


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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-101

XXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

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 May 3, 2004.

This final decision, dated January 27, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his record to show that he was appointed a chief warrant officer (CWO2) on January 1, 2002, which he alleged is the date he would have been appointed to CWO had he not asked for his name to be removed from the final eligibility list on March 28, 2001. He alleged that he only removed his name from the list because the regulations were confusing.

SUMMARY OF THE RECORD AND REGULATIONS

On November 16, 1987, the applicant, a native of xxxxxxxxxxxxxxxx, enlisted in the Coast Guard. He had previously served in the Marine Corps for four years and, at the time of his enlistment in the Coast Guard, was a member of the xxxxxx National Guard. Upon completing boot camp, he was assigned to a cutter for about one year, and then attended "A" School to become a third class yeoman (YN3; E-4 in the administrative rate).

Upon becoming a YN3 in 1989, the applicant was assigned to the Personnel Reporting Unit (PERSRU) of the xxxxxx Coast Guard District in xxxxx. He worked in xxxxx in various administrative capacities until 1997, and advanced to YN1 (E-6). In 1997, he was transferred to xxxx as the Administration Department Head and PERSRU Chief. While in Xxxx, he advanced to YNC (E-7). In June 2000, while still in Xxxx, he was on the 1999 and 2000 eligibility lists for advancement to YNCS (E-8), and he was a candidate for selection for appointment to CWO.

Article 1.D.10.c.2. of the Personnel Manual provides that

[u]pon publication of the [CWO] Final Eligibility List, candidates will be given two weeks from the date time group of the ALCGPERSCOM message to request removal from the list with a two-year loss of eligibility. A candidate who declines an appointment to warrant grade, or elects removal from the Final Eligibility List after the two-week period has elapsed shall be required to wait five years from the anniversary date of that election before being eligible to re-compete. At the time the candidate makes either of the above elections, Commander (CGPC-opm) and (CGPC-epm) shall be notified by expeditious means, and the following Administrative Remarks (CG-3307) entry documenting the election, shall be made in the candidate's Headquarters PDR:

DATE: "I have read and understand Article 1.D.10.c., Coast Guard Personnel Manual. I voluntarily elect to be removed from the eligibility lists for appointment to warrant grade. I understand that I will not be eligible to apply for appointment to warrant grade for (two or five whichever is applicable) years from the anniversary date of this election. I understand that I will be eligible to reapply as a candidate for appointment to warrant grade on or about (date)."

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

Personnel who have been selected for promotion to chief warrant officer, above the cutoff on the CWO 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 lists 60 days after publication of the officer eligibility lists, unless an individual concerned has notified Commander (CGPC-epm) that they do not intend to accept the chief warrant officer appointment.

On August 11, 2000, the Coast Guard Personnel Command (CGPC) issued ALCGPERSCOM 065/00, which contained the final eligibility list for members selected by the June 2000 CWO appointment board. For members eligible for the Personnel Administration specialty, including the applicant, the "cut"¹ fell under the xth name on the list. The applicant's name was xxth on the list. It also stated that "[o]nly those

¹ When issuing such a list, the Coast Guard notes how many people it expects to appoint from the list. The fact that the applicant's name was "not above the cut" means that when the list was issued, the Coast Guard noted that it was not certain he would be appointed to CWO before the list expired, although he was eligible for appointment if enough CWOs retired or were separated to open up sufficient vacancies. Because more vacancies occurred than were anticipated, appointments were later made from the list below the cut.

whose names appear at or above the cutoff for each specialty are assured appointment.” Paragraph 6 stated the following:

Per Article 5.C.13.D. of [the Personnel Manual], those whose names appear at or above the cutoff are not eligible for advancement Their names will automatically be removed from the Enlisted Advancement Eligibility List 60 days after publication of this msg unless they have notified the Coast Guard Personnel Command ... that they do not intend to accept appointment to warrant grade. Also, those who decline appointment or who voluntarily elect removal from the [CWO] eligibility list are not eligible to re-compete for appointment as follows:

- A. Those who elect removal within two weeks of the date time group of the May 2000 SWE eligibility cutoff msg are not eligible to compete for warrant officer for two years.
- B. Those who elect removal after the two-week period are not eligible to compete for warrant officer for five years.

