


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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-023

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXX

FINAL DECISION


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 the applicant's request for correction on November 10, 2003.

This final decision, dated July 27, 2004, 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 his record to show that immediately prior to his advancement from chief petty officer (E-7) to temporary lieutenant (LT) on June 1, 1999, he was advanced to chief warrant officer (CWO2) and that his permanent pay grade is CWO3.

The applicant stated that while serving as a chief petty officer, he was simultaneously selected for appointment to CWO and to temporary LT. His command told him that he could not be appointed to CWO prior to temporary LT. Therefore, his permanent grade remains E-7.

The applicant alleged that a Coast Guard legal office has since advised him that "personnel being advanced under similar circumstances are advanced to CWO first." The applicant alleged that if he had properly been appointed to CWO prior to accepting the appointment to temporary LT, he would have been selected for promotion to CWO3 on June 1, 2003. Therefore, he alleged, his permanent grade should be CWO3.

VIEWS OF THE COAST GUARD

On March 30, 2004, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial relief in this case. He based his recommendation on a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC).

CGPC stated that the applicant applied for appointment to CWO in 1998 and was selected for appointment to CWO, as number one on the list of selectees, on June 1, 1999. CGPC stated that the Assignment Officer told the applicant that if he accepted the temporary LT appointment, he could not be appointed to CWO.

CGPC stated that there was no firm policy regarding the applicant's situation prior to December 2000. However, in December 2000, the Chief Counsel found that a member could be appointed to CWO prior to an appointment as a temporary LT, even if the two appointments were made on the same day, as long as the CWO appointment was made first. Therefore, CGPC recommended that the Board correct the applicant's record to show that he was appointed to CWO on June 1, 1999.

CGPC stated, however, that "it cannot be determined that [the applicant] would have been selected by the PY [promotion year] 2003 CWO3 Promotion Board." Therefore, CGPC recommended that, if the applicant is selected for promotion by the next CWO3 promotion board to review his record, his date of rank to CWO3 should be backdated to June 1, 2003, and he should "be assigned precedence immediately senior to the most senior CWO3 with the same date of rank, since he was number one on the June 1999 CWO (WEPS) appointment list."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 31, 2004, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

APPLICABLE LAW

Title 14 U.S.C. § 214, entitled "Appointment of temporary officers," provides that "[t]he President may appoint temporary commissioned officers in the Regular Coast Guard in a grade, not above lieutenant ... from among the commissioned warrant officers, warrant officers, and enlisted members of the Coast Guard"

Title 10 U.S.C. § 575(a) states that "[a] selection board ... shall recommend for promotion to the next higher grade those warrant officers considered by the board whom the board, giving due consideration to the needs of the armed force concerned

for warrant officers with particular skills, considers best qualified for promotion within each grade (or grade and competitive category) considered by the board.”

Article 1.A.3.b. of the Personnel Manual deals with the effect that a temporary appointment has on a member’s permanent status. It states that a temporary appointment “does not change these temporary officers’ permanent, probationary, or acting status; prejudice their promotion or appointment opportunities; or abridge their rights or benefits. A temporary officer may not lose any rightful pay and allowances due to his or her permanent status when appointed.”

Article 1.A.3.c. provides that “[a] temporary appointment ... may be vacated at anytime. If an officer’s appointment is so vacated, he or she reverts to his or her permanent status (14 U.S.C. § 214).”

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 10 U.S.C. § 1552. The application was timely.

2. The applicant alleged that he was erroneously counseled that he could not be appointed to CWO prior to being appointed to the rank of temporary LT. The Coast Guard has admitted that the applicant was erroneously counseled and that he could have executed an oath of office for appointment to CWO2 on the day he was also appointed to temporary LT. Moreover, there are no laws that prohibited the applicant from accepting his appointment to CWO2 first and subsequently executing the oath for the temporary appointment to LT on the same day. Therefore, the applicant has proved by a preponderance of the evidence that he was erroneously counseled and that his record should be corrected to show that he executed an Acceptance and Oath of Office for appointment to CWO2 on June 1, 1999, before he executed one for appointment to LT.

3. The applicant requested that his permanent rank be changed to CWO3, as of June 1, 2003. However, 10 U.S.C. § 575(a) requires members to be recommended for promotion to CWO3 by a promotion board prior to being promoted to the permanent rank of CWO3. Therefore, this Board will not correct his record to show that he has already been promoted to CWO3 without requiring proper review and consideration by a promotion board. However, if the applicant is selected for promotion to CWO3 when he is considered by the next CWO promotion board, his date of rank should be backdated to June 1, 2003, the date he would have been promoted to CWO3 had he been

duly considered by the PY 2003 CWO promotion board. In addition, as CGPC recommended, he should "be assigned precedence immediately senior to the most senior CWO3 with the same date of rank, since he was number one on the June 1999 CWO (WEPS) appointment list."

4. Accordingly, the relief recommended by the Coast Guard should be granted.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxx, USCG, for the correction of his military record is granted in part as follows:

His record shall be corrected to show that he executed an Acceptance and Oath of Office and was appointed to CWO2 on June 1, 1999, immediately prior to his appointment to temporary LT. Thereafter, his military record shall be considered by the next CWO promotion board for promotion to CWO3. If, at that time, he is selected for promotion to CWO3, his date of rank shall be backdated to June 1, 2003. His precedence shall be immediately senior to the most senior CWO3 with the same date of rank because he was number one on the June 1999 CWO (WEPS) appointment list.

The Coast Guard shall pay him any back pay and allowances he may be due as a result of these corrections.

