

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-046

XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

Ulmer, Chair:

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 application was docketed on December 22, 2003, upon receipt of the applicant's completed application and military records.

This final decision, dated September 9, 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 military record (1) by removing special enlisted performance evaluation marks for the period ending June 11, 2001, (2) by reinstating his eligibility for a Good Conduct award retroactive to the date of his last Good Conduct award, and (3) by advancing him to chief warrant officer (CWO) in the engineering specialty, with the date of rank he would have received if he had been selected for CWO in 2001.

APPLICANT'S ALLEGATIONS

The applicant alleged that the June 11, 2001 special performance evaluation marks were prepared in violation of Article 10.B.5.b. of the Personnel Manual.¹ He stated that he could not find any policy that permitted Coast Guard units to issue

¹ This provision lists the instances in which a special performance evaluation should be prepared. It does not list alleged misconduct that is not the subject of a disciplinary or criminal proceeding as a situation requiring a special evaluation.

special evaluations arbitrarily or to issue them as punitive measures. The applicant further stated the following:

These evaluations resulted in my removal from the [2001] CWO Eligibility List and termination of Good Conduct eligibility. These evaluations were issued after the theft of a government owned firearm that was stolen from a government vehicle I was operating. The firearm was assigned to me and I was operating the vehicle on official duty. A subsequent administrative investigation was conducted by my command. I was not awarded non-judicial punishment (NJP) or convicted by Courts-Martial. I was not convicted or charged with any offense.

Without these erroneous evaluations, I believe I would have been competitive and could have advanced to CWO in 2002 or 2003. I thereby request that I be advanced to CWO at a time commensurate with the other primary candidates advanced from the 2001 CWO eligibility list . . . These evaluations resulted not only in my removal from the 2001 advancement list , but also prohibit any advancement until after January 2005. In 2003 the Coast Guard held a special CWO board for a new Criminal Investigator specialty. It is my understanding that everyone who applied for CWO under this special board was approved and offered appointment in 2003 . . . If advanced I also request reimbursement for back pay and allowances.

The CG-3307's [page 7s] I received with these evaluations documented the adverse evaluations only, and should therefore be removed from my military record along with the evaluations.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on September 30, 1985, and has served continuously on active duty since that time. He has risen to pay grade E-7. In 2000, he was assigned for duty to the Coast Guard Investigative Service.

In 2001, he applied for an appointment to CWO in the engineering specialty. In April 2001, he was one of the 650 individuals listed in ALPERSCOM 038/01 (Preboard Eligibility List²) as having met the requirements for consideration by a selection board for appointment to warrant officer grade.

² According to Article 1.D.6.c. of the Personnel Manual, the Preboard Eligibility List contains the names of those members whose records will be placed before a CWO appointment selection board for promotion to warrant grade. This provision states "[b]ased on the estimated number of warrant officer appointments required for the following year, Commander (CGPC-opm) will determine the number of

On June 11, 2001, the applicant was issued the special performance evaluation with an unsatisfactory conduct mark and a mark of "not recommended for advancement." The Personnel Manual requires that the CO document certain unsatisfactory and low performance marks on a page 7. So, on June 11, 2001, the following page 7s were entered into the applicant's record to explain the negative marks on the performance evaluation:

1. A negative page 7 was placed in the applicant's record documenting the unsatisfactory conduct mark. The CO stated that the applicant was given the unsatisfactory conduct mark "for nonconformance to military rules, regulations, and standards, by member failing to adequately secure his government issued weapon resulting in the theft of the weapon."

2. A page 7 was placed in the applicant's record documenting the mark of "not recommended" for advancement because the applicant failed to secure a government issued weapon resulting in the weapon being stolen. The entry noted that the applicant had been counseled that any further failure to obey regulations could result in non-judicial punishment (NJP) and/or removal from his assignment with the USCG Investigation Service. The CO further noted that the member had been counseled on the steps necessary to earn a mark of recommended for advancement.

3. A third page 7 was entered into the applicant's record documenting the termination of the applicant's "period of eligibility for a Coast Guard Good Conduct award." The entry stated that a new period of eligibility began on June 12, 2001.

On June 21, 2001, the Special Agent in Charge, Coast Guard Investigative Service, (applicant's CO) advised Commander, Coast Guard Personnel Command (CGPC) by letter that he had withdrawn his recommendation that the applicant be considered for a CWO appointment because of the applicant's unsatisfactory conduct mark on the June 11, 2001 performance evaluation. The CO stated that the applicant received the unsatisfactory mark for failing to adequately secure his government issued pistol resulting in the theft of the weapon.

On July 20, 2001, CGPC informed the applicant that action had been initiated under Article 1.D.2 of the Personnel Manual to have the applicant's name removed from the 2001 Preboard Eligibility List. CGPC stated the reason for the action was his receipt of notification from the applicant's commanding officer (CO) that the applicant had been given an unsatisfactory mark in conduct for the period ending June 11, 2001. CGPC further advised the applicant that according to regulations, he could not have an

candidates to be considered for appointment and establish minimum preboard scores for primary and alternate candidates in each specialty."

unsatisfactory mark in conduct for the three years immediately preceding the January 1 application deadline up to the date of appointment.