Paragraph 7 of ALCGPERSCOM 065/00 instructed commands to ensure that the CG-3307 required by Article 1.D.10.f.² of the Personnel Manual was prepared and entered into the record of “those who decline appointment or voluntarily elect removal from the eligibility list.”

On August 25, 2000, CGPC issued ALCGPERSCOM 074/00, with the subject “Amended Timetable for Publishing May 2000 Servicewide Exam (SWE) Eligibility List Cutoffs.” It stated that the cutoffs for the SWE eligibility lists would not be published until about September 15, 2000. Therefore, to allow those on the CWO list to see the SWE cutoffs before deciding whether to stay on the CWO list, the deadlines set in ALCGPERSCOM 065/00 would be delayed as follows:

- 2. [ALCGPERSCOM 065/00], which provides the eligibility list and guidelines for appointment to warrant grade, established timetables for members at or above the cutoffs to decide to accept or decline their appointment. Given the delay in publishing the May 2000 SWE eligibility cutoffs, the timetables in para 6 of [ALCGPERSCOM 065/00] are modified to allow mbrs to wait until the May 2000 SWE eligibility cutoff msg is released to decide to elect removal from the warrant eligibility list.
 - A. Those who elect removal within two weeks of the date time group of the May 2000 SWE eligibility cutoff msg are not eligible to compete for warrant officer for two years.
 - B. Those who elect removal after the two-week period are not eligible to compete for warrant officer for five years.

On September 7, 2000, CGPC issued the May 2000 SWE eligibility list cutoffs in ALCGENL 049/00. It stated that “[a]s per [ALCGPERSCOM 074/00], the [date time

² Change 31 of the Personnel Manual, issued in 1999, revised Article 1.D.10. and moved the penalties and requirement for the CG-3307 from subparagraph f. to subparagraph c.

group] of this msg shall be used to establish the new timetable for mbrs at or above the cutoff for appointment to warrant grade.”

On February 1, 2001, CGPC issued ALCGENL 011/01, which authorized the applicant’s advancement to YNCS on March 1, 2001. The applicant was advanced to YNCS on March 1, 2001. He also received transfer order to a YNCS billet in Xxxxx.

On March 28, 2001, the applicant asked CGPC to remove his name from the CWO final eligibility list. On April 10, 2001, CGPC responded to his office, the PERSRU in Xxxx, with a message noting that his name had been removed from the list and stating “[e]nsure CG-3307 is submitted [in accordance with Article 1.D.10.c.2. of the Personnel Manual].” However, there is no such CG-3307 in the applicant’s record. The applicant transferred to Xxxxx and has not been allowed to compete for CWO, in accordance with Article 1.D.10.c.2. of the Personnel Manual.

APPLICANT’S ALLEGATIONS

The applicant stated that in March 2001, because he was not “above the cut” on the CWO final eligibility list, he was not certain whether he would be appointed. Along with his advancement to YNCS, he received transfer orders from Xxxx to Xxxxx. He “did not want to transfer to Xxxxx and then have the possibility of being offered an appointment [to CWO] after [he] arrived, which would have meant an immediate additional transfer.” Therefore, he decided to remove his name from the CWO eligibility list and re-compete for CWO during the next cycle.

The applicant alleged that when he asked for his name to be removed from the list, he did so “with the understanding that [he] would be able to re-compete for warrant officer before the 2001 appointment board.” He alleged that ALCGPERSCOM 074/00 stated that members at or above the cut on the eligibility list “would incur a penalty if they removed themselves from the list.” Because he was not at or above the cut, he did expect to incur the penalty. He noted that another bulletin, ALCGENL 049/00, which referenced ALCGPERSCOM 074/00, also referred to a “new timetable for members at or above the cutoff for appointment to warrant grade.”

The applicant stated that on April 10, 2001, his command received notification that his name had been removed from the CWO eligibility list, in accordance with his request, and an instruction to place an administrative entry (CG-3307) in his record to show that he was ineligible to compete for CWO for five years. The applicant alleged that if he had known that he would not be able to re-compete for CWO for five years, he would not have had his name removed from the list. Moreover, he alleged, even if he were allowed to re-compete for CWO in the next cycle, he would not be able to obtain the rank of CWO4 prior to reaching 30 years of service.

