

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

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 106-97

FINAL DECISION

██████████ Deputy Chairman:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on April 24, 1997, upon the Board's receipt of the applicant's request.

This final decision, dated April 9, 1998, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, an ██████████; pay grade E-5), asked the Board to correct her record to show that she was advanced to pay grade E-6 as a result of her placement on the 1996 advancement list for promotion to E-6.

Applicant's Request for Relief

The applicant alleged that she was not "given the opportunity to advance to E-6 off the May 1996 promotion list due to deviations in the Coast Guard High Year Tenure policies and the CWO (chief warrant officer) selection process."

The applicant alleged that a particular chief ██████████ who had been approved for retirement, was given a waiver beyond his HYT (high year tenure) professional growth point so that he could be promoted from the 1997 warrant officer promotion list. The applicant alleged that this was a violation of Coast Guard policy (COMDTINST 1040.10 (Enlisted High Year Tenure)).

The applicant was on the E-6 advancement list, although she was not above the cutoff (individuals guaranteed advancement). The cutoff for the 1996 ██████████ advancement list was established at number 2 (only the first two individuals on the list were guaranteed advancement). When the 1996 advancement list expired on June 30, 1997, four people had been promoted to ██████████ (pay grade E-6). The applicant was number five on the E-6 advancement list. The applicant said that if this ██████████ had retired, there would have been an additional E-7 vacancy, which meant that the applicant could have advanced to E-6.

On March 28, 1997, the applicant, by way of her commanding officer (CO), addressed the applicant's concerns about the situation to the Commandant. The applicant's CO recommended that the Commandant review the procedures that led to the waiver of HYT for the [REDACTED]. The applicant did not submit the response, if any, from the Commandant.

Other Evidence Submitted by the Applicant

The applicant submitted an alleged "enlisted separation and retirement list." This list indicated that the [REDACTED] was slated for retirement on April 1, 1997. The list does not contain a heading or anything to indicate that it is related to the high year tenure program. The document is certified to be a true copy.

The applicant also submitted a list of those individuals selected for promotion to warrant officer by the June 1996 selection board. The list was effective from June 1, 1997 through 31 May 1998. She highlighted the name of the [REDACTED] who was allegedly slated for retirement; he was number eight on the eligibility list.

Views of the Coast Guard

On March 13, 1998, the Coast Guard recommended that the application be denied. The Coast Guard stated that the individual (who is the subject of the applicant's complaint) had been selected for warrant officer. He was allowed to withdraw his request for retirement and to remain on active duty past his high year tenure professional growth point so that he could accept that appointment to warrant officer. The Service stated that the applicant has not shown that the Coast Guard committed any error in this situation. The Service further stated that the applicant has not shown that even if there was error on the part of the Coast Guard that she would be entitled to retroactive advancement as a result of the error.

The Coast Guard argued that the applicant does not have standing to claim retroactive advancement even if the Service's action was erroneous. In this regard, the Service stated that erroneous actions favoring certain members do not create third party rights in favor of other members. See Decision of the Deputy General Counsel in CGBCMR Dkt. No. 94-89 (Errors resulting in promotion of one member do not create third party rights in favor of member who may have been prejudiced by that promotion). The Service further stated that a member may not claim retroactive advancement or promotion based on an alleged erroneous action in the case of another member, particularly if, absent the alleged error, she still would not have been entitled to the advancement as a matter of law. Id.

The Coast Guard stated that pursuant to Article 5-C-31.b. of the Coast Guard Personnel Manual, only members who appear at or above the cutoff on the advancement list are ensured advancement. Other members, like the applicant, who score below the cutoff point, are advanced only if additional vacancies occur at the

higher pay grade before the list expires. Members who score below the cut off and who are not advanced before the advancement list expires must continue to compete for advancement with other eligible members of their rate in the next servicewide examination.

The Coast Guard stated the high year tenure policy is a tool for managing the Coast Guard's work force. The Service stated that high year tenure does not give individual members the right to insist that other members be compelled to separate. The Service stated that the implementing regulations for high year tenure permits waivers so that harsh and unintended results in certain cases can be avoided.

The Coast Guard stated that waivers of mandatory separation under the high tenure program are matters committed to the discretion of the Commander, Coast Guard Personnel Command. The Service stated that waivers may be granted to "members who possess critical skills or qualifications, or present an unusual or specially deserving case." The Coast Guard granted a waiver to the [REDACTED] and permitted him to remain on active duty to accept a warrant officer appointment. Exercises of such discretion by Coast Guard officials are presumed to be correct, lawful, and in good faith, absent strong evidence to the contrary. The Service stated that the applicant has not presented any evidence to rebut this presumption.

The Coast Guard stated that the applicant's interpretation of Article 1-D-2.a.(7)-(8) of the Personnel Manual is unfounded and inconsistent with the regulations themselves. The applicant stated that this provision "clearly intended" to prevent a member with an approved retirement letter from receiving a waiver beyond his high tenure professional growth point. In contrast, the Coast Guard stated that this provision of the Personnel Manual deals with eligibility to apply for selection to warrant grade and is not meant to be used to challenge waivers of the high year tenure policy.

