

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-077

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Andrews, J.

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 application on March 11, 2005, upon receipt of the applicant's completed application.

This final decision, dated December 8, 2005, is 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 military record by advancing him to chief machinery technician (MKC; E-7) as of June 1, 2002. (After the applicant applied to the Board, he was advanced from MK1 to MKC on May 1, 2005.) The applicant alleged that after taking the October 2001 Reserve service-wide examination (RSWE), his name appeared above the cutoff for advancement on the MKC Reserve advancement list. However, on October 20, 2001 he submitted a request to serve on active duty, and on January 22, 2002, he executed an extended active duty (EAD) contract to serve at the recruiting office in San Antonio for two years beginning on March 1, 2002. Paragraph 1(e) of his EAD contract states that "[o]nce an extended active duty contract is executed, the member is not eligible to be advanced in the Reserve component."

The applicant alleged that on June 2, 2002, he was told that he had been advanced to MKC from the inactive duty list. He was given a certificate of advancement and letter from the Master Chief Petty Officer of the Coast Guard

welcoming him to the "chief" grade, copies of which he submitted. However, later he was told that he could not be advanced because he was on active duty.

The applicant further alleged that at the time, he could have been put on the active duty supplemental advancement list then in effect if he had requested a waiver of the sea time requirement for active duty members being advanced to MKC. However, no one advised him that he could seek such a waiver and get on the active duty supplemental list, so he did not request one. The applicant submitted a copy of ALCOAST 366/02, which was issued on July 22, 2002, and which, he alleged, supports his allegations. ALCOAST 366/02 states the following in pertinent part:

SUBJ: Policy change for enlisted reservists on extended active duty

A. Recall of enlisted reservists to extended active duty, COMDTINST 1141.3 ...

1. The purpose of this ALCOAST is to announce changes to the enlisted advancement policy for reservists serving on EAD. ... This input showed that many reservists are hesitant to volunteer for EAD because of the different advancement standard applied to reserves on EAD than to those not on EAD. By listening to field input and reviewing the issue, we have been able to change our policy to reflect current service needs and the needs of our members. ...

2. Effective for the October 2003 Reserve advancement cycle, reservists on EAD desiring to compete for advancement must take the [RSWE]. Since the Reserve advancement eligibility list from that exam will not be effective until 1 JAN 2004, reservists will be allowed to keep their names on the active duty supplemental advancement lists or the active duty advancement eligibility list until 31 DEC 2003, though placement on a supplemental list does not guarantee advancement.

VIEWS OF THE COAST GUARD

On July 22, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief.

The JAG adopted as a part of his advisory opinion a memorandum on the case prepared by CGPC. CGPC stated that following the October 2001 RSWE, the applicant was #14 on the January 2002 Reserve advancement list, which expired on December 31, 2002. However, pursuant to his EAD contract, he began serving on active duty on March 1, 2002, and was thereafter ineligible to be advanced off the list. On June 1, 2002, CGPC advanced the MK1s who were #12, #13, and #15 on the Reserve list to MKC, in accordance with ALCGPERSCOM 045/02.

CGPC stated that the Coast Guard changed its policy in ALCGPERSCOM 039/02, which was issued on May 21, 2002. ALCGPERSCOM 039/02 provided that beginning with the upcoming RSWE in October 2002, reservists on EAD were eligible to compete in the RSWE as well as against active duty members in the regular SWE. CGPC further stated that on July 22, 2002, ALCOAST 366/02 made it mandatory for reservists on EAD to compete in the RSWE and advance within the Reserve system instead of the active duty system beginning in October 2003. CGPC stated that the applicant was #41 on the 2003 Reserve list but did not advance until May 1, 2005, after he placed #10 on the 2004 Reserve list.

CGPC stated that under Article 7.C.1.f. of the Reserve Policy Manual (RPM) reservists above the cutoff for advancement who are not advanced prior to beginning EAD may only be advanced if authorized by CGPC but, if not advanced while on EAD, should ask to be advanced upon their release from active duty. CGPC argued that under Article 7.C.2.e. of the RPM, the "responsibility to be advanced within the reserve system rests solely on the individual."

CGPC stated that under Article 5.C.15.c.4. of the Personnel Manual, members on active duty who, like the applicant, joined their ratings before February 1, 1994, must have at least twelve months of time at sea while serving in a pay grade above E-3 before they can advance to MKC. CGPC stated that under Article 5.C.15.a., waivers of this sea-time requirement may only be granted for members currently serving at sea or who are under orders to sea duty.

