DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of Coast Guard Record of:

BCMR Docket
No. 2002-040

DECISION OF THE DEPUTY GENERAL COUNSEL ACTING UNDER DELEGATED AUTHORITY

The Final Decision of the Board for Correction of Military Records (the Board) accurately summarizes the Applicant's Request for Relief, the Summary of the Record, the Applicant's Allegations, the Views of the Coast Guard, Applicant's Response to the Views of the Coast Guard, and the Applicable Law. In addition, I agree with and therefore adopt all of the majority Board's Findings and Conclusions except as they are further expanded below.

FINDINGS AND CONCLUSIONS

I agree that the Board has jurisdiction in this case. The Coast Guard relies on Utah Power and Light Co. v. United States, 243 U.S. 389 (1917) for its position that the Government is not bound by mistaken representations of its agents. It is important to note that the Supreme Court has left undecided whether there are cases in which "the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealing with their Government." Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 61 (1984) (further stating, in dicta, that for a private party to prevail it would have to demonstrate that the traditional elements of estoppel are present). More recently, the Supreme Court has stated that Congress may exercise its power to expand recoveries for those who rely on mistaken advice, should it choose to do so. Office of Personnel Management v. Charles Richmond, 496 U.S. 414, 428 (1990) (This case concerned a citizen who received erroneous information from a federal employee regarding his disability annuity. The court held that in this case, payments of money from the Treasury were not authorized by any statute and rejected the estoppel claim by the claimant).

Congress has given the BCMR power to expand recovery for members of the Coast Guard and this includes giving the BCMR the power to rectify a member's record when an error or injustice has occurred. The Coast Guard has committed an injustice against one of its members when the Coast Guard's action, or lack thereof, shocks one's sense of justice. Reale v. United States, 208 Ct. Cl. 1010, 1011 (1976). The BCMR has the authority to decide on a case-by-case basis if the Coast Guard has committed an error or injustice. It is possible for the Coast Guard to commit an error or an injustice when a

member has relied on misinformation by a Coast Guard employee to his or her detriment. This interpretation of the BCMR's authority is consistent with Congress' view of what may constitute an error or injustice as exemplified by Congress' willingness to examine and grant relief for individual claims against the Government for legal or equitable reasons. 31 USCS § 3702 (d). The Comptroller General has decided that such claims presented to Congress, on behalf of employees of the Government, may include a claim based on erroneous advice or authorization furnished by a government official if the employee demonstrates reasonable reliance on such advice or authorization to his or her detriment. *See*, Lester J. Reschley—Transportation of Household Goods Incident to Transfer—Subsequent Voluntary Transfer, (1993) 72 Comp Gen 111.

I also agree that the Applicant acted in a reasonable manner by relying on the advice given by the yeomen. Applicant wanted to become an officer as soon as possible, so he went to Cadet Administration and asked for information and advice regarding what he needed to do to ensure that he could become an officer as early as possible and also qualify for O-1E pay. Applicant was given materials and advice by two yeomen. The yeomen explained to Applicant that he needed over four years of service to qualify and that upon graduation from OCS in September 200X, he would have four years six days of service. During the Applicant's conversations with the yeomen, nothing was said to indicate any hesitation or disagreement among the yeomen regarding the advice they gave Applicant. In this scenario, it was reasonable for Applicant to rely upon the advice given by the yeomen. A yeoman's specific job duties include having the knowledge and skills to advise members on routine personnel matters, and calculation of time would seem to be such a matter. Also, Applicant's Acceptance and Oath of Office show he was appointed as an Ensign (O-1E) and his PCS orders also showed his rank as O-1E, indicating that others as well accepted the computation of time as being correct.

