level of pay. During the following six years, he performed sufficient drills to earn the following points toward retirement: 15, 22, 46, 50, 43, 50. Members of the Reserve receive 15 points even if they do not perform any drills. He did not perform active duty for training, apparently, because he had already served on active duty for 10 years.

During his six years in the Reserve, the applicant received fitness reports in which he was rated "very good," "excellent," or "outstanding" (corresponding to marks of 7, 8, and 9) in the performance categories. In comparison with other officers, he received ratings of "competent and efficient," "dependable and typically effective," and "very fine," and one rating as "one of the few outstanding officers I know." The written comments in his Reserve fitness reports include the following: "very capable"; "experienced and capable"; "outstanding … largely responsible for the excellent program of this unit"; "capable, interested, and enthusiastic"; and "good instructor, generally effective and dependable." He was consistently recommended for retention and promotion.

On September 5, 1969, the applicant filled out a form summarizing his service, education, and civilian work for review by the selection boards. The district commander, a captain who had served as the reviewer for his fitness reports (reviewing the for "completeness only," not indicating his concurrence), forwarded his form to the selection board on November 12, 1969. In comparison with other officers, the captain marked the applicant as "average," in fourth place on a scale of eight descriptors ranging from "poor" to "outstanding." The applicant failed of selection twice in 1971 and was therefore transferred to the inactive Standby Reserve on October 1, 1971.

VIEWS OF THE COAST GUARD

On January 31, 2001, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board dismiss the application without prejudice "for incompleteness due to the failure of the Applicant to specify an actionable error or injustice." In the alternative, he recommended that the Board deny the application for untimeliness or for lack of merit.

The Chief Counsel interpreted the application as a request to be promoted to the rank of commander. He stated that the applicant's request and allegations are too vague for the Board to address effectively because there is no "specific allegation of error or injustice … or substantial proof of any error or injustice by the Coast Guard." He argued that the applicant seems to allege irregularity in the proceedings of the selection boards but presents only his own record and the Acting Commandant's letter about the possible reasons for his failure of selection as proof. The Chief Counsel stated that because selection board proceedings are strictly confidential under 14 U.S.C. § 261(d), it is impossible for anyone to know why the applicant was passed over, but that, as the Acting Commandant indicated, the applicant's failure to achieve satisfactory years for retirement in four of the six years he served in the Reserve "was notable."

The Chief Counsel argued that under *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) and *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), the Board must assume that the selection boards have acted correctly, lawfully, and in good faith absent clear, cogent, and convincing evidence to the contrary. Furthermore, he alleged that federal courts have long refused to interfere in military decisions regarding promotions and advancements, particularly when they are determined by selection boards comparing hundreds of eligible candidates. *Reaves v. Ainsworth*, 219 U.S. 296 (1911); *Orloff v. Willoughby*, 345 U.S. 83 (1953); *Payson v. Franke*, 282 F.2d 851 (D.C. Cir. 1960), *cert. denied*, *sub nom. Robinson v. Franke*, 265 U.S. 815 (1961); *Brenner v. United States*, 202 Ct. Cl. 678 (1973). The Chief Counsel argued that the Board should apply the same standards as the courts under the presumption of regularity afforded selection boards.

The Chief Counsel further argued that the application should be denied for untimeliness under the Board's three-year statute of limitations, which should not be waived in light of the lack of merit in the case. *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995). Finally, he argued that if the Board decides the case on the merits, relief should be denied consistent with the Board's decision in BCMR Docket No. 1999-083 because the applicant did not prove any procedural error but based his claim on the quality of his record.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 2, 2001, the Chairman forwarded a copy of the Chief Counsel's advisory opinion to the applicant and invited him to respond within 15 days. The applicant was granted an extension and responded on February 28, 2001.

The applicant alleged that his allegations of error were quite specific: (1) the "average" rating he received from the captain who forwarded his form to the selection board and (2) the invalid criterion used by the selection board. With respect to the first error, the applicant alleged that the captain who marked him as "average" for the selec-

tion boards "never had any official or personal face-to-face contact with [him]. His sole basis on which to judge [his] qualifications was [his] military record and fitness reports." He alleged that the "average" mark is clearly erroneous given his high marks and comments he received in his fitness reports, including comments from an admiral. With respect to the second error, the applicant argued that he had proved that the selection boards used an invalid criterion for promotion under the "best qualified" system: retirement points. He alleged that the boards' use of this criterion was also unfair because during his first two years in the Reserve, he was trying to establish a civilian career, and during his last four years, he performed two satisfactory years and barely missed performing satisfactory years twice "due to heavy job conflicts with a highly competitive commission sales territory frequently involving out-of-town travel."