CGPC alleged that the applicant was not eligible for advancement off the Reserve list once he executed his contract and that any request to CGPC for advancement "would likely have been disapproved since there were no shortages of qualified candidates for advancement." CGPC further alleged that the applicant did not have the required sea time to be advanced within the active duty system and that, because his assignment did not involve sea duty, he would not have been granted a waiver. Therefore, CGPC argued, the applicant was not denied advancement simply because he did not know about waivers.

The JAG concluded that prior to June 2002, CGPC erroneously advised the applicant that he would be advanced to MKC off the Reserve list. Under policy then in effect, however, Reserve members on EAD could not advance off a Reserve advancement list and were required to compete as members on active duty. Therefore, the error was corrected. However, in October 2003, the policy changed to require reservists on EAD to compete within the Reserve system, and the applicant was subsequently advanced on May 1, 2005, after placing #10 on the list following the October 2004 RSWE.

The JAG further argued that under Article 7.C.2.e. of the RPM, the applicant was responsible for informing himself about the possibility of a waiver and that even if he had requested one, no waiver would have been authorized since the applicant was not on sea duty or under orders to sea duty.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 24, 2005, the applicant responded to the views of the Coast Guard. The applicant stated that he does not understand why the Coast Guard requires reservists competing for advancement to MKC on the SWE to have twelve months of sea time but not if they compete for advancement on the RSWE. Furthermore, he pointed out, under Article 7.C.1.f. of the RPM, reservists "who placed above the advancement cutoff on a [RSWE] advancement eligibility list but who were not advanced before commencing a period of EAD" may be advanced with authorization from CGPC and may ask to be advanced upon release from active duty. The applicant argued that he clearly fell within the scope of this policy and that he received authorization from CGPC when the Master Chief Petty Officer of the Coast Guard sent him the letter and certificate of advancement. Therefore, he argued that his date of advancement should be corrected to June 1, 2002.

The applicant also argued that paragraph 1(e) of his EAD contract "only pertains to reservists who did not place on the RSWE eligibility list prior to commencing EAD" and therefore should not bar his advancement.

APPLICABLE LAW

Article 7.C.2.e. of the Reserve Policy Manual (RPM) in effect from January through October 2002 stated that "[p]rimary responsibility for compliance with the requirements for advancement rests with the individual concerned as outlined by the Personnel Manual COMDTINST M1000.6 (series). In summary, members are required to bear the consequences of any error or omission they should have avoided."

RPM Article 7.C.1.e. stated that "[w]hile serving on extended active duty (EAD), enlisted reservists are limited in Service Wide Examination participation and advancement in rating as per the Personnel Manual, COMDTINST M1000.6 (series), and as follows. ... (2) Reservists in general ratings on EAD may participate only in the active duty Service Wide Examination and advancement system. Participation shall be per the Personnel Manual, COMDTINST M1000.6 (series)."

RPM Article 7.C.1.f. stated that "[e]nlisted personnel who placed above the advancement cutoff on a reserve administered Service Wide Examination advancement eligibility list but who were not advanced before commencing a period of EAD, may be advanced only if authorized by CGPC-rpm. If not advanced while on EAD, the reservist

may be advanced after RELAD. ... The reservist must request this advancement upon RELAD.”

Article 5.C.1.b.1. of the Personnel Manual (PM) in effect from January to October 2002 stated that the regulations regarding advancement in Article 5.C. were applicable to “[a]ll active duty enlisted personnel and Coast Guard reservists on extended active duty.” PM Article 5.C.4.a. stated that it is “each individual’s responsibility to ensure their eligibility in all respects for the SWE.” PM Article 5.C.15.c.1. provided to be eligible to take the SWE for advancement to MKC, MK1s had to have at least twelve months of sea duty in a pay grade higher than E-3. PM Article 5.C.15.a.1. provided that “[w]aiver for this requirement will not be granted except in cases where [the] candidate is presently serving at sea or is under orders to sea duty and will meet the sea duty requirement by the effective date of the advancement eligibility list.”

On December 27, 2001, the Commandant issued the advancement eligibility list pursuant to the RSWE given in October 2002. The applicant’s name appeared as #14 on the list.

On May 23, 2002, the Commandant issued ALCGPERSCOM 039/02, which provided that reservists on EAD for a period of two years or less would be eligible to participate in the RSWE in October 2002 if otherwise qualified.

On May 31, 2002, the Commandant issued ALCGPERSCOM 045/02, which authorized the advancement to MKC of the members who were #11, #12, #13, and #15 on the RSWE advancement list as of June 1, 2002.

On July 22, 2002, the Commandant issued ALCOAST 366/02, which provided that “[e]ffective for the October 2003 Reserve advancement cycle, reservists on EAD desiring to compete for advancement must take the [RSWE].”