I further agree that an injustice resulted from the erroneous advice given to Applicant by the yeomen. Applicant relied upon the advice provided by the yeomen and entered the OCS class earlier than he had been slotted for. Had Applicant not received this advice, he would have remained in the October 200X class and would not have requested to enter in the earlier OCS class. If Applicant attended the October 200X class, he clearly would have had over four years service and would have qualified for the O-1E classification. Unlike BCMR case No. 346-89 in which it was determined that the Coast Guard's withdrawal of a commission that was improperly sent to the member due to an administrative error did not rise to the level of "shocking" the sense of justice, here Applicant relied to his detriment upon misinformation given to him by the yeomen. This present case is more similar to BCMR case No. 193-92, where the Board found that the Coast Guard committed an injustice when it failed to inform its member that, upon reenlistment, he would be unable to complete 20 years of satisfactory service for retirement purposes prior to his 62nd birthday.

Finally, I note that by granting this remedy, the BCMR is not granting relief that requires the circumvention of a Federal statute. Rather, the BCMR's relief concerns an administrative interpretation of a requirement to comply with the statute. Sections 203 and 1009 of the United States Code state that a commissioned officer in pay grade O-1 is entitled to the pay rate of O-1E if the officer has over four years of active service. However, the statute does not say how those four years are to be calculated. The Coast Guard has internally determined what process is used to calculate the four years of service. That process was apparently so confusing that even the yeomen who advised Applicant, and are trained to advise members in personnel matters, did not know that they should have calculated Applicant's time in service by weeks rather than days. Ordering the Coast Guard to change Applicant's record to reflect over four years of service prior to becoming a commissioned officer asks the Coast Guard only to adjust, in circumstances as compelling as these, its interpretation of how those four years are calculated for this applicant.

ORDER

The application for correction of the military record of xxxxxxxxxx, USCG, is hereby granted as follows:

- Applicant shall be given the option to have his record corrected to show that he was commissioned on October 1, 200X, as an O-1E.
- Applicant will exercise this option no later than 90 days from the date of the final decision.
- If Applicant chooses to have his record corrected to show that he was commissioned as an O-1E on October 1, 200X, he shall receive any back pay and allowances that are due because of this correction.

_____
Date

_____
Rosalind A. Knapp
Deputy General Counsel
Department of Transportation,
as designated by the Secretary

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 2002-040

FINAL DECISION

[redacted] Chair:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of Title 14 of the United States Code. It was commenced on February 14, 2002, upon the Board's receipt of the applicant's complete application for correction of his military record.

This final decision, dated October 25, 2002, is signed by the three duly appointed members who were designated to serve as the Board in this case. Two of the members, the majority, voted to recommend relief. One of the members, the minority, voted to deny relief.

The applicant, an ensign (pay grade O-1), asked the Board to adjust his pay grade to that of O-1E[1] (ensign with over four years of enlisted active service) retroactive to XXXXXX XX, XXX, the date he graduated from the officer candidate school (OCS). (Enlisted active service and enlisted service are used interchangeably in this decision.)

SUMMARY OF RECORD AND SUBMISSIONS

The applicant alleged that he has suffered an injustice because yeomen assigned to Cadet Administration erroneously advised him that upon his graduation from OCS in XXXXXX XXXX, he would qualify for the pay of an ensign with over four years of enlisted active service (O-1E). Subsequent to graduation, the applicant learned that he did not qualify for this special pay because he was two days short of having "over four years" of enlisted active service. The applicant claimed that if he had known that he would not qualify for the special pay upon his graduation from OCS on XXXX XX,

[1] Sections 203 and 1009 of Title 37 of the United States Code state that a commissioned officer in pay grade O-1 . . . is entitled to the special pay rate for O-1E if the officer has had over four years of active service as a warrant officer or enlisted member. See also Article 2.A.1.j. of COMDTINST M7220.29A (Coast Guard Pay Manual).

XXXX, he would not have entered OCS until October XXXX, securing his status an O-1E upon graduation.

The applicant enlisted in the Coast Guard on September 30, 1996, for a period of eight years, to include four years of active duty. A part of the applicant's enlistment contract called for him to participate in the Minority Officer Recruitment Effort (MORE) program.[2] As a participant in this program, the Coast Guard required that the applicant earn his college degree by a date certain, after which he would enter OCS. The applicant initially entered the January XXXX OCS class, but failed to complete the program at that time because of an injury (a broken foot). He was disenrolled and reverted to his SN (seaman; pay grade E-3) enlisted rate, until he was medically fit to attend a future OCS class. The applicant stated that it was left up to him and his doctor to decide when he would be physically able to reenter OCS.

