

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:



BCMR Docket
No. 20-96

DECISION OF THE DEPUTY GENERAL COUNSEL

I approve the Final Decision of the Board.

I disapprove the Final Decision of the Board.



Rosalind A. Knapp
Deputy General Counsel
Delegate of the Secretary
Department of Transportation


DATE: Apr. 6, 1997

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RECONSIDERATION OF FINAL DECISION


This is a proceeding for reconsideration of a final decision under the provisions of section 1552 of title 10, United States Code. It was commenced on November 6, 1995, when the applicant asked the BCMR to reconsider its decision in BCMR Docket No. 221-94.

This recommended final decision, dated November 22, 1996, is signed by the three duly appointed members who were designated to serve as the Board in this case.

SUMMARY OF RECORD AND SUBMISSIONS

FIRST APPLICATION (BCMR DOCKET NO. 92-92)

On February 4, 1992, the applicant, a health services technician first class (HS1; pay grade E-6) at the time he filed his application, asked the BCMR to delete the marks on his performance evaluation for the period ending in March 1989.¹ He also asked the BCMR to reconsider his eligibility to be advanced to HSC in 1989 and his eligibility to participate in the chief warrant officer (CWO) examination in 1990.

On March 12, 1993, the Board signed a recommended final decision in BCMR Docket No. 92-92 in which it recommended that the applicant's request for relief be granted. Specifically, the Board found that the applicant's performance evaluation for the period ending in March 1989 "is so likely to have been infected by retaliation against the applicant for lawful reporting of the derelictions of a superior that it would be an injustice to keep it in his record. . . . All other references to his removal, on the ground of unsuitability, from his position as a recruiter should also be removed from his record. Retroactive advancement to paygrade E-7 [HSC] should be granted, and the applicant

¹ While the applicant's application in BCMR Docket No. 92-92 was pending, he was advanced to chief health services technician (HSC; pay grade E-7).

should be permitted to take the examination for chief warrant officer with retroactive advancement if he passes." The Board's recommended decision was forwarded for review to the Deputy General Counsel, the Delegate of the Secretary of Transportation (Delegate).

On March 4, 1994, the Delegate concurred with the Board's recommended order and directed that the applicant's record be corrected in the following manner:

The military record of [the applicant] shall be corrected by removing his enlisted performance evaluation form for the period ending March 30, 1989 and all documents stating that he was removed as a recruiting officer because of unsuitability. The Coast Guard shall recompute the applicant's final multiple for advancement to E-7 based on the September 1990 examination and retroactively advance him if his standing is above the cutoff for advancement, with back pay and allowances. The Coast Guard shall also permit the applicant to take the next examination for chief warrant officer. If he passes, his advancement shall be made retroactive to the date he probably would have been advanced had it not been for the retaliation.

SECOND APPLICATION (BCMR DOCKET NO. 221-94)

In September 1994, the applicant asked the Board to clarify its order in BCMR Docket No. 92-92. He alleged that the Coast Guard failed to comply with the Board's order in that case. Specifically, the applicant asked the BCMR to clarify whether the Board's order referred only to the written CWO examination or whether the Board intended, as the Coast Guard argued, that the applicant must successfully complete the entire CWO selection process before the Coast Guard was obligated to advance him retroactively to CWO.

The applicant asserted that if the BCMR's order in BCMR Docket No. 92-92 meant only that it was necessary for him to take and pass the CWO examination to be advanced retroactively to CWO, he met this requirement in September 1993 and August 1994.

In September 1993, the applicant was recommended as an alternate for consideration by the CWO selection board, but he was not selected for placement on the eligibility list for appointment to CWO. According to the applicant, the Coast Guard stated that his September 1993 recommendation for consideration by the CWO selection board could not be used to satisfy the Board's order in BCMR Docket No. 92-92 because that recommendation occurred prior to March 4, 1994, the effective date of the Board's order. The Coast Guard informed the applicant that, in order to satisfy the Board's order in BCMR Docket No. 92-92, he needed to apply to the June 1994 CWO selection board.

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The applicant applied to the June 1994 CWO selection board. By letter dated May 12, 1994, the applicant was notified that his name was not on the list of primary and alternate candidates for consideration by the CWO selection board. The Coast Guard advised the applicant that no further action would be taken with regard to his retroactive advancement to CWO.

The applicant asserted that the results of the June 1994 CWO selection process should not have been used by the Coast Guard to satisfy the BCMR's order because requirements for participation in that examination were completed in February 1994, prior to the effective date of the BCMR's order of March 4, 1994.