VIEWS OF THE COAST GUARD

On September 20, 2004, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. He based his recommendation, in part, on a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC).

CGPC stated that although the applicant alleged that he was confused by ALCGPERSCOM 065/00, it "stated the policy for removal, referenced the section in the [Personnel Manual] on CWO appointments, and listed a point of contact with a phone number. The message clearly stated that a candidate who voluntarily removes his/her name after the two-week period is not eligible to compete for CWO appointment for five years. The policy applies to everyone on the list whether above the cut or not. If the applicant had any doubt or any confusion, he should have called the P.O.C. on the message and/or referred to Section 1.D.10.c.2. of the [Personnel Manual]."

CGPC stated that ALCGPERSCOM 074/00 "announced a delay and extended the two-week period for only those candidates at or above the cut on the 2001 CWO Appointment Board Final Eligibility List, until the message for the May 2000 SWE Cut-offs was released. It did not in any way change or waive the policy concerning other candidates removed from the 2001 CWO Appointment Board Final Eligibility List.

CGPC stated that it could not find a copy of the CG-3307 required by Article 1.D.10.c.2. of the Personnel Manual and that it "is reasonable to assume that the CG-3307 was never completed." However, CGPC noted that "[t]he applicant was in charge of the PERSRU [personnel reporting unit] at that time and acknowledges seeing the message from CGPC (opm-1) directing the CG-3307 entry. The applicant did not provide a reason why the CG-3307 was not completed, but it is reasonable to assume the applicant understood, upon seeing the message, that the five-year penalty applied to him." CGPC stated that "[t]he applicant, especially as a Senior Chief Yeoman, should have not only known and understood this policy, but he should have asked CGPC (opm-1) for clarification if he had confusion or doubt about the CWO Appointment process and policy."

TJAG argued that the five-year ineligibility period was set forth in both the Personnel Manual, ALCGPERSCOMs 065/00 and 074/00, and ALCGENL 049/00. TJAG stated that CGPC complied with all regulations in enforcing the five-year ineligibility period. Moreover, TJAG alleged, the "only possible 'error' in Applicant's record is the lack of a CG-3307 documenting Applicant's understanding of the consequences of his actions. The message that effected Applicant's removal from the list mandated such an entry, an entry that Applicant was responsible for preparing in his job as supervisor of the PERSRU."

TJAG alleged that the applicant's claim that he was confused by the language in CGPC's messages is doubtful considering his "professional training and responsibilities as a senior enlisted leader in the Yeoman rating." Moreover, TJAG alleged, "the Coast Guard did nothing to mislead him. Both messages of which Applicant complains put him on notice that seeking voluntary removal from the CWO eligibility list would make him ineligible to compete again for either two or five years. Both messages contained a point of contact (POC) to consult if there were any questions regarding the message. The Coast Guard Personnel Manual ..., the 'bible' of the Yeoman rating, set forth the consequences for Applicant's voluntary removal of his name from the eligibility list ... [and] Applicant knew, or should have known, of the consequences of his actions." CGPC argued that the applicant now "posits a strained reading of the messages in question and ignores both the guidance provided in the [Personnel Manual] and his failure to consult with the provided POC."

Finally, TJAG argued that, even if the applicant "were unaware of the consequences of his actions when he requested removal, [he] was certainly on notice when his command received the message sent on 10 April 2001 approving his removal and directing the command to prepare a [CG-3307] documenting that [he] was ineligible for five years. Applicant's decision not to complain or seek clarification at that time, but rather to execute his apparently desirable orders to Xxxxx provides additional evidence that rather than being misled, Applicant was merely engineering a post hoc argument to overcome a decision he now regrets. The only injustice in this case would be for the Board to reward such behavior."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 20, 2004, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. The applicant responded on October 20, 2004.

The applicant objected to the tone of the Coast Guard's advisory opinion. He stated that it suggests that he is dishonest and untruthful. He pointed out that such an assessment is contrary to his performance evaluations, in which he has received high marks for integrity. He argued that CGPC has "circled the wagons" in response to his application because they sent out the misleading messages.