The applicant decided to join the XXXXX OCS class. He stated, however, that prior to his decision to enter this class, he discussed the issue of his receiving O-1E pay upon completion of OCS with the unit's two yeomen. He stated that these yeomen told him that he would receive pay as an O-1E upon graduation from the June 2000 OCS class. The applicant stated that although his doctor wanted him to wait until XXXXXX to reenter OCS, the doctor acquiesced and assisted the applicant in obtaining a medical waiver so that he could enter the June XXXX OCS class.

The applicant stated that upon his graduation, on XXXXX XX, XXXX, he was appointed an ensign, pay grade O-1E, as evidenced by his Acceptance and Oath of Office, which states that he was appointed an Ensign (O-1E). His PCS orders also showed his rank as O-1E, and the applicant stated that he received dislocation allowance pay at the O-1E rate.

The applicant stated that after graduation he decided to apply for advanced pay due to a family situation. He was told that he was not eligible for pay at the O-1E rate because he did not have over four years of enlisted service. He was told, at that time, the OCS yeomen had incorrectly calculated his period of enlisted service. The applicant stated that, according to the Human Resources and Information Center (HRSIC), the yeomen at OCS calculated his enlisted time on a per day basis when it should have been

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[2] The MORE statement of understanding signed by the applicant called for him to enlist in the Coast Guard for eight years (four active and four inactive), successfully complete Coast Guard Recruit Training, and to successfully complete college by August 199X, where upon he would be assigned to OCS. The Memorandum of Understanding further stated that upon completion of OCS the applicant would be discharged from his enlisted status and commissioned as an ensign in the Coast Guard Reserve to serve on active duty for a period of three years. According to the Advisory Opinion, MORE participants receive free tuition and books in addition to their enlisted pay.

calculated on a per week basis. The applicant was told that he needed to have been in an enlisted status for an additional two days to have over four years of enlisted service. The applicant stated that had he known he would not meet the requirement for O-1E pay upon graduating from the June XXXX OCS class, he would have waited and enrolled in the October XXXX OCS class.

The applicant submitted a copy of an email, dated October 16, XXXX, written by one of the OCS yeomen to a YN1 at HRSIC, stating the following:

> I've got a question on one of the newly promoted Ensigns that kicked out on the exception report. I thought this one person would be an O1E since he's got a total of 4 years active duty on the dot (30 Sep96 through 29Sep00). The SDA Manual asks if the [member] has 4 years or more of active service as an enlisted member and was enlisted prior to being appointed a reserve commission, enter O1E. I know this person cuts it close time wise, but shouldn't he still be an O1E? Help, please??

The YN1 responded to the yeoman's email by stating that the applicant needed to be discharged from his enlisted status on September 30, XXXX in order to have over four years enlisted active service necessary to qualify for O-1E pay. (The applicant was discharged from his enlisted status on XXXX XX, XXXX.) The YN1 then stated that "[the applicant] should have waited until the class after the [June XXXX] one!"

The applicant submitted a copy of another email he sent to the other OCS yeoman (PO1) who also allegedly provided the applicant with erroneous advice about his pay. This email, dated January 28, 2002, provided the PO1 with a summary of the events as the applicant remembered them (essentially the same statement of facts in this application). The applicant asked the PO1 to respond to the email with "[PO1's] account of what took place in the determination of [the applicant's] pay grade upon departure from OCS." The PO1 responded with the following:

> I don't remember the specifics concerning when we looked in the manuals, but if Cadet Admin promoted you to O1E upon graduation, it would be safe to assume that they calculated over 4 years of active services in an enlisted pay grade (whether or not it was six days I can't say). This is the first time I have heard that the time is calculated by week and not days . . . I checked with [the other YN1] in Cadet Admin, and he remembers that you were promoted to an O1E and stated (so) on your orders because it had been determined you had over four years in an enlisted pay grade.