The applicant stated that he again satisfied the BCMR's order on August 2, 1994, by taking the officer aptitude rating (OAR) examination.²

The applicant was selected for placement on the eligibility list for appointment to CWO by the June 12, 1995 CWO selection board. However, he was below the cutoff on the eligibility list. (Those members above the cutoff are ensured of advancement.)³

The Coast Guard recommended that the applicant's request for relief be denied. The Service stated that although the deadline for applying to the June 1994 CWO selection board had passed when the Board issued its order, the initial steps of the competition did not take place until the preboard eligibility list was published on April 29, 1994. The Coast Guard stated that it was appropriate to use the June 1994 CWO selection process to satisfy the Board's order in BCMR Docket No. 92-92. The Coast Guard stated that the applicant's 1994 CWO preboard score was not high enough to place him on the list of those eligible for consideration by the CWO selection board. The Service stated that the calculation of the applicant's preboard score included the changes to the record ordered by the Board in BCMR Docket No. 92-92.

On September 29, 1995, the BCMR denied the applicant's request for relief in BCMR Docket No. 221-94. The Board stated the following with regard to the applicant's request:

Article 1-D-2a. of the Personnel Manual describes the written examination as an eligibility requirement to compete in the process for selection to warrant officer. The CWO selection process itself includes the

² In January 1992, the Coast Guard began using the OAR as the written examination for CWO appointments. There is no required minimum score on the OAR for participation in the CWO selection process.

³ While the applicant was placed on the eligibility list, he was ultimately not selected to be appointed to CWO based on the June 12, 1995 CWO selection board results.

commanding officer's recommendation, the preboard score, and consideration and selection by a board. Passing the examination for CWO, as described in the BCMR's order, means passing the entire warrant officer selection process and not just satisfying one eligibility requirement.

To allow the applicant to be appointed as a chief warrant officer without successfully completing the entire selection board process would also be a violation of the Coast Guard Personnel Manual. While changes to the chief warrant officer selection process have been made since 1989, the process has been and remains multi-layered. The BCMR would be acting arbitrarily if it were to issue an order that would be in violation of Coast Guard regulations. Since the written examination is only one step in meeting the eligibility requirements to compete in the chief warrant officer selection process, the [BCMR] intended by its order in Docket No. 92-92 that the applicant successfully compete in the entire chief warrant officer process.

The Board further found that the June 1994 CWO selection process satisfied the Board's order in BCMR Docket No. 92-92:

Even though the eligibility requirements for participation in the June 1994 chief warrant officer selection process, which included the written examination, had to be completed prior to the BCMR's order of March 4, 1994, the preboard score and the selection board itself did not take place until after the BCMR's order. The Coast Guard's application of the BCMR's order to the June 1994 CWO selection board was appropriate. The applicant participated in the June 1994 CWO selection process, but his record was not considered by the CWO selection board because the applicant's preboard score was insufficient to place him on the list of those eligible for consideration by that board.⁴

⁴ The Board further found that the applicant's contention that he would have been selected for CWO by the 1989 CWO selection board if his name had not been removed from the E-7 list was without merit. The Board stated that "[t]here is no evidence in the record that the applicant ever made the eligibility list (which is different from the E-7 advancement list) in 1989 for appointment to chief warrant officer." The Board further found that "[t]he applicant could not receive a retroactive date of appointment to chief warrant officer until he had 'passed,' i.e., been selected and appointed to that grade. He has not presented any evidence that he was selected and appointed to the chief warrant officer grade for the period 1989 through 1994. The applicant must have a chief warrant officer date of rank before an adjustment can be made to it." The Board noted that the applicant had recently been selected as one of those eligible for appointment to CWO as a result of the June 1995 selection board. The Board stated, however, that he had not "received an appointment as a CWO. The June 1995 CWO selection board cannot be used to satisfy the BCMR's order [in BCMR Docket No. 92-92] because the Service was directed to make the applicant's advancement to chief warrant officer retroactive if he passed the next chief warrant officer selection board. The June 1995 chief warrant officer selection board was not the next CWO selection board that convened after the BCMR's order in Docket No. 92-92."

