

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-081

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

GARMON, Attorney-Advisor:

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 docketed on May 20, 2003 upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated January 22, 2004, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his record to show that his permanent rank is chief warrant officer, pay grade CWO3, (CWO3) rather than senior chief xxxxxx xxxxxxxxxxxxxx, pay grade E-8.

APPLICANT'S ALLEGATIONS

The applicant stated that on June 1, 1999, the day he was appointed to temporary lieutenant (LT) through the direct commission engineers (DCE) program, he was also selected for advancement to chief warrant officer (CWO). He alleged that Coast Guard regulations provide that when members are simultaneously selected for CWO and a temporary LT commission, they are first appointed to CWO2 (chief warrant officer, pay grade CWO2), followed by their appointment to temporary LT commission. He alleged that based on the regulations, he therefore was erroneously counseled that he could not be advanced to CWO prior to being appointed to the rank of temporary LT. He alleged that had he been advanced to CWO2 before being appointed to LT, he would have been appointed to permanent rank of CWO3, on June 1, 2003.

SUMMARY OF THE APPLICANT'S RECORD

On July 8, 1980, the applicant enlisted in the Coast Guard Reserve. On August 1, 1997, he was promoted to senior chief xxxxxxxxxxxxxxxx, pay grade E-8.

On August 7, 1998, the Coast Guard Personnel Command (CGPC) released a general message, announcing the names of personnel eligible for appointment to warrant grade for 1999. The applicant was listed as number one on the list for the electronics specialty.

On June 1, 1999, the applicant was administered the oath of office in a temporary appointment in the grade of LT (pay grade O3-E). The applicant's record contains no evidence that he accepted an appointment to CWO2.

VIEWS OF THE COAST GUARD

On October 25, 2003, the Chief Counsel of the Coast Guard submitted an advisory opinion to which he attached a memorandum on the case prepared by CGPC. In adopting the analysis of CGPC, the Chief Counsel recommended that the Board grant the applicant's request for relief.

The Chief Counsel asserted that the applicant was erroneously counseled and, thereby, precluded from rightfully executing an oath of appointment to CWO2 on the same day he was appointed to temporary LT, June 1, 1999. He pointed out that there are no provisions within any Coast Guard statutes or regulations that prohibited the applicant from accepting his appointment to CWO2 first and subsequently executing the oath for the temporary appointment to LT on the same or following day. In fact, he stated, the Coast Guard routinely accomplishes such appointments for members under similar circumstances. He asserted that the applicant should have been afforded the opportunity to accept the commission to warrant officer that he "rightfully earned before he executed his appointment to lieutenant."

The Chief Counsel asserted that the Coast Guard has "previously interpreted 14 U.S.C. § 214 to authorize an appointment to CWO2 and subsequent appointment to temporary LT on the same day." Therefore, the Chief Counsel recommended, the applicant should be allowed to execute an oath to permanent CWO2, effective June 1, 1999, and permitted to be promoted to permanent CWO3, effective June 1, 2003.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 20, 2003, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to respond within 30 days. On October 27, 2003, the

applicant responded, informing the Board that he had no objection to the Coast Guard's advisory opinion.

APPLICABLE LAW

Title 14 U.S.C. § 214, entitled "Appointment of temporary officers," provides that "[t]he President may appoint temporary commissioned officers in the Regular Coast Guard in a grade, not above lieutenant ... from among the commissioned warrant officers, warrant officers, and enlisted members of the Coast Guard"

Title 10 U.S.C. § 575 (a) states that "[a] selection board ... shall recommend for promotion to the next higher grade those warrant officers considered by the board whom the board, giving due consideration to the needs of the armed force concerned for warrant officers with particular skills, considers best qualified for promotion within each grade (or grade and competitive category) considered by the Board.

Personnel Manual (COMDTINST M1000.6A)

Article 1.A.3.b. of the Personnel Manual deals with the effect that a temporary appointment has on a member's permanent status. It states that a temporary appointment "does not change these temporary officers' permanent, probationary, or acting status; prejudice their promotion or appointment opportunities; or abridge their rights or benefits. A temporary officer may not lose any rightful pay and allowances due to his or her permanent status when appointed."

Article 1.A.3.c. provides that "[a] temporary appointment ... may be vacated at anytime. If an officer's appointment is so vacated, he or she reverts to his or her permanent status (14 U.S.C. § 214)."

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 submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The applicant alleged that he was erroneously counseled that he could not be advanced to CWO prior to being appointed to the rank of temporary LT. The Chief Counsel admitted that, in light of the Coast Guard's interpretation of 14 U.S.C. § 214, it committed an error by precluding the applicant from executing an oath of appointment to CWO second class on the day he was also appointed to temporary LT. Moreover, the

Board finds that there are no Coast Guard regulations that prohibited the applicant from accepting his appointment to CWO2 first and subsequently executing the oath for the temporary appointment to LT on the same day. Therefore, the applicant has proved by a preponderance of the evidence that he was erroneously counseled and that his permanent rank should be changed.

3. The applicant requested, and the Chief Counsel recommended, that his (the applicant's) permanent rank be changed to CWO3, as of June 1, 2003. The record indicates that the applicant was entitled to execute an oath of appointment to permanent CWO2 on June 1, 1999. However, the Board finds that under 10 U.S.C. § 575 (a), the applicant must be recommended for promotion to CWO3 by a promotion board prior to being promoted to the permanent rank of CWO3. Therefore, if the applicant is selected for promotion to CWO3 when he is considered by the next CWO promotion board, his date of rank should be backdated to June 1, 2003, the date he would have been promoted to CWO3 had he been duly considered by a CWO promotion board.

4. Accordingly, the applicant's record should be corrected to show that he was commissioned to CWO2 on June 1, 1999 and that he is subsequently entitled to be considered by the next CWO promotion board for promotion to CWO3.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxx, USCG, for the correction of his military record is granted as follows:

His record shall be corrected to show that he executed an oath of office and was commissioned to CWO2 on June 1, 1999. Thereafter, his military record shall be considered by the next CWO promotion board for promotion to CWO3. If, at that time, he is selected for promotion to CWO3, his date of rank shall be backdated to June 1, 2003.

The Coast Guard shall pay him any back pay and allowance he is due as a result of this correction.

Stephen H. Barber

Harold C. Davis, M.D.

Dorothy J. Ulmer