The applicant argued that the BCMR should not apply the same standards used by the courts because "Congress views the Boards as their administrative arms entrusted with the responsibility to be guarantors of fair and equitable treatment for active duty military members, veterans and retirees." He also alleged that, given the quality of his record, the Chief Counsel's argument that he has not proven that he was more fit for promotion than other lieutenant commanders who were chosen for promotion is "absurd." He argued that it is particularly absurd because he has no access to the other officers' records that would allow him to prove his case.

The applicant further argued that his application is not untimely because he did not discover the captain's erroneous "average" mark until April 8, 2000, when he received the Coast Guard's response to his request for information under the Freedom of Information Act. Therefore, he alleged, he applied for relief within three years of his discovery of the error. Moreover, he alleged, "the sheer magnitude" of the injustice done to him warrants consideration of his case on the merits. In addition, he argued that the delay should not be held against him because when he protested his failure of selection to the Coast Guard and his congressman in 1971, neither mentioned the BCMR to him as a possible avenue of relief.

Finally, the applicant argued that his case can be distinguished from that in BCMR Docket No. 1999-083 because (1) the mark of "average" constitutes a material error in his record; (2) the selection boards used an invalid criterion; and (3) in light of the quality of the rest of his record, these two material errors caused his failure of selection. He argued that but for his erroneous failures of selection, he would have continued to serve in the Reserve and retired with at least 20 years of satisfactory service.

APPLICABLE LAW

According to 33 C.F.R. § 52.22, "[a]n application for correction of a record must be filed within three years after the applicant discovered or reasonably should have discovered the alleged error or injustice. If an application is untimely, the applicant shall set forth reasons in the application why its acceptance is in the interest of justice. An

untimely application shall be denied unless the Board finds that sufficient evidence has been presented to warrant a finding that it would be in the interest of justice to excuse the failure to file timely."

Under 14 U.S.C. § 254, every member of a selection board must swear an oath that "he will, without prejudice or partiality, … perform the duties imposed upon him." Article 14 U.S.C. § 260 requires each selection board to submit a written report, signed by all members, containing the names of the officers recommended for promotion. The report also must certify that the officers recommended for promotion are the best qualified. Under 14 U.S.C. § 261(d), "[e]xcept as required by this section, the proceedings of a selection board shall not be disclosed to any person not a member of the board."

Article 14-A of the Personnel Manual in effect in 1971 governed the work of selection boards. Article 14-A-1(b) stated that the "criteria published herein are furnished boards solely for guidance and do not limit the scope of authority vested in [selection] boards. Each member of the board must retain an impartial, unbiased and unprejudiced attitude regarding all officers being considered and regarding all groups and specialized duties in the Coast Guard." According to Article 14-A-1(c), selections of officers for promotion to the rank of lieutenant and above were to be based on a determination of who was "best qualified." (Congress limits the number of officers in the ranks of lieutenant and above, so only a certain number of officers may be promoted.)

Article 14-A-3(a) provided that each selection board "will develop its own overall standards and criteria. The degree of significance assigned to each of the many factors to be considered will vary according to the grade level and the type of selection with which the board is concerned." Article 14-A-3(b) described four basic criteria to be considered by selection boards: performance of duties as revealed in fitness reports; personal qualities, such as leadership, judgment, initiative, and professionalism; and education. Article 14-A-4 provided that commander selection boards should consider the greater of (a) the seven most recent years of service or (b) all of an officer's service at his current rank to be most significant.

Article 14-A-6(b) provided that, "[i]n arriving at recommendations, comparisons should be made among all officers whose names are submitted to the board for consideration. The extent to which these officers measure up, among themselves, in accomplishments in past assignments and potential for greater responsibility according to the overall criteria adopted by the board should be the basis for recommendation." Article 14-A-6(c) stated that the Commandant could provide boards with procedures and forms to their assist evaluations, but "[t]he determination to use such assistance in the form provided or in modified form, or not at all, rests solely with the board."