Applicant's Reply to the Views of the Coast Guard

On March 16, 1998, a copy of the views of the Coast Guard was mailed to the applicant with an invitation for her to respond. She did not submit a response.

HIGH YEAR TENURE REGULATION

The High Year Tenure instruction (COMDTINST 1040.10), which was published on November 15, 1993, is a tool to manage the enlisted personnel force of the Coast Guard. It limits regular enlisted service to a maximum of 30 years of active service, and it sets professional growth points (PGP), the maximum time a member can remain in service for each grade, for pay grades E-4 through E-9.

Subsection 2.a. of COMDTINST 1040.10 contains the following provision: "Professional Growth Points are: . . . (7) E-7 - 26 years active military service."

Subsection 2.d. states that "Personnel who have competed in the Servicewide Examination (SWE) and are above the cutoff on the eligibility list for advancement can reenlist/extend for terms authorized for their prospective vice current grade level. Example, if an E5 takes the E6 SWE and appears above the cutoff [those individuals above the cut are ensured of advancement] on the advancement eligibility list, the member's PGP/time in service will increase to 22 years of active service." (The instruction is silent on what happens if an enlisted member is on the selection list for promotion to warrant officer).

Subsection 2.e. states that "Personnel with 20 or more years service may request retirement in lieu of discharge, but must select a retirement date that will not take them beyond the end of the month in which they exceed their PGP. More simply, individuals with over 20 years of active service will be retired, but they must request a voluntary retirement date."

Subsection 4. permitted members to request a waiver of the HYT 6 to 12 months prior to their PGP or the expiration of their approved waiver period.

WARRANT OFFICER REGULATIONS

Article 1.D.2.a.7. of the Personnel Manual states that "[m]embers who are scheduled for separation under the High Year Tenure Program are not eligible to apply since their mandatory separation date will have occurred prior to the effective date of the Final Eligibility List."

Article 1.D.2.a.8. states that "[m]embers whose requests for retirement have been approved are not eligible to apply. Members whose request for retirement is approved after being recommended shall be removed from the Preboard or Final Eligibility List as applicable. Commanding officers shall notify Commander . . . by message so the names of such applicants can be removed from the applicable lists."

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's record and submissions, the Coast Guard's submission, and applicable law:

1. The BCMR has jurisdiction of this case pursuant to section 1552 of title 10, United States Code. The application was timely.

2. The applicant has not established that the Coast Guard committed an error by granting a waiver of an [REDACTED]'s professional growth point so that he could remain on active duty and accept an appointment to warrant officer. The regulation governing high year tenure (COMDT ST 1040.10) permits the Coast Guard to grant waivers to

members who have reached their professional growth point. Section 4.b. of the regulation states that "[w]aivers will be considered only from personnel who possess critical skills or qualifications, or present an unusual or specially deserving case." The applicant did not provide any evidence that would suggest that the [REDACTED], who is the subject of the complaint, failed to meet either of these requirements. Nor did she submit evidence that the Coast Guard abused its discretion in granting a waiver to the [REDACTED].

3. The applicant argued that pursuant to Article 1.D.2.a.7 of the Personnel Manual, the [REDACTED] should not have been permitted to apply for warrant officer because he was identified as having reached his professional growth point. Members that are subject to the high year tenure policy are identified by Headquarters when they are within 12 months of their professional growth point. Section 2.b.i., COMDTINST 1040.10. The Board presumes the [REDACTED] was notified that he was subject to HYT in April 1996. All eligibility requirements for promotion to warrant officer were required to be completed by January 1996. It could very well have been that at the time the applicant applied for warrant officer he had not been notified that he was subject to high year tenure. Also, the applicant has not provided the Board with the date that the [REDACTED] was granted a waiver of his professional growth point.

4. The applicant further argued that pursuant to Article 1.D.2.a.8 of the Personnel Manual once the [REDACTED]'s retirement request was approved, his name should have been removed from further consideration for warrant officer. There is insufficient evidence to consider this allegation.

5. The applicant has not shown that she would have been advanced to [REDACTED] 1 even if the Coast Guard did commit an error with respect to the [REDACTED]'s appointment to warrant officer. Since she was not above the cutoff, which was at number 2 on the [REDACTED] list, the applicant was not guaranteed advancement. The applicant could have advanced only if an [REDACTED] vacancy occurred for the number 5 person on the 1996 advancement list prior to its expiration date. She has not submitted evidence of such a vacancy. She even states that her chance for advancement "may have been dashed due to a departure from existing HYT policy." (Emphasis added.) As stated above, the Coast Guard had predicted only two vacancies for advancement to [REDACTED] from the 1996 advancement list. The applicant was not entitled to advancement as a matter of law nor can she claim a legitimate expectation of advancement, particularly since she was not at or above the cutoff on the 1996 [REDACTED] advancement list.

6. The applicant has not shown by a preponderance of the evidence that the Coast Guard committed an error or injustice in her case.

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

ORDER

The application of _____
of her military record is denied.

, USCG, for correction