PRESENT APPLICATION (BCMR DOCKET NO. 20-96)

Applicant's Request for Reconsideration

On November 6, 1995, the applicant requested that the BCMR reconsider its decision in BCMR Docket No. 221-94. Specifically, he requested that the Board (1) find that the April 1994 preboard score did not satisfy the requirements for the order in BCMR Docket No. 92-92; (2) find that the June 1995 CWO process satisfies the order in BCMR Docket No. 92-92; (3) require the Coast Guard to provide "whole relief" as ordered in BCMR Docket No. 92-92; and (4) require the Coast Guard to bear the burden of proof regarding whether he would not have been promoted between 1989 and 1991 "since the heart of the matter remains that the Coast Guard treated me unjustly, and I am still having repercussions in my career from the injustice."

The applicant disputed the Coast Guard's contention in BCMR Docket No. 221-94 that the initial steps for the competition for the June 1994 CWO selection board "did not take place until the preboard eligibility list was published on 29 April 1994." The applicant stated the following with regard to the CWO selection process:

To compete in the "entire" C.W.O. process for June 1994, and satisfy all the eligibility requirements would have meant participation in and completing all the facets of the competition. An analysis of the preboard score . . . , shows that the OAR is an integral part of the preboard score; more importantly, it is 50 percent of the preboard score. The first step for the C.W.O. selection begins before a candidate is eligible to request the Commanding Officer's recommendation which was due to the PERSRU [personnel reporting unit] no later than February 11, 1994 Because a six month waiting period is required between OAR testings, I used my 1992 test score. This decision was made with the advice of the Fifth Coast Guard District's Educational Officer . . . to guard against a possible lower score than the 1992 score. If the BCMR's order is to make me whole and the "entire" C.W.O. process is to be completed, retesting with the OAR should have been allowed Since the OAR is a component of the preboard score, it is clearly the initial step to competing for Warrant Officer.

The applicant also stated that as a result of the Coast Guard's error and injustice that was established in BCMR Docket No. 92-92, he has repeatedly been denied opportunities to participate in various examinations for advancement to HSC and CWO. The applicant asserted that the Coast Guard has not properly addressed this issue. He stated that he is asking for "make whole relief." He further stated that "[w]hile no one will ever know if I would have been promoted during 1989-1991, the Coast Guard's actions insured I would not get promoted during that period of time.

The burden of proof is on the Coast Guard to show that I would not have been promoted during that time. This entire situation exists as a direct result of the Coast Guard's unjust actions in March 1989."

The applicant also disputed the Board's finding in BCMR Docket No. 221-94 in which the Board found that "there was no evidence in my record indicating I made the eligibility list for 1989-1991." In support of this contention, the applicant submitted various documents, including an April 19, 1989 notification to him regarding the time and location for the 1989 warrant officer examination, an April 10, 1989 memo to him regarding the warrant officer selection battery, and a two-page "advancement recommendation and examination request" worksheet. On the first page of this worksheet, the circle for "E-6 to CWO" was filled in for the question "Candidate is recommended for appointment from/to:". The second page contains the signatures of the applicant, dated February 9, 1989, and of his commanding officer, dated February 17, 1989.

Documentation Submitted by the Applicant

In addition to the documentation discussed above, the applicant also submitted a list of the Coast Guard members who were promoted to warrant officer in the medical specialty between 1989 and 1991, a copy of ALCOAST 011/94, dated February 1, 1994, regarding active duty CWO appointment board cycles, and various excerpts from the BCMR's decisions and the Coast Guard's views in BCMR Docket Nos. 92-92 and 221-94.

Views of the Coast Guard

The Coast Guard recommended that the applicant's request for reconsideration be denied because it does not meet the BCMR's standards for reconsideration.

The Service stated that the applicant based his request for reconsideration on three arguments. The Coast Guard asserted that none of these arguments met the BCMR's standard of reconsideration:

On the first issue, applicant contends that the timing of the Board's decision denied him an opportunity to retake the OAR in the event he received a bad score. Applicant had a usable OAR score from 1992 and he could have retaken the test in early 1994 but he elected not to. This was a conscious decision as evidenced by his conversation with the district Educational Officer. This argument does not represent new evidence that merits reconsideration.

Regarding his second argument, missed opportunities, applicant's only new information is the number of HSCs promoted and the number of Medical Warrant Officers appointed in recent years. These numbers are

only anecdotal and provide no new evidence that applicant would have been promoted or appointed.

Regarding applicant's proof of eligibility for promotion, his enclosure[s] . . . only [indicate] that applicant was allowed to take the Warrant Officer Selection Battery test. The results from the test would have helped determine whether or not applicant would make the eligibility list, assuming applicant met all other eligibility requirements. The presence of [the enclosures] does nothing to support applicant's argument. Applicant has not provided sufficient evidence or proof to support this argument.

