

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 1998-046

FINAL DECISION

██████████ Deputy Chairman:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on January 13, 1998, upon the Board's receipt of the applicant's request.

This final decision, dated December 10, 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 advance him to pay grade E-7 (chief ██████████ effective December 16, 1997, the date he reenlisted in the Coast Guard.

Applicant's Request for Relief

The applicant reenlisted in the Coast Guard on May 5, 1992, for a period of four years. On February 6, 1995, he agreed to extend this enlistment for a period of two years. The applicant's reenlistment was scheduled to expire on May 4, 1998. The applicant did not, however, complete all of this enlistment; he was discharged by reason of hardship on January 12, 1996, as an ██████████, (petty officer first class; pay grade E-6). Prior to his discharge, the applicant had taken and passed the servicewide examination (SWE) for advancement to chief electrician's mate (E-7), but he was never promoted to that grade.

On December 16, 1997, approximately one year after his hardship discharge, the applicant reenlisted in the Coast Guard as an ██████████. He stated that he is not eligible to compete for advancement to E-6 until January 1, 1999, and would not be eligible to compete for E-7 until two years from the date of his advancement to E-6.

The applicant claimed that he should be retroactively advanced to E-7 because the Coast Guard improperly processed his request for a humanitarian assignment. He alleged that because of the draw-down the Coast Guard unjustly denied his humanitarian transfer request and forced him out of the Service. The applicant alleged that because he was forced to accept a hardship discharge, he lost his advancement to E-7. He explained the situation as set out below.

The applicant was transferred in May 1995 from [REDACTED] to [REDACTED]. His wife, who has several medical illnesses for which she was receiving treatment at Yorktown, was determined to be fit for overseas duty and she moved to [REDACTED] with the applicant.

In August 1995, approximately three months after his transfer to [REDACTED] the applicant requested a humanitarian transfer from [REDACTED] back to [REDACTED]. He stated in that request that his wife had been diagnosed with another illness, Systemic Lupus Endocarditis, and her overall condition was worse than it was prior to their transfer to [REDACTED]. He stated that the health care needed by his wife was not available in [REDACTED] as it was in [REDACTED]. He also stated that his assignment in [REDACTED] to a 110' patrol boat did not afford him the time necessary to care for his wife and their young son.

In his humanitarian transfer request, the applicant asked for the maximum two year humanitarian assignment. He stated that if he was not available for unrestricted reassignment upon completion of the humanitarian assignment, a hardship discharge would be inevitable. The applicant submitted statements from six different doctors explaining his wife's condition and stating that the applicant needed to be available to assist his wife in caring for herself and their son. One of these medical statements dated back to 1994. A more recent medical statement from the Commanding Officer (CO), U.S. Naval Hospital, [REDACTED] to the CO of the [REDACTED] stated that adequate medical care for the applicant's wife was not available at that Naval hospital or in the immediate area. The CO of the hospital recommended that the applicant and his family be returned to the United States.

The applicant's request for a humanitarian transfer received a favorable endorsement from his CO and the group commander. However, the Commander, [REDACTED] Coast Guard District, gave the request a lukewarm endorsement. The Commander stated that the applicant presented some of the same statements to support this request that he used to support the PCS transfer to [REDACTED]. The Commander further stated as follows:

While making inquiries regarding this request, it became clear that the primary issue that seems to be at the heart of this case is [the applicant's] shipboard assignment. Upon learning his assignment to the [REDACTED] [a cutter], [the applicant] contacted the RTC FPA and [the applicant's] detailer. The detailer told him that a shore billet would be available in 1996 and he could request reassignment at that time. This appeared to satisfy [the applicant]. In the short time since his reporting onboard the [REDACTED] [the applicant] has been unable to deploy with the unit thus creating potential problems for the Command. [The applicant's] family requires his presence more than is possible with his assignment onboard a cutter.

On November 17, 1995, the Commander, Military Personnel Command (MPC) disapproved the applicant's request for a humanitarian assignment. The Commander, MPC stated as follows: "We understand your concern for your wife, but there are adequate medical resources available in the [REDACTED] that are being utilized. Furthermore, records show that you requested the assignment to [REDACTED] because of your wife's health. There is no indication that a move back to the [REDACTED] area will alleviate this hardship." As an alternative, the commander suggested that the applicant consider a mutual exchange of station or a hardship discharge.

On November 22, 1995, the applicant requested a hardship discharge.

Views of the Coast Guard

On November 9, 1998, the Board received an advisory opinion submitted by the Chief Counsel of the Coast Guard. He recommended that that the applicant be granted partial relief by correcting his record to reinstate him to E-6. The Coast Guard further suggested that the applicant's record be corrected to show that he was not discharged on January 12, 1996, but that he was transferred into the Coast Guard inactive Reserve and that he was recalled to active duty on the date of his reenlistment, December 16, 1997. The Coast Guard did not recommend that the applicant receive back pay and allowances for the period between the date of his discharge and the date of his reenlistment, because he did not serve on active duty for this period, and because his discharge was voluntary. The Chief Counsel did not object to the applicant's receipt of back pay and allowances from the date of his reenlistment to the date of correction of his record.

