DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-195

FINAL DECISION

AUTHOR: Andrews, J.

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on September 28, 2004, upon receipt of the completed application.

This final decision, dated May 19, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S AND ALLEGATIONS

The applicant, a machinery technician first class (MK1; pay grade E-6), asked the Board to correct his record to show that he has been advanced to chief machinery technician (MKC; pay grade E-7).

The applicant alleged that upon his discharge from ten years of active duty, he immediately joined the Selected Reserve on August 18, 2002. He was not allowed to take the servicewide examination (SWE) in October 2002 for advancement to MKC in the Reserve because he had been released into the Reserve too recently and the deadline had passed. In February 2003, he was recalled to active duty under Title 10 to serve overseas in Kuwait for nine months. In October 2003, he returned home, took the SWE, and was ranked number 20 on the Reserve SWE list for advancement to MKC. In January 2004, he was again recalled to active duty to serve at a Marine Safety Office.

The applicant alleged that in spring 2004, while still on active duty under Title 10, he inquired about returning to the regular Coast Guard. He was very conscious of his position on the Reserve advancement list and asked the MK force manager if he was likely to be advanced if he remained in the Reserve. He alleged that the MK force manager told him that it was not likely that he would be advanced off the list since he was number 20.

The applicant alleged that in July 2004, he was considering remaining in the Reserve until his Title 10 recall orders expired and rejoining the regular Coast Guard at that time. However, the MK detailer advised him that he "needed to lateral back [to the regular Coast Guard] by 15 July 2004 to avoid having to get a waiver because of [his] time in service." After he was told by the MK force manager a second time that it was unlikely that he would be advanced off the Reserve list if he remained in the Reserve, he decided not to wait to reenlist in the regular Coast Guard. Instead, he reenlisted on July 15, 2004, as advised by the MK detailer. Thereafter, he took leave in order to return home and get his family moved to his new duty station on time. On August 25, 2004, just a few days after he reported to his new unit, a bulletin was issued showing that all MK1s down to number 30 on the Reserve MKC advancement list would be advanced.

The applicant alleged that he "got dropped through the cracks" twice with respect to his advancement to MKC: once when he was not allowed to participate as a Reserve in the October 2002 SWE even though he would have been eligible if he had remained on active duty, and again when he was removed from the Reserve list because he integrated into the regular Coast Guard after being told twice by the MK force manager that it was unlikely he would be advanced from the list even if he stayed in the Reserve.

In support of his allegations, the applicant submitted a copy of the October 2003 SWE eligibility list, which shows that he was in 20th place on the Reserve SWE list for advancement to MKC. He also submitted a copy of ALCGPERSCOM 072/04, which was issued on August 25, 2004, and lists members on the advancement lists who could be advanced as of September 1, 2004, to fill vacancies in the Selected Reserve. ALCG-PERSCOM 072/04 shows that twenty MK1s on the Reserve SWE list—down to the 30th place—were to be advanced to MKC.

The applicant also submitted copies of email messages. In one, dated April 13, 2004, a chief warrant officer asked the Reserve Force Master Chief about the applicant's chances for advancement from the 20th place on the list. In response, the Reserve Force Master Chief stated on April 19, 2004, that "it looks like 4 is the current vacancy at MKC. [My] gut feeling is it will be tough to get down to #20."

In another email message dated August 31, 2004, the Reserve Force Master Chief told the applicant that "the RPAL [Reserve Personnel Allowance List] which was in effect on [July 15, 2004] and remained in effect until [August 5, 2004] (when the re-aligned 8100 RPAL was signed by G-CCS) held very little promise of reaching down to #20. However, the 8100 RPAL re-alignment ultimately did create significant unanti-cipated opportunities within the BM and MK ratings effective [September 1, 2004]. Due to your integration into the USCG [on July 15, 2004] you were no longer eligible for advancement off the OCT [2003] RSWE list."

In an email message dated September 1, 2004, the EAD, HYT, CIR & RIR Coordinator at the Coast Guard Personnel Command (CGPC) informed the applicant that "had you held off on your integration request and been advanced to chief and then put in your request for integration, it would more than likely have been disapproved because we are not short of MKC's. However, we are very short at the MK1 level and that was a big plus in getting your integration approved."

VIEWS OF THE COAST GUARD

On February 15, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request.

The JAG stated that the record indicates that the applicant was treated fairly and in accordance with Coast Guard policies. He stated that it is true that the applicant's decision to shift back and forth between the regular Coast Guard and the Reserve has prevented his advancement to MKC, but his failure to advance "has not been the result of any error or injustice on the part of the Coast Guard." He stated that in deciding to integrate back into the regular Coast Guard on July 15, 2004, the applicant acted based on the best information available at the time and in his own best interests. The JAG stated that no member of the Coast Guard misled the applicant and pointed out that absent evidence to the contrary, Coast Guard officials must be presumed to have acted "correctly, lawfully, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). The JAG explained its policies as follows:

> Operationally, the active duty force and the reserves function as an integrated whole. Nevertheless, they are not an integrated whole for a myriad of purposes, including retirement, entitlements, and most relevant to this case, promotions. In hindsight, Applicant could have stayed in the reserves and made Chief. He chose not to do so. Applicant's decision was likely affected by his desire to return to active duty. If he had waited to see if he would make Chief, he would have faced significant hurdles in his attempt to return to active duty. First, he would need a waiver due to his length of service (over 11 years) and second, the Coast Guard would have had to have a critical shortage of MK Chiefs. The record shows, and Applicant was aware, that it was unlikely he would be able to return to active duty if he chose to wait.