Views of the Coast Guard

The Chief Counsel submitted the Coast Guard views in this case. He recommended that the Board deny relief. He stated that the applicant was two days short of having over four years of enlisted service to qualify for the pay of an ensign with over four years of enlisted service (O-1E). The Chief Counsel argued that the applicant could not point to any error in his military record.

The Chief Counsel stated that even if the applicant's allegation - that the Coast Guard provided him with incorrect advice - is true the Government is not estopped from repudiating the advice given by one of its officials if that advice was erroneous. The Chief Counsel cited Utah Power & Light Co. v. United States, 243 U.S. 389, 409, 37 S. Ct. 387, 61 L. Ed. 791 (1917) in support of this position. The Chief Counsel further stated that the applicant is estopped from making any claims against the Government based on his reliance on the supposed erroneous advice. He further stated as follows:

> In Montilla v. United States, 457 F. 2d 978, 198 Ct. Cl. 48 (1972), the Court of Claims held that the misrepresentations of officers of the U.S. Army to the plaintiff, leading him to believe that he had completed twenty years of active military service and was eligible for retirement pay upon reaching age 60, could not alter the fact that the plaintiff had not actually completed twenty years of active service as computed under 10 U.S.C.1332 (1964) . . .. Even more recently and more analogous to the underlying facts of this case, a federal claims court held a "[c]ommissioned officer who had previously served exactly four years as enlisted member of Army was not entitled to receive pay for 'commissioned officer who had been credited with over 4 years.'" Colon v. United States, 8 Cl. Ct. 30 (1985).[3] In the instant case, the applicant consulted with two yeomen from the [United States Coast Guard Academy] Cadet Administration and received inaccurate advice regarding his pay status upon graduation from the June 2000 OCS class. As in Montilla and Conlon, the Government cannot now waive the provisions of the statute implicated in this case and the applicant cannot assert a claim of detrimental reliance.

A memorandum from the Commander, Coast Guard Personnel Command (CGPC) was attached to the advisory opinion. CGPC stated that the difference between the pay of an O-1E and an O-1 is significant. In addition, he offered the following:

> It is note worthy that from the time the applicant was accepted for the MORE program on September XX, XXXX until his initial entry into OCS on January 15, 2000, applicant understood that he would graduate OCS as

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[3] In Colon v. United States, 8 Cl. Ct. 30 (1985) the applicant was not arguing that his record contained an error or injustice, but rather that the Army's interpretation of the statute was incorrect. The plaintiff in this case never applied to the Army BCMR.

an O-1 (member with less than 4 years of active duty) vice as an O-1E (member with more than 4 years of active duty).

* * *

There is evidence in the record that supports [the applicant's] claim that he was erroneously counseled. The applicant entered the June XXX class and graduated without further incident or injury. It was at this time that he discovered that he was ineligible to be commissioned as an O-1E. The applicant appears to have had entered the June XXXX OCS class with the objective of completing OCS as soon as possible, but at the same time obtain a commission as an O-1E.

Was the counseling applicant received, erroneous or otherwise required? The answer is no -- the Coast Guard has no obligation to counsel members on the impact their request to attend OCS will have on their eligibility to be commissioned as an O-1E or O-1. The policies concerning this are published in the Coast Guard Pay Manual and are available for any enlisted OCS candidate to examine. In addition, the correct methods to compute total time in service are contained in the Coast Guard Pay and Personnel Procedures Manual and are available for any one to study. The applicant relied on the erroneous advice provided unofficially by administrative personnel, which is unfortunate, but he and not the Coast Guard is ultimately responsible for the decision he made to request entrance to the June XXXX OCS class.

Applicant's Reply to the Views of the Coast Guard

A copy of the Coast Guard views was mailed to the applicant on June 18, 2002. The applicant did not submit an immediate response. However, on September 16, 2002, in response to an inquiry by the BCMR staff, the applicant wrote that "[he] conditionally authorize[d] the official change of my Date of Commissioning (DOC) from 29 Sep XX to the next available date fulfilling the requirement for an Officer with four years of enlisted service prior to commissioning. . . "

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. After considering this case in executive session, two members of the Board, the Majority, voted to recommend relief and one member, the minority, voted to deny relief. The following findings constitute the Majority opinion.