The applicant repeated his argument that ALCGPERSCOM 065/00 is misleading because paragraph 6 refers only to those members whose names appear at or above the cut-off and establishes the penalties for them. He alleged that paragraph 2 of ALCGPERSCOM 074/00 "could not be more clear when it indicates that ALCGPERSCOM 065/00 established timetables for members at or above the cutoff to elect removal from the list." He argued that if CGPC intended for the penalties to apply to members below the cut, the messages should have said so explicitly. He alleged that paragraph 3 of ALCGENL 049/00 "is clear that the timetable to elect removal from the eligibility list is for members at or above the cutoff."

The applicant stated that he did not contact the POCs about the messages because he relied on the messages to be correct. He pointed out that, although the comparable messages released in 2001, 2002, and 2003 contain the same language as those he relied on in 2000, after preparing the memorandum for the advisory opinion for his case, CGPC amended the language in the messages released in 2004. In ALCGPERSCOM 061/04, he pointed out, CGPC has clarified the language to remove the ambiguity.³

The applicant alleged that when in April 2001, he saw that his name was not on the list of those who would be considered for appointment to CWO that year, he was disturbed and pondered "taking [his] case up the chain of command" but thought it was too late. He stated that for the past three years he has been thinking about the unfairness of having made an important, irrevocable decision based on misinformation, and decided to seek relief from the Board. He argued that his delay is irrelevant, as CGPC would have made the same arguments in 2001. The applicant mentioned the criticism in the advisory opinion about his failure to take action when he saw the mes-

³ ALCGPERSCOM 061/04, is similar to ALCGPERSCOM 065/00. However, in ALCGPERSCOM 061/04, the information about penalties for removing one's name from the list appears separately in paragraph 7, while paragraph 6 pertains only to the fact that those above the cut will be removed from enlisted advancement eligibility lists within 60 days unless they remove their names from the CWO final eligibility list.

sage from CGPC concerning his removal from the list, but did not explain why he did not complain or complete the CG-3307 at that time.

The applicant alleged that he had nothing to gain from removing his name from the CWO final eligibility list and that it is illogical to think he would have done so if he had known about the five-year penalty. He alleged that he “could have remained on the list with no penalty and waited to see if [CGPC] got to [his] number.”

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 in March 2001, he reasonably believed that paragraph 2 of ALCGPERSCOM 074/00 established a five-year penalty for removing one's name from the CWO final eligibility list only for those candidates whose names were above the cutoff. He alleged that he believed that, contrary to Article 1.D.10.c.2. of the Personnel Manual, he could remove his name from the list without incurring any penalty. For the reasons cited below, the Board finds that the applicant's alleged belief, if true, was not reasonable, especially in light of the fact that the applicant, as a YNCS, is supposed to be expert in such matters.

3. None of the bulletins cited by the applicant—ALCGPERSCOM 074/00, ALCGPERSCOM 065/00, and ALCGENL 049/00—purported to establish new penalties or amend the penalties for removing one's name from the CWO final eligibility list provided under Article 1.D.10.c. of the Personnel Manual. If, as the applicant's allegation suggests, he removed his name from the CWO final eligibility list without knowing or consulting the regulations for doing so in Article 1.D.10. of the Personnel Manual, he made a significant career-altering decision with extreme negligence. Moreover, he did so as a YNCS who should have known to consult Article 1.D.10. if he did not know the exact content of the regulation.

4. The subject line for ALCGPERSCOM 074/00 was “Amended Timetable for Publishing May 2000 Servicewide Exam (SWE) Eligibility List Cutoffs.” This message, which is quite short, did not purport to “establish” the penalties, as the applicant alleged. Its purpose was only to note the need for an amended timetable for requiring those on the CWO final eligibility list to decide whether to remain on the list because of the delay in publication of the SWE eligibility list cutoffs. Likewise, the language in

ALCGENL 049/00 cited by the applicant was clearly intended to alert members to the new timetable and did not even refer to the penalties.