The JAG based his recommendation in part on a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC), which he adopted. CGPC stated that the applicant asked to be integrated back into the regular Coast Guard on May 5, 2004. CGPC submitted a copy of the applicant's request for integration, which indicates that it was signed by him on May 5, 2004, and endorsed by his commanding officer on May 14, 2004.

CGPC also submitted a copy of an analysis page regarding the applicant's request for integration. It states that his Title 10 recall orders would expire on September 30, 2004, and that because he was approaching his 11th anniversary on active duty, he should integrate by July 15, 2004, or he would have to receive a waiver.

In addition, CGPC submitted a copy of a message dated June 23, 2004, from CGPC to the applicant's command authorizing his reenlistment on July 15, 2004. This message references ALCOAST 080/02, which states that Reserve members in certain ratings, including MK3 and MK2, could be integrated if they had less than eleven years of active service. ALCOAST 080/02 further states that applications for integration from

members in higher pay grades would be considered on a case-by-case basis in accordance with "specific Service needs."

CGPC stated that when the applicant requested integration, the regular Coast Guard needed MK1s but not MKCs. If the applicant had waited to integrate until after he was advanced to MKC, his request to integrate as an MKC "would have been disapproved."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 2, 2005, the BCMR received the applicant's response to the views of the Coast Guard. The applicant stated that he still believes he was misled and "was not given the most accurate information available" even though the misinformation was apparently not intentional. He stated that he inquired about his chance of being promoted off the October 2003 RSWE list several times, and no one ever mentioned that a "force restructuring" was under consideration. The applicant questioned why he was not informed about the upcoming "force restructuring" and alleged that if he had been, the knowledge would have "dramatically weighed on my decision." He questioned why the Coast Guard would claim that there was no need for MKCs in the regular Coast Guard if the "force restructuring" resulted in so many more Reserve MK1s being advanced to MKC.

The applicant stated that he was unaware that he might not have been integrated after advancement to MKC until September 1, 2004, when he received the email from the EAD, HYT, CIR & RIR Coordinator. He stated that when he was making his decision about whether to integrate or to wait, he had no knowledge that he would not have been allowed to integrate as an MKC. He questioned how such a conclusion could even be reached when CGPC was supposed to make decisions about integrating MKCs on a case-by-case basis.

The applicant stated that CGPC's allegations in this regard contradict what he was told by the MK assignment officer prior to his integration. He alleged that the assignment officer advised him to apply for integration and get his "ducks in a row" so that on July 15, 2004, he would have an option. He alleged that the assignment officer told him that if he was advanced to MKC before he integrated, his "billet choices would change and [he] would have a short time to make a new billet choice." The applicant stated that the day before he reenlisted he checked again on his chances for advancement and was told that there was "no way" he would be advanced off the list. Ultimately, he alleged, he chose to integrate on July 15, 2004, rather than to wait to see if he might be advanced, based on the assessments of the MK force manager, the MK assignment officer, and the Reserve Force Master Chief. He alleged, in essence, that the advancement of so many Reserve MK1s to MKC, which was announced on August 25, 2004, must have been known or foreseeable by someone at CGPC before July 15, 2004, and that he should have been told so that he could have made an informed decision.

On May 18, 2005, the applicant informed the Board that the person in 21st place on the October 2003 Reserve SWE list, who was advanced to MKC, was thereafter allowed to integrate into the regular Coast Guard as an MKC.

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 reenlisted in the regular Coast Guard on July 15, 2004, because he had been misinformed about the likelihood that he would be advanced to MKC from the 20th place on the Reserve SWE eligibility list. He alleged that if he had been told that he would likely be advanced, he would have waited until after his advancement and then reenlisted in the regular Coast Guard. He alleged that he should have been told that a "force restructuring" was under consideration and that, if he had been, he would have waited to reenlist even if it meant having to request a waiver. He argued that for twenty Reserve MK1s to be promoted to MKC on September 1, 2004, someone at CGPC must or should have known it was likely to happen by July 15, 2004, and should have shared that information with him so that he could make a more informed decision.

3. Absent evidence to the contrary, the Board presumes that Coast Guard officials—such as those the applicant consulted prior to his integration—have acted "correctly, lawfully, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). The applicant has not proved that any of the people he consulted about his chance of advancement off the Reserve SWE eligibility list knew prior to his integration that numerous Reserve MK1s would be advanced to MKC on September 1, 2004, and failed to respond to his questions honestly and in good faith. Nor has he proved that they were aware that a "force restructuring" was under way that would likely result in such a dramatic increase in the number of Reserve advancements to MKC. In response to his query in April 2004, the Reserve Force Master Chief stated that "it looks like 4 is the current vacancy at MKC. [My] gut feeling is it will be tough to get down to #20." The Reserve Force Master Chief's "gut feeling" was ultimately inaccurate because a new RPAL was issued in August 2004. However, the applicant has not proved that in April or July 2004 he was deliberately misled or that anyone deliberately withheld information to which he was entitled.

4. The record indicates that the applicant's failure to achieve advancement to MKC to date has resulted from his own decisions about his career and some very unfortunate timing. However, he has not proved the existence of any error in his

record. Nor has he proved that his failure to be advanced constitutes "treatment by the military authorities that shocks the sense of justice, but is not technically illegal." *See Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); Decision of the Deputy General Counsel, BCMR Docket No. 2001-043.

5. Because the applicant has not proved by a preponderance of the evidence that he was wrongfully denied any information regarding expectations for the advancement of Reserve MK1s to MKC that existed on July 15, 2004, the Board need not address other issues raised in the case, such as whether the applicant might have been denied integration after advancement to MKC.

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

ORDER

The application of _____, for correction of his military record is denied.

William R. Kraus

Dorothy J. Ulmer

George A. Weller