3. The applicant was commissioned as an ensign (O-1E) upon graduation from OCS on September 29, 200X. This designation entitles junior officers to increased pay for having over four years of enlisted active service upon appointment as a commissioned officer. Shortly after graduation, the Coast Guard discontinued paying the applicant as an O-1E because he was two days short of having over four years of enlisted active service to qualify for O-1E pay. He is currently being paid as a commissioned officer without enlisted service, although his Oath of Office states that he was commissioned an O-1E.

4. The applicant has shown by a preponderance of the evidence that prior to joining the June XXXX class, he was provided with incorrect counseling by senior yeomen in Cadet Administration at the Coast Guard Academy. He was erroneously counseled that if he joined the June OCS class, he would be commissioned in pay grade O-1E, upon graduation in September XXXX because he would have four years and six days of service. Emails between the applicant and the OCS yeomen corroborate the applicant's contention that he was provided with erroneous counseling by OCS yeomen. Materials submitted by the Coast Guard admit that the evidence in the record supports the applicant's claim that he received erroneous advice. Under COMDTINST 1414.8B, a part of a yeoman's duty is to counsel members about pay and personnel matters. Yeomen also calculate creditable service, active duty base date, pay base date, expiration of enlistment, date of rank, leave loss, leave balance, and sea time.

5. The Board finds the applicant's Acceptance and Oath of Office as well as his PCS travel orders stating that he was commissioned as an Ensign (O-1E) further corroborate his contention in this regard. Moreover, CGPC stated, in its memorandum attached to the advisory opinion as an enclosure, that evidence in the record supported the applicant's contention that he was erroneously counseled. Since these yeomen were assigned to cadet administration and part of a yeoman's duty is to provide counseling in such matters, it was logical and reasonable for the applicant to presume that these yeomen were authorized and qualified to counsel him about receiving O-1E pay upon graduating from the June XXXX OCS class.

6. In fact, and contrary to the advice provided by the OCS yeomen, the applicant did not have over four years of enlisted service to qualify for O-1E pay on September 29, 2000, the date of his commissioning. He enlisted on September 30, 1996 and received his officer commission on September XX, XXXX. According to sections 203 and 1009 of Title 37 of the United States Code, the applicant must have had over four years of enlisted service, rather than exactly four years of service, to be eligible for O-1E pay. As the Chief Counsel stated, the applicant could not have been commissioned any earlier than October 1, XXXX to have the over four years of enlisted service necessary to

qualify for O-1E pay. Accordingly, the Board finds that the Coast Guard committed an error by miscalculating the applicant's enlisted service and by erroneously advising him that he would qualify for O-1E pay upon graduating from the June XXXX OCS class. This error is further illustrated by the Coast Guard's issuance of Acceptance and Oath of Office and PCS orders stating that the applicant was commissioned as an Ensign O-1E.

7. The Coast Guard, citing Utah Power and Light Co. v. United States, 243 U.S. 389, 409 (1917), argued that even if the yeomen provided erroneous advice, it is not estopped from repudiating the advice given by one of its officials if that advice was erroneous. However, this rule is not without exceptions. The Courts have held the government accountable for providing erroneous advice on which a reasonable person would have relied. See Tippett v. United States, 2001 U.S. App. LEXIS 26376; 28 Fed. App. 942 (D.C. Cir. 2001), where a plaintiff-appellant relied to his detriment on misinformation provided by Army personnel. The Court ordered that plaintiff to be reinstated on active duty, to be given constructive service credit, and to be paid back pay and allowances. See also Scharf v. Department of the Air Force, 710 F. 2d 1572 (1983), where a civil service employee was erroneously advised that "if he retired optionally and that if later his disability retirement were approved and he had already retired that the optional retirement would be set aside and he would go on disability retirement." Apparently, this could not be done if an optional retirement preceded a disability retirement much to the surprise of the plaintiff. The plaintiff argued that because of this erroneous advice his optional retirement was not voluntary and should be canceled. The Court found the retirement advice to be misleading and that it materially affected the plaintiff's decision regarding retirement. The Court further stated that a "reasonable person would have certainly concluded from the advice received that there would be no adverse consequences if an optional retirement preceded a disability retirement. Furthermore, it was reasonable for [plaintiff] to rely on the advice of his retirement counselor, and he did in fact rely on this advice in good faith." Id. at 1575.