The Coast Guard further stated the following with regard to the applicant's claims:

The clarification issued by the Board in Docket No. 221-94 is consistent with prior Board decisions in which it does not substitute its judgment for the judgment of a selection board. The appropriate remedy for members who have defective evaluations before selections boards is to remove the defective evaluation and provide eligible members with additional opportunities for selection with a corrected record. That remedy occurred in this case. The Board ordered the defective evaluation removed and the Coast Guard offered the member additional opportunities for selection with a corrected record, if he [were] eligible. Docket No. 221-94 affirmed that procedure. However, Applicant did not meet the eligibility requirements for the June 1994 Board and he was not selected by the June 1995 WOSB [warrant officer selection battery]. Thus, the Board properly found Applicant was not entitled to a retroactive date of rank.

Applicant's Response to the Coast Guard's Views

On May 7, 1996, the applicant stated that he was requesting information, via the Freedom of Information Act (FOIA), from the Coast Guard in order to respond to the Service's views in his case. The applicant restated that he is fully entitled to the "make-whole relief" that he requested.

Applicant's Supplemental Response

On September 3, 1996, the applicant submitted the documentation that he said that he requested from the Coast Guard in May 1996. He stated that this information "fully confirm[s] [the applicant's] assertion that the Coast Guard continued to promote personnel to Chief Warrant Officer . . . in the Medical specialty for which he had a right to compete on a fair basis."

The first portion of the documentation submitted by the applicant lists the names of those Coast Guard members who were advanced from HS1 to HSC between 1989 and 1995. The following chart indicates how many Coast Guard members were promoted to HSC during those years:

1989	1990	1991	1992	1993	1994	1995
11	14	22	33	18	17	19

The second portion of the documentation lists the names of those Coast Guard members who were appointed to CWO in the medical administration specialty between 1989 and 1995. The following chart indicates how many Coast Guard members were promoted to CWO in the medical administration specialty during those years:

1989	1990	1991	1992	1993	1994	1995
6	6	3	1	2	3	0

RELEVANT PORTION OF THE BCMR'S REGULATION REGARDING RECONSIDERATION⁵

33 CFR § 52.67

(b) The Board may grant an application for reconsideration of a final determination only if newly discovered evidence or information, not previously considered by the Board, is presented by the applicant or otherwise comes to the attention of the Board, and if newly discovered evidence or information would, if true, result in a determination other than that originally made. The Board may refuse to consider evidence or information claimed to be newly discovered if it finds that such materials could have been presented to the Board prior to its original determination if the applicant had exercised reasonable diligence.

(c) A denial of reconsideration must be approved by the Secretary.

⁵ Effective June 13, 1996, the BCMR's regulation regarding reconsideration was amended so as not to require each denial of reconsideration to be approved by the Secretary. 61 Fed. Reg. 24235 (May 14, 1996). However, because the applicant's case was docketed before this amendment went into effect, the Board has applied the regulation as it existed when it received his application. In doing so, the Board is adhering to the general legal principle that administrative rules should not be given retroactive effect absent specific language permitting retroactive application. See Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988); 2 Am. Jur. 2d, Administrative Law § 236.

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 submissions, the decisions in BCMR Docket Nos. 92-92 and 221-94, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10, United States Code.
2. In BCMR Docket No. 221-94, the Board's order in BCMR Docket No. 92-92 was clarified for the applicant. In the present case, the applicant has not established that the Board's conclusions in BCMR Docket No. 221-94 were erroneous.
3. The applicant's request does not meet the requirements for reconsideration under § 52.67 of the BCMR's regulations. The information that the applicant presented does not constitute evidence that could result in a determination other than that originally made by the BCMR in BCMR Docket No. 221-94, and this information could have been presented to the BCMR prior to its decision in BCMR Docket No. 221-94 "if the applicant had exercised reasonable diligence."
4. The Board notes that none of the data provided by the applicant in the present case regarding advancements to HSC and promotions to CWO between 1989 and 1995 establishes any error or injustice on the part of the Coast Guard with regard to the applicant's situation. In addition, he has not demonstrated how this information relates to his own situation.
5. The applicant's request for reconsideration should therefore be denied.

ORDER

The application for reconsideration regarding the correction of the military record of _____, USCG, is denied.