The Chief Counsel stated that the Coast Guard had committed an error by not granting the applicant's request for a humanitarian transfer. The Chief Counsel stated that the record clearly indicated that the applicant's wife's medical condition worsened upon her arrival to [REDACTED] and that competent medical authority, having the best knowledge of her medical condition, determined that adequate medical treatment was not available for her in that location. Even if medical care were available in [REDACTED] the Chief Counsel stated that it would have involved a six hour trip from the applicant's home in [REDACTED] (a Navy base in [REDACTED] to [REDACTED]). The Chief Counsel stated that the Coast Guard should not have required the applicant's spouse to make this trip because it was outside of the medical catchment area for military dependents living in [REDACTED]. ("The medical catchment area is the geographic region that a member or dependents are required to travel within to obtain medical services. This is normally defined as no more than 1-hour drive time each way. DOD Tricare Standards.")

The Chief Counsel did not recommend that the applicant receive retroactive advancement to pay grade E-7 because he was not above the cut-off (those guaranteed advancement) on the pertinent advancement eligibility list. The cut-off on the eligibility

advancement list pertinent to the applicant was at number 21. The applicant was number 29. Promotions from that list were made through number 30. The Chief Counsel stated that the advancement list was canceled on December 31, 1996, approximately a year before the applicant reenlisted in the Coast Guard.

Further, with respect to the retroactive advancement issue, the Chief Counsel of the Coast Guard stated that in Docket No. 1994-089 the Deputy General Counsel (DGC) of the Department of Transportation rejected an applicant's argument for retroactive advancement to warrant officer. The Chief Counsel stated that the DGC stated in that case that the "advancements above the Coast Guard's projected vacancies (i.e. 'cut-off') was more of an aberration in probability than a legitimate expectation that the applicant came close to being promoted." The Chief Counsel stated that the DGC noted that "the reactivation of expired eligibility lists raises not only legal concerns, but also equitable concerns" because it would repeat through official action the wrong of bumping an otherwise qualified member to a position below the number of vacancies for the year.

Applicant's Reply to the Views of the Coast Guard

On November 20, 1998, the applicant responded to the views of the Coast Guard and agreed with them.

The applicant offered the following as his understanding of what the Coast Guard recommended as relief in his case:

Upon this agreement, it is my understanding that I will be reimbursed as well for pay and allowances that I was entitled to as an E6 from 16DEC97 to the actual date of my reinstatement. I feel this should also include any travel allowances such as DLA [dislocation allowance] I was paid as an E5 prior to reporting to the [REDACTED] from RUITOFF [recruiting office] [REDACTED]. I request this to be in a lump sum via direct deposit.

I also understand that my record will state that I was RELAD [released from active duty] into the inactive CG Reserve for the period I was out of the Coast Guard as an E6 and subsequently recalled to active duty on 16DEC97. If so, my longevity pay should reflect my original pay base date of 05OCT87, thus, I should have been paid this past year in the pay column E6 over ten years. Also, it is my understanding that my time in rate (TIR) as an E6 from before was 01MAY93 - 12JAN96 will count for purposes such as points towards the servicewide examinations scoring process.

APPLICABLE REGULATIONS

Article 4.B.11.d.6. of the Personnel Manual declares as follows:

[A] Service need normally must exist before a permanent change of station will be authorized; i.e., the receiving unit should have a billet vacancy or projected vacancy. It is important to note that consideration for temporary permissive travel authorization is based on the merits of the hardship alone. However, a consideration for a permanent change of station (PCS) permissive travel authorization is based on both the merits and the needs for the Coast Guard. [Emphasis in original.]

Article 5.C.14.B. of the Personnel Manual declares as follows:

3. Time in Pay Grade in Present Rating (TIR). TIR is computed from the effective date of advancement to present pay grade for the rating in which presently serving to the established terminal eligibility date. All TIR, while on active duty in the Coast Guard or extended active duty for more than one year in the Coast Guard Reserve, provided the member wasn't reduced and subsequently advanced, will be credited as TIR. No credit will be given for the following service:

* * *

b. Service in any other branch of the Armed Forces or their Reserve components, periods of inactive duty, periods between discharge and reenlistment, and deductible time.

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 Coast Guard erred, in November 1995, by denying the applicant's request for a humanitarian transfer. The Board finds that the applicant has established this error and the Chief Counsel of the Coast Guard has admitted to it. If the Coast Guard had complied with applicable directives, the applicant would not have been forced to request and accept a hardship discharge in January 1996.

3. Initially, the applicant requested retroactive advancement to pay grade E-7. Since that time, however, the Coast Guard and the applicant have agreed upon the

relief necessary to correct the error that the Coast Guard committed by refusing, without good reason, to approve the applicant's humanitarian transfer. The Board concurs with the applicant and the Coast Guard and finds that the applicant's records should be corrected as recommended by the Chief Counsel.

4. Accordingly, the applicant is granted the relief as set out in the order below.

ORDER

The application of [REDACTED] USCG, for correction of his military record is granted, in part. His record shall be corrected to eliminate any break in military service by showing that he was released, as an [REDACTED] from active duty into the inactive Reserve on January 12, 1996, and he was recalled to active duty on December 16, 1997, as an [REDACTED]. The applicant shall receive back pay and allowances (including DLA), as an [REDACTED] from the date of his recall to active duty, December 16, 1997, to the date his record is corrected. The applicant's pay entry base date shall be adjusted to reflect the corrections ordered herein, and his TIR as an [REDACTED] shall be calculated from May 1, 1993, the date of his advancement to that grade. The applicant's reenlistment as an [REDACTED] on December 16, 1997 is null and void.

All other requests for relief are denied.