Article 14-A-6(5) stated that each board should issue a report listing the names of those officers selected for promotion and certifying that, "in the opinion of at least a

majority of the members if the board has five members, or in the opinion of at least two-thirds of the members if the board has more than five members, the officers recommended for promotion, … are the best qualified for promotion … of those officers whose names have been furnished to the board."

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 submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record. 10 U.S.C. § 1552. The applicant alleged that he did not discover the fact that he had been marked "average" by his command until 1999. However, the applicant failed of selection in 1971, and the form with the "average" mark has been in his official military record and accessible to him since that time. Therefore, the Board finds that the applicant knew or should have known of the alleged errors of which he now complains in 1971. Thus, his application was untimely by almost 26 years.

3. Pursuant to 10 U.S.C. § 1552, the Board may waive the three-year statute of limitations if it is in the interest of justice to do so. To determine whether it is in the interest of justice to waive the statute of limitations, the Board should conduct a cursory review of the merits of the case. *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

4. The applicant has not proved that either of the selection boards that failed to select him for promotion adopted unlawful criteria in selecting officers. The Acting Commandant's comments regarding the possibility that his previous level of participation in the Reserve may have been a factor in his failure of selection do not prove that the selection boards actually used that as a criterion or that he failed of selection because of his past level of participation. Moreover, the applicant has not proved that such a criterion is unlawful. Under the regulations in the Personnel Manual, selection boards had (and still have) broad discretion to adopt their own criteria for evaluating candidates for promotion and were not obligated to adopt or limit themselves to those shown in the precept. The fact that the Coast Guard had removed a specific criterion regarding the number of satisfactory years does not mean that the selection boards were not allowed to consider the level of an officer's past participation in the Reserve when deciding who should be promoted. In fact, the Board finds that an officer's level of participation in the Reserve, as indicated by the number of retirement points earned each year, would be an obvious and appropriate criterion for selection.

5. The applicant alleged that, in light of the quality of his fitness reports, the "average" mark assigned by the captain who endorsed his report form for the selection boards is a clear and prejudicial error that unjustly caused his failures of selection. However, the Coast Guard's officer evaluation system, like many personnel evaluation systems, has sometimes been afflicted with grade inflation. The system has been revised several times over the years to combat this phenomenon. Moreover, the fact that some of his previous commands had awarded him high marks and had written highly laudatory comments about his performance does not prove that the captain did not intend to mark him as "average" or that the captain made the mark because of some unfair bias against him. The applicant's fitness reports indicate that the captain only reviewed them to determine their completeness, not to evaluate the accuracy of the reporting officer's marks and comments. In addition, although the applicant alleged that the captain was not familiar with his performance, he did not prove that the captain did not base the "average" mark on reliable information. Therefore, the Board finds that the applicant has not proved that the mark was in error.

6. The applicant alleged that his failures of selection constituted a clear injustice in light of the quality of his fitness reports. He asked the Board to infer from his excellent record that a mistake was made and that his failures of selection were unjust. While it is apparent that the applicant was a highly competent officer, nothing in his record proves that he was more fit for promotion than any of the officers who were chosen. Moreover, the factors taken into consideration by a selection board are not limited to fitness report marks and comments but are myriad. Therefore, even if he could prove that his average marks were higher than those of an officer who was selected for promotion, this would not prove that the selections boards committed any error or injustice in exercising their discretion. Under 14 U.S.C. § 261(d), Congress made the deliberations of selection boards entirely privileged; they may not be disclosed to anyone except the board members themselves. Therefore, the Coast Guard committed no error in refusing to provide the applicant with copies of any of the selection boards' proceedings (assuming they still exist).

7. The applicant made numerous allegations with respect to his treatment by the Coast Guard. Those allegations not specifically addressed above are considered to be without merit and/or not dispositive of the case.

8. The Board's review of the record indicates that there is no merit in this case. Therefore, it is not in the interest of justice to waive the statute of limitations.

9. Accordingly, the application should be denied because of its untimeliness and lack of merit.

ORDER

The application of XXXXXXXX, USCGR, for correction of his military record is denied.