8. The Board finds that the applicant justifiably relied to his detriment on the erroneous advice given to him by the OCS yeomen. The Board further finds that such reliance was reasonable. The Board is convinced that if the applicant had been properly informed by these yeomen that he would not qualify for O-1E pay upon graduating from OCS in September XXXX, he would have waited and entered the October XXXX class. He could easily have done this by not seeking a medical waiver to enter the June 200X class. Medical waivers are not automatic. Article 3-A-7 of the Medical Manual states that a medical waiver "is an authorization to change a physical standard when an individual does not meet the physical standards prescribed for the purpose of the examination." This provision further states that the Commandant must grant such waivers. The Board finds nothing wrong or greedy in the applicant's desire to become an officer at the earliest opportunity and to obtain O-1E pay, since he was ever so close to having the necessary time to qualify for that special pay. Like the counselor in the Scharf case, neither the yeomen nor the Coast Guard acted to correct their mistake until

after the applicant had graduated from OCS. If this was an administrative error, it should have been discovered sooner.

9. The applicant stands to lose several hundred dollars in pay each month because he relied on the information provided by senior enlisted yeomen who were authorized to provide counseling on the issue of pay and service credit. While the Coast Guard argued that it had no duty to counsel the applicant about O-1/O-1E pay, it failed to explain what the duties were for the yeomen assigned to OCS Cadet Administration. Even if the yeomen were not obligated to counsel the applicant, once they undertook the duty to do so, they were obligated to provide correct information. The applicant gave up an opportunity to enter the October class and guaranteed O-1E pay based on the erroneous counseling he received from the yeomen. Whether at the time he enlisted he expected to be an O-1E is irrelevant to his situation after almost four years of active service. Based on the above, the Board finds that the applicant has suffered a serious injustice that requires corrective action.

10. The Board takes note of the Chief Counsel's argument based on Montilla v. United States, 457 F. 2d 978, 986 (1972), that no officer or agent can by his actions or conduct waive the provisions of a statute or nullify its enforcement, unless such statute has been repealed or declared unconstitutional. However, 10 USC 1552 empowers the Secretary, acting through a Board to correct any military record by removing error and/or injustice. Moreover, as the Court stated in Caddington v. United States, 178 Supp. 604, 607, 147 Ct. Cl. 629 (1959), "the Secretary and his Boards have an abiding moral sanction to determine insofar as possible, the true nature of an alleged injustice to take steps to grant thorough and fitting relief." Accordingly, the Board has the authority to correct the applicant's record to cure what it has found to be a serious injustice.

11. Having found error and injustice in this case, the pivotal question becomes whether the Board can fashion a remedy that is consistent with the governing military pay statute. Such a remedy is available. The applicant's record can be corrected to show that he was commissioned as an O-1E on October X, XXXX. This correction would give him the over four years of enlisted service necessary to qualify for O-1E pay, and it will satisfy the statute. The applicant has indicated his agreement with this correction and expressed his understanding that correcting his record in this manner would cause him to lose seniority on the Active Duty Promotion List (ADPL). The granting of relief in the manner described is consistent with the statute and cures the injustice suffered by the applicant.

12. Accordingly, the Majority finds that the applicant is entitled to relief.

13. The Majority notes the extremely well written Minority opinion but is not persuaded by it for the following reasons. First, the Minority places the blame for this situation on the applicant. It overlooks the fact that yeomen are the military personnel

specialists for the Coast Guard and the applicant was at the time an enlisted member (seaman (SN)) when he sought counseling from those with apparent authority to perform such counseling, the OCS senior enlisted yeomen.