On April 20, 2005, the Commandant issued ALCGPERSCOM 035/02, which authorized the applicant’s advancement to MKC as of May 1, 2005, to fill a vacancy.

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 over this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. Under RPM Article 7.C.1.f., “[e]nlisted personnel who placed above the advancement cutoff on a reserve administered Service Wide Examination advancement eligibility list but who were not advanced before commencing a period of EAD, may be advanced only if authorized by CGPC-rpm.” The applicant was above the cutoff on the RSWE advancement list but not advanced when he began active duty on March 1, 2002. Therefore, without authorization by CGPC, he could not expect to advance without competing against regular active duty members on the SWE, pursuant to RPM Article 7.C.1.e. and PM Article 5.C.1.b.1. The applicant’s EAD contract shows that he was notified of this policy before beginning EAD, as paragraph 1(e) of the contract states that “[o]nce an extended active duty contract is executed, the member is not eligible to be advanced in the Reserve component.”

3. The applicant did not allege that when he signed the EAD contract he did not realize that he was giving up his right to be advanced off the 2002 RSWE advancement list. He did not allege that he was unfairly surprised not to be eligible for advancement from that list. However, after reviewing the Coast Guard’s advisory opinion, he argued that paragraph 1(e) of his EAD contract should not apply to him and should “only pertain[] to reservists who did not place on the RSWE eligibility list prior to commencing EAD.” However, this argument is illogical as at that time, reservists on EAD were barred from competing on the RSWE. Therefore, the only way the name of a reservist on EAD could be on an RSWE advancement eligibility list is if the reservist got on the list before commencing EAD. Moreover, the language in paragraph 1(e) clearly mirrors the regulation under RPM Article 7.C.1.f. As a member of the Reserve, the applicant was charged with knowing this regulation and his contract indicates that he was forewarned that he was giving up his eligibility for advancement off the RSWE advancement list by executing an EAD contract. Unfortunately, the contract did not point out that, under RPM Article 7.C.1.f., CGPC may give special authorization for a reservist on EAD to be advanced off a Reserve list.

4. The applicant alleged that he was authorized for advancement to MKC by CGPC, pursuant to RPM Article 7.C.1.f., because he received a certificate and a letter from the Master Chief Petty Officer of the Coast Guard noting his advancement as of June 1, 2002. However, on May 31, 2002, CGPC issued ALCGPERSCOM 045/02, which authorized the advancement to MKC of the members who were #11, #12, #13, and #15 on the RSWE advancement list as of June 1, 2002. The applicant, who was #14 on the list, was omitted from the bulletin. Therefore, he clearly was not authorized for advancement. The fact that the Master Chief Petty Officer of the Coast Guard made a mistake and sent him the certificate and welcoming letter, which may have given the applicant false hope for a few days, is unfortunate but does not bind the Coast Guard to advance him.

5. The applicant alleged that he should have been advised to seek a waiver of the sea-time requirement so that he could compete for advancement on the SWE. The applicant cited no regulation that entitled him to this advice, and the Board knows of none. As a member of the Coast Guard, the applicant is charged with knowing the regulations. Under both RPM Article 7.C.2.e. and PM Article 5.C.4.a., the applicant was responsible for knowing and meeting the eligibility requirements for his own advancement. Furthermore, under PM Article 5.C.15.a.1., waivers of the sea-time requirements “will not be granted except in cases where [the] candidate is presently serving at sea or is under orders to sea duty and will meet the sea duty requirement by the effective date of the advancement eligibility list.” In 2002, the applicant was neither serving at sea nor under orders to sea duty. Therefore, it is unlikely that he would have received a waiver even if he had submitted a request.

6. The applicant complained that he does not understand why the Coast Guard requires reservists competing for advancement to MKC on the SWE to have twelve months of sea time but not if they compete for advancement on the RSWE. However, it is not for this Board to decide what qualifications reservists and active duty members should have for advancement.

7. The applicant has not proved by a preponderance of the evidence that the Coast Guard committed any error or injustice¹ by refusing to advance him to MKC on June 1, 2002, or by not advising him to seek a waiver of the sea-time requirement for competition for advancement to MKC on the SWE.

8. Accordingly, the applicant’s request should be denied.

¹ See *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev’d on other grounds*, 930 F.2d 1577 (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (finding that for purposes of the BCMRs under 10 U.S.C. § 1552, “injustice” is treatment by military authorities that “shocks the sense of justice”).

ORDER

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

Charles P. Kielkopf

William R. Kraus

Thomas H. Van Horn