5. Neither paragraph 2 of ALCGPERSCOM 074/00 nor paragraph 6 of ALCGPERSCOM 065/00 stated that the penalties applied only to those at or above the cutoff. While the first part of these similar paragraphs noted that those at or above the cutoff for appointment to CWO were not eligible for advancement as enlisted members, no such limitation appeared in the discussion of the penalties in subparagraphs A or B, which referred generally to “[t]hose who elect removal.” Although the information about those at or above the cutoff being ineligible for advancement and the penalties for self-removal from the list are grouped in the same paragraphs in the ALCGPERSCOMs, the Board is not persuaded that anyone making a significant career-directing decision could reasonably assume, without further inquiry, that contrary to Article 1.D.10.c. of the Personnel Manual, the penalties would be applied not to all “[t]hose who elect removal” but only to those at or above the cutoff. The fact that CGPC has recently revised the bulletin to separate the information into two separate paragraphs does not persuade the Board that the applicant could or should have been confused about whether the penalty in Article 1.D.10.c. applied to him because of the grouping of information in paragraph 2 of ALCGPERSCOM 074/00 and paragraph 6 of ALCGPERSCOM 065/00.

6. Moreover, ALCGPERSCOM 074/00 referred the reader to ALCGPERSCOM 065/00. Paragraph 7 of ALCGPERSCOM 065/00 clearly instructed commands to ensure that all members who voluntarily elected removal of their names from the CWO final eligibility list completed the CG-3307 required under Article 1.D.10. to acknowledge the two- or five-year penalty that would be incurred.⁴ Paragraph 7 did not state that only those at or above the cut who elected removal from the list should complete the CG-3307. Furthermore, as chief of the PERSRU, the applicant was chiefly responsible for ensuring that such requirements were fulfilled. He apparently failed to do so either as instructed under ALCGPERSCOM 065/00 and Article 1.D.10.c. or when his office received the notice on April 10, 2001, acknowledging his request for removal and directing the preparation of the missing CG-3307. He has provided no satisfactory explanation for his failure to complete the CG-3307 either at the time of his request for removal, in accordance with Article 1.D.10.c. of the Personnel Manual and ALCGPERSCOM 065/00, or in response to CGPC’s order on April 10, 2001.

7. The record indicates that upon receiving advancement to YNCS and orders to his home state in March 2001, the applicant voluntarily removed his name

⁴ Although paragraph 7 of ALCGPERSCOM 065/00 referred the reader to subparagraph f. of Article 1.D.10., rather than to subparagraph c. (see footnote 2, above), the difference could not have caused any confusion as there no longer is a subparagraph f. in Article 1.D.10. and the only CG-3307 mentioned in the article is the one in subparagraph c.

from the CWO final eligibility list. He has admitted that he did so to avoid a likely transfer away from Xxxxx in the event that he was appointed to CWO. The applicant has not proved that the Coast Guard has committed any error in prohibiting him from competing for CWO during the five-year period following his voluntary removal from the CWO final eligibility list, in accordance with Article 1.D.10.c. of the Personnel Manual. The Board, however, is not limited to correcting legal errors in members' records, but may also remove injustices. "Injustice" is "treatment by the military authorities that shocks the sense of justice, but is not technically illegal."⁵

8. If the Coast Guard applied a five-year penalty for removing one's name from the CWO final eligibility list without warning its members, the Board might find the application of such a penalty to be unjust. However, the Coast Guard published the penalty not only in Article 1.D.10. of the Personnel Manual, but also in ALCGPERS-COMs 074/00 and 065/00. Although the applicant alleged that he did not know the penalty would apply to him, the preponderance of the evidence in the record indicates that he knew or should have known about it. In fact, as a YNCS serving as chief of the PERSRU, he was not only particularly well placed to know of the penalty through communications with CGPC, he was also responsible as part of his job for knowing about the penalty or knowing to consult the Personnel Manual in such a situation. Therefore, the Board finds that the applicant has not proved that the Coast Guard has committed any injustice in prohibiting him from competing for CWO during the five-year period following his voluntary removal from the CWO final eligibility list in accordance with Article 1.D.10.c. of the Personnel Manual.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁵ See *Reale v. United States*, 208 Ct. Cl. 1010,1011 (1976); Decision of the Deputy General Counsel, BCMR Docket No. 2001-043.

ORDER

The application of [REDACTED], USCG, for the correction of his military record is denied.