14. Second, the Minority sees this case as similar to that in BCMR No. 346-89, wherein the Deputy General Counsel denied relief. The Deputy General Counsel found in that case that the Coast Guard had committed an administrative error by accidentally sending that applicant an offer of a Reserve commission before commissioning authority had been granted. Therefore, the Oath of Office that applicant executed was invalid. This case involves much more than an accidental mailing. The OCS yeomen were charged with the duty of calculating service time and pay (and the Coast Guard has presented no evidence to the contrary). The yeomen incorrectly calculated the applicant's enlisted service and incorrectly advised him, prior to his entering OCS, that he would meet the requirements for O-1E upon graduating in September XXXX. Even the Coast Guard relied on this erroneous information and used it to prepare and execute the applicant's Acceptance and Oath of Office and to prepare his PCS orders. Moreover, the applicant received DLA pay based on the miscalculation. If the Coast Guard accepted this calculation, why should not the applicant have relied on it? The applicant's situation involves much more than a simple administrative error, but a failure of the Coast Guard to correctly calculate and advise him about his pay status.

15. Third, unlike the applicant in Docket No. 346-89, the applicant in this case certainly changed his position to his detriment based on the bad advice. Based on the erroneous advice, the applicant changed his position from that of guaranteed O-1E if he had graduated from the October OCS XXXX class to a lesser pay status (O-1) upon graduating from the June XXXX class. The applicant in Docket No. 346-89 had received a piece of paper offering her a commission and nothing else. As the Deputy General Counsel stated in Docket No. 346-89, that applicant did not participate in Reserve duty or suffer harm or prejudice in any manner. The applicant in this case acted affirmatively on the advice he received. He sought a medical waiver and joined and completed the June OCS class based on that advice. He received and executed an Acceptance and Oath of Office based on that advice. He received PSC orders and DLA pay based on that advice. Last, based on that advice, he gave up an opportunity to enter the October XXXX OCS class, wherein he would have been in pay status O-1E upon graduation.

16. With respect to the Minority's argument that even if an injustice exists in this case, it does not "shock the sense of justice," the Majority notes that in 1994, the Deputy General Counsel approved BCMR No. 193-92 finding merely that that applicant had

suffered an injustice.[4] The Board finds that the applicant's case is not any less compelling than that in Docket No. 193-92.

17. Accordingly, the Majority finds that the Coast Guard committed an error in improperly counseling the applicant and this error resulted in an injustice, which entitles the applicant to relief.

[ORDER AND SIGNATURES ON NEXT PAGE]

[4] In BCMR No. 193-92, the applicant received significant relief in that his record was corrected to show that "he received sufficient points to make his 1979 AY satisfactory and that he performed 20 years of creditable military service in order to receive retirement with pay. The Coast Guard shall pay the applicant all pay and allowances due him as a result of this correction to his record."

ORDER

The application of XXXXXXXXXXX, USCG, for correction of his military record is granted. The applicant shall be given the option of having his record corrected to show that he was commissioned on October 1, XXXX as an O-1E. The applicant shall exercise this option not later than 90 days from the date of the final decision. If the applicant's record is corrected to show that he was commissioned as an O-1E on October 1, XXXX, he shall receive any back pay and allowances that is due because of this correction.

[redacted]

[redacted]

*see dissenting opinion

[redacted]

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-040

DISSENTING OPINION

Although I concur with the Board's holding that the Coast Guard has committed no actionable error in this case, I dissent from its determination that the applicant has suffered an injustice that this Board is required to cure. Accordingly, I believe that the applicant's request for relief should be denied.

Pursuant to 10 U.S.C. § 1552, the Board is empowered to correct records in instances where it finds that the Coast Guard has committed an error, or where such correction is required to cure an injustice. The two terms are not synonymous. In BCMR Docket No. 346-89, the Deputy General Counsel, acting under delegated authority, relied on a standard used by the Court of Claims, which distinguished between the two terms, as the basis for determining whether the applicant suffered an injustice:

> 'Error' means legal or factual error…'Injustice', when also not error, is treatment by the military authorities that shocks the sense of justice, but is not technically illegal.

