

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-218

**XXXXXXXXXXXXX
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 Chair docketed the application upon receipt of the applicant's completed application on August 3, 2010, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated May 19, 2011, is approved and 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 to warrant officer status on June 1, 2009.

BACKGROUND

The applicant was selected for a warrant officer appointment in June 2008. The appointment list was published on June 6, 2008 and was effective from June 1, 2009 through May 31, 2010. The applicant was number [REDACTED] on the list of [REDACTED] selected for warrant officer in the [REDACTED] specialty and the initial cut (those ensured an appointment) was at number 4. The message publishing the appointment list stated the following, in pertinent part:

[O]nly those whose names appear at or above the cutoff for each specialty are assured appointment as vacancies occur. Those whose names appear at or above the cutoff by the time this list expires on 31 May 2010 will be carried over to the top of the next eligibility list, ahead of new candidates. Those whose names appear at or above the predictor, but below the cutoff are in no way assured appointment to warrant grade and should be prepared to recompute in next year's CWO appointment board . . .

Commanding officers shall . . . comply [Articles] 1.D.11.E. and F. of the [Personnel Manual], with respect to physical examinations

The record indicates that the cut was revised to number 13 on September 18, 2008, and to number 28 on December 23, 2008. On January 14, 2009, the detailer for warrant officer assignments sent the applicant an email advising him to submit his assignment preference for warrant officer. The detailer also advised the applicant that he expected orders for new assignments to be issued on February 6, 2009 and that the applicant was required to have a commissioning physical within one year of his appointment date, June 1, 2009.

The applicant responded to the email by explaining that he had undergone an initial medical board (IMB) and that he would likely be retired within the next year because of a physical disability. According to the applicant, the detailer told him in a subsequent telephone conversation that his appointment would be withheld due to the medical board. The applicant alleged that the detailer told him that he would be carried over to the next appointment board if “it got this far with no results.”

The applicant complained about the amount of time it was taking to process him through the physical disability evaluation system (PDES). He stated that he signed the medical board in October 2008 and rejected the informal physical evaluation board (IPEB) findings in December 2009. As of May 12, 2010, he was still waiting for a final decision from the PDES. The Coast Guard recently informed the Board that the applicant had been found unfit for duty on February 13, 2011.

VIEWS OF THE COAST GUARD

On November 17, 2010, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in accordance with a memorandum from the Commander, Personnel Service Center (PSC). PSC stated that the applicant was scheduled to be appointed to warrant officer on June 1, 2009, but he had an IPEB pending at that time. PSC stated that according to Article 1.D.11 of the Personnel Manual, if an appointee is not physically qualified on the date of appointment, PSC will remove the candidate’s name from the final eligibility list, and if the candidate becomes fit for full duty and the current list has expired, the member must re-compete for a future CWO appointment. PSC stated that the applicant is not physically qualified for a CWO appointment.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 20, 2010, the Board received the applicant’s response to the views of the Coast Guard. He disagreed with them. He stated that on the date he should have been appointed to warrant officer the medical board had reviewed his case and referred it to the IPEB. He argued that at that time he was entitled to a presumption of fitness for duty under Article 2.B.2. of the PDES Manual because physical evaluation boards only make recommendations about a member’s fitness for duty.

The applicant also argued that since there was no adverse information in his record, his name should not have been removed from the eligibility list under Article 1.D.10 of the Personnel Manual. He argued that having a pending physical evaluation board is not the type of adverse information contemplated by the Personnel Manual for removal from the appointment eligibility list.

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. The application was timely.

2. The applicant alleged that his name was removed from the warrant officer appointment list without proper compliance with the procedures in Articles 1.D.10 and 1.D.11.d. of the Personnel Manual. Articles 1.D.10 and 1.D.11.d. allow for the removal of an appointee's name from the warrant officer final eligibility list due to a moral or professional failing. However, except for the applicant's statement, there is no other evidence in the record to support his contention in this regard. The applicant has not submitted sufficient evidence to prove that his name was removed from the appointment eligibility list under Article 1.D.10 or 1.D.11.d.

3. The Board notes that the applicant admitted that the detailer for warrant officers informed him in January 2009 that his appointment would be withheld after the applicant informed the detailer that he was undergoing PDES processing. The applicant's statement in this regard supports the Board finding that his name was removed from the warrant officer appointment eligibility list because he was unable to comply with Article 1.D.11.e. of the Personnel Manual by producing a medical report that he was physically qualified for an appointment. This provision of the Personnel Manual states the following:

A commissioning physical is required for appointment. It must be reviewed and approved by Commander, Maintenance and Logistics Command . . . or designated clinical administrator prior to execution of the oath of office. If the appointee is physically qualified on the date of appointment, a copy of the approved Report of Medical Examination (SF-88) shall be forwarded to Commander ([PSC]-opm-1) along with the completed oath of office form. If the appointee is not physically qualified on the date of appointment, the appointment letter along with the original SF-88 shall be returned to Commander ([PSC]-opm-1). Commander ([PSC]-opm-1) will remove the candidate's name from the Final Eligibility List.

4. As stated, Article 1.D.11.e. requires appointees to undergo a commissioning physical examination and to submit a Report of Medical Examination Form SF-88 showing that they are physically qualified before they can become warrant officers. Even if an appointment letter is issued to a given appointee, the appointee must return the letter and cannot take the oath of office unless he can submit a Form SF-88 that has been reviewed and approved by appropriate Coast Guard personnel. The applicant has not submitted an SF-88 or any other medical evidence

showing that he was physically qualified for a warrant officer appointment on June 1, 2009 or any date thereafter.

5. In response to the Coast Guard's finding in the advisory opinion that he was not physically qualified for an appointment under Article 1.D.11.e. of the Personnel Manual, the applicant asserted that he was entitled to a presumption of fitness for duty under Article 2.B.2. of the PDES Manual. However, the procedures in the PDES Manual pertain to fitness for duty to remain in the Coast Guard and do not relieve the applicant of his obligation to comply with the requirements of Article 1.D.11.e. of the Personnel Manual. Removing the applicant's name from the appointment eligibility list did not affect his rights under PDES, which he apparently continued to pursue even after his name was removed from the warrant officer appointment list. Even assuming that the applicant's removal from the appointment list was procedurally incorrect or premature, the applicant still was required to comply with the appointment requirements of Article 1.D.11.e. of the Personnel Manual by showing through a SF-88 that he was physically qualified for an appointment. In addition, the applicant has submitted no evidence that his removal from the appointment list prevented him from obtaining a Form SF-88; nor does he even allege that he was medically qualified for a warrant officer appointment as of June 1, 2009, the date of his scheduled appointment or any subsequent date. The Board notes that under Article 1.D.11.e., the applicant had until May 31, 2010, the date on which the appointment eligibility list expired, to obtain the necessary SF-88 proving that he was physically qualified for a warrant officer appointment. He did not do so.

5. Therefore, for the reasons discussed above, the Board finds that the applicant has failed to prove that the Coast Guard committed an error or injustice by not appointing him as a warrant officer from the 2008 appointment eligibility list. Accordingly, his request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

