

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-147

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

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 case on June 20, 2007, upon receipt of the completed application, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated March 13, 2008, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his record to show that he was advanced to chief machinery technician (MKC; page grade E-7), effective September 1, 2004. The applicant alleged that his name was removed from the Reserve advancement eligibility list and that he was denied advancement because of a medical condition for which he was placed in a medical hold status. At the time of his removal from the Reserve advancement eligibility list, the applicant was serving on active duty pursuant to orders issued under Title 10 of the United States Code.

VIEWS OF THE COAST GUARD

On November 6, 2007, the Board received an advisory opinion from the Judge Advocate General of the Coast Guard, recommending that the Board grant relief in accordance with a memorandum from the Commander, Coast Guard Personnel Command (CGPC), which was attached as an enclosure to the advisory opinion.

CGPC stated that in October 2003, the applicant took the Reserve service wide examination (SWE) for advancement to MKC. The applicant was number 17 on the list because he scored 17th highest of all the individuals who took the SWE for that cycle.

CGPC stated that on February 11, 2004, the applicant sustained an injury to his right shoulder and as a result he was found not fit for duty and placed on medical hold. He remained on medical hold until September 10, 2007.

The applicant received his regular Enlisted Employee Review ((EER) performance appraisal)) on May 31, 2004. The applicant was not recommended for advancement on the EER due to "Member cannot be recommended for advancement because he is in a medical hold status and is not fit for full duty."

On August 24, 2004, CGPC published the Reserve advancement list announcing those service members who could be advanced to the next higher grade. The applicant's name was on this list.

However, on August 25, 2004, the applicant's command sent messages to the Personnel Service Center stating that the applicant was not eligible due to his "Not Recommended" for advancement on his May 31, 2004 EER.

On August 31, 2004, the Personnel Service Center removed the applicant's name from the Reserve advancement list and stated that he would not be advanced due to the message from his command.

On September 30, 2004, the applicant was released from active duty and on October 1, 2004, he was transferred to the retired reserve list without pay (RET-2).

CGPC concluded that the applicant was eligible for advancement based on the Reserve SWE. However, before he was due to be advanced, he suffered an injury causing him to be placed in a not fit for duty status. CGPC stated that the applicant's command did not recommend him for advancement on his May 31, 2004, EER because of his medical hold status. CGPC stated that under Articles 5.C.25¹ and Article 10.B.6.a.3² of the Personnel Manual, personnel in a not fit for full duty status can be advanced regardless of their fitness for duty. Moreover, CGPC stated that Article 10.B.7³ of the Personnel Manual prohibits giving adverse EERs based upon a member's not fit for duty status that limits his or her ability to perform. CGPC further stated the following:

The withholding of an advancement recommendation based upon the applicant's medical hold status is contrary to policy. The command provides no other justification for their adverse advancement recommendation and no guidance for the applicant to earn an advancement recommendation. The command followed

¹ Article 5.C.25.c. of the Personnel Manual states that personnel declared unfit for duty by CGPC are eligible for advancement if their names appear above the cut-off for advancement on the current advancement eligibility list.

² Article 10.B.6.a. of the Personnel Manual states that rating chains shall ensure that individuals who have a limited opportunity to perform due to medical reasons do not receive adverse EERs solely for that reason.

³ Article 10.B.7. of the Personnel Manual states that a recommendation of "Not Recommended" reflects that the member is not capable of satisfactorily performing the duties and responsibilities of the next higher pay grade. This provision requires that the member is properly counseled on the steps necessary to earn a recommendation for advancement.

procedure in requesting removal from the advancement list based upon his not being recommended for advancement on his May 31, 2004 EER . . . However, the basis for the not recommended is contrary to policy and unjustly disadvantages the applicant.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 28, 2007, the Board received the applicant's response to the views of the Coast Guard. He agreed with them.

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, 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 JAG admitted, and the Board agrees, that the Coast Guard committed an error when it marked the applicant as "Not Recommended" for advancement on his May 31, 2004 EER solely on the fact that the applicant was in a not for duty status. Article 10.B.6.a. of the Personnel Manual states that members shall not receive adverse EERs solely because their medical circumstances limit their ability to perform. The only justification given by the applicant's rating chain for not recommending him for advancement on his May 31, 2004 EER was his not fit for duty status.

3. The Coast Guard committed further error by using the erroneous mark of "Not Recommended" for advancement to justify removing the applicant from the Reserve SWE advancement list. Article 5.C.25 of the Personnel Manual states that members above the cut-off⁴ on the advancement eligibility list and are found unfit for duty are eligible for advancement.

4. To summarize, the Board agrees with the Coast Guard that the removal of the applicant from the enlisted Reserve advancement eligibility list was a violation of Article of Article 5.C.25 and Article 10.B.6.a. of the Personnel Manual.

5. The Board also finds that the mark of not recommended for advancement and the comment "Member cannot be recommended for advancement because he is in a medical hold status and is not fit for full duty" should be removed from the applicant's EER dated May 31, 2004, because the Coast Guard has admitted they were assigned in violation of the regulation.

6. Accordingly, the applicant's request should be granted.

⁴ Those service members above the cut-off are guaranteed advancement even after an advancement list expires, whereas members below the cut-off must compete for advancement if not advanced prior to the expiration of the advancement list.

ORDER

The application of XXXXXXXXXXXXXXX, USCGR, for correction of his military record is granted.

The applicant's record, including his September 30, 2004 DD-214 and his RET-2 orders, shall be corrected to show that he was advanced to MKC (E-7) effective September 1, 2004.

The applicant's record shall be further corrected by removing the mark "not recommended for advancement" and the comment "Member cannot be recommended for advancement because he is in a medical hold status and is not fit for full duty" from his EER dated May 31, 2004.

The Coast Guard shall pay him any back pay and allowances he may be due as a result of this correction.

Charles P. Kielkopf

Kenneth Walton

Eric J. Young