Reale v. United States, 208 Ct. Cl. 1010, 1011 (1976). Also see Sawyer v. United States, 18 Ct. Cl. 860 (1989), rev'd on other grounds, 930 F.2d 1577 (Fed Cir. 1991).

The Deputy General Counsel applied the "shocks the sense of justice" standard adopted in Reale to a situation involving an applicant who erroneously received a Coast Guard Reserve commission offer, which was intended to be effective upon her signing an oath of office following the applicant's discharge from active duty. Even though the applicant accepted the commission and signed the oath, the Deputy General Counsel determined that there was no "injustice" resulting from the Coast Guard's actions. The Deputy General Counsel held that the Coast Guard was simply attempting to "correct an administrative error by withdrawing the commission, completing its record, and acting on that completed record." Although there were allegations in the record that the offer's withdrawal was a "result of a reprisal against [the applicant] for filing [a]

discrimination complaint and [a] petition before the BCMR," the Deputy General Counsel held that there was "[n]o bad faith or other impropriety … apparent in the withdrawal of the offer." Furthermore, the Deputy General Counsel noted that the applicant did not "suffer any harm or prejudice during the period between executing the oath of office and having the oath declared invalid."

In this case, I do not find that the erroneous advice provided to the applicant by Coast Guard yeomen concerning the applicant's qualifications to receive pay at the O-1E pay level upon completion of Officer Candidate School (OCS) constitutes an injustice that "shocks the sense of justice." Although the applicant received erroneous information from the yeomen, the applicant readily admits that he participated in the process of going "through the materials and the manuals" with the yeomen. His personal review of the relevant materials is certainly a factor in alleviating some of the blame ascribed to the yeomen, as the applicant was ultimately responsible for the decision to actively seek a waiver to enter the June 200X class.

In addition, the applicant could not have reasonably had any expectation of ever receiving O-1E level pay upon his enlistment with the Coast Guard on September 30, 199X. As a constituent part of his enlistment agreement, the applicant was selected to participate in the Minority Officer Recruitment Effort (MORE). Pursuant to the terms of his MORE agreement, the applicant was required to complete college by August 199X, whereupon he would enter and complete OCS. It is clear that under this arrangement, the applicant would not be eligible for pay at the O-1E level, as he was expected to complete OCS prior to accruing over four years of enlisted active service. Once the applicant completed his studies sometime after August 199X, he was enrolled in the January, 200X OCS class. But for an injury (broken foot) sustained during the course of this OCS class, the applicant would have completed the class sometime in late April 200X, well before serving over four years in enlisted active service. Accordingly, the applicant could not have had any expectations of receiving ensign pay at the O-1E level until sometime after sustaining this injury.

Unlike the situation in BCMR Docket No. 346-89, in which the applicant alleged that he was suffering from reprisal at the hands of the Coast Guard for filing a discrimination complaint and a petition before the BCMR, there have been no allegations of improprieties in this case. Moreover, there is absolutely no indication that the Coast Guard has acted in bad faith in this case. In fact, but for the applicant's active intervention in seeking a medical waiver to enter the June 200X OCS class, the Coast Guard would have enrolled him in the October 200X OCS class. Had the Coast Guard's plan been followed, the applicant would have qualified to receive O-1E level pay upon graduation from the October 200X OCS class.

Finally, there is no evidence to suggest that the applicant has suffered any harm or prejudice resulting from his receipt of erroneous information during the period

between his decision to enter the June 200X class and the date on which he was informed that he was not eligible to receive level O-1E pay.

In assessing whether the applicant has suffered an injustice, I note that the facts in this case present an even less compelling argument for finding an injustice requiring remedy than those discussed in BCMR Docket No. 346-89. Although unfortunate, the applicant's inability to qualify for O-1E level pay is a fact that he should live with, as he was the motivating factor responsible for moving up his attendance in the June 200X OCS class. Regardless of any advice provided by the yeomen, the applicant was responsible for reviewing the appropriate materials and understanding their impact.

Accordingly, I recommend that the applicant's request be denied.

[redacted]