VIEWS OF THE COAST GUARD

On April 30, 2004, the Judge Advocate General (TJAG) of the Coast Guard submitted an advisory opinion in which he adopted the findings and analysis provided by the Commander, Coast Guard Personnel Command (CGPC). CGPC's comments were attached as Enclosure (1) to the advisory opinion. CGPC did not recommend reinstating the applicant's name on the 2001 CWO eligibility List and retroactive appoint to CWO. He did recommend, however, that the Board grant the following alternative relief:

- a. The Special Evaluation dated June 11, 2001, should be removed from the Applicant's permanent record.
- b. Administrative Remarks, CG-3307's dated June 8 and June 11 (2) should be removed from the Applicant's permanent record.
- c. Applicant's eligibility for the Good Conduct Award should be reinstated, retroactive to June 11, 2001.
- d. Preparation of a new Administrative Remarks, CG-3307, dated June 11, 2001, documenting the Applicant's misconduct and action taken to remove him from the 2001 Preboard Eligibility List for appointment to CWO.
- e. Pending receipt of a favorable recommendation from his commanding officer, CGPC shall authorize the Applicant to compete in the 2004 CWO Appointment cycle in the Investigator (INV) specialty.
- f. If selected for promotion on the June 2004 CWO Appointment Board (or during a subsequent special board if the BCMR final action is not decided by approximately 7 June 2004), the Applicant should receive a back date of rank of 1 January 2004.

CGPC stated that the special evaluation given to the applicant on June 11, 2001, was not prepared in accordance with the Personnel Manual. Therefore using it as a basis for the CO to withdraw his recommendation for the applicant's appointment to CWO and for CGPC to remove the applicant's name from the Preboard Eligibility List was improper. In this regard, CGPC stated that in the absence of a court-martial, civil conviction or NJP, there was no authority to prepare a "[s]pecial [e]valuation and mark the applicant "unsatisfactory" for the purpose of withdrawing his recommendation or

removing him from the list." CGPC stated that the applicant was inappropriately removed from the 2001 Preboard Eligibility list, unfairly denied his right to a special board,³ and erroneously disqualified from competing in the 2002, 2003, and 2004 CWO appointment cycles.

CGPC stated that the applicant's CO could have properly removed the applicant's name from the Preboard Eligibility List by choosing one or a combination of the following options:

- a. Withdraw the recommendation, counsel the member, and request CGPC to remove the Applicant's name from the Preboard Eligibility List. The Applicant would have been afforded the opportunity to comment on the commanding officer's request [that] possibly could have resulted in the convening of a special board to consider removing [the applicant] from consideration for one year . . .
- b. Subject the Applicant to Court Martial or NJP, complete an authorized Special Evaluation, mark [the applicant] unsatisfactory, and then request his removal from the 2001 Preboard Eligibility List . . . This would have legitimately resulted in the applicant's disqualification from competing for CWO appointment for an additional 3-year period (The 2002, 2003, and 2004 Appointment cycles).
- c. A final option would have been for the commanding officer to exercise option a, then at the Applicant's next regular evaluation (September 30, 2001), and mark him "unsatisfactory" in conduct, in accordance with Chapter 10 of the Personnel Manual . . . This would have . . . legitimately disqualified the Applicant from competing in the CWO appointment in 2002, 2003, and 2004.

CGPC stated that in discussions with the Chief, Office Promotions Branch, the applicant indicated that he agreed with the resolution of this case "by implementing the proposed alternative remedy that allows the Applicant to compete in the upcoming [June 2004] board for appointment to CWO (INV) and if selected, receive a retroactive appointment date of January 1, 2004." CGPC indicated that if the BCMR had not acted to correct the applicant's record by the June 2004 appointment board that a subsequent special board would be convened to consider the applicant's record.

³ Under Article 1.D.10.a.2 of the Personnel Manual, if CGPC had acted to remove the applicant's name from the Preboard Eligibility List based solely on the CO's recommendation, without the special evaluation, the applicant would have been entitled to review the recommendation, comment on it, and have his record reviewed by a special board that would have recommended whether his name should have been reinstated on the Preboard Eligibility list, if CGPC had acted to remove it.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 12, 2004, the Board received the applicant's reply to the views of the Coast Guard. The applicant stated that he agreed with the advisory opinion, except for the recommendation that a new Page 7 should be prepared and placed in his record. He stated that it should be left up to the command to determine what, if any, action should be taken to document his failure to secure a firearm once the special evaluation and accompanying page 7s are removed. The applicant also submitted a very favorable letter from his current CO recommending that the applicant be appointed a CWO.

APPLICABLE LAW

Personnel Manual (COMDTINST M1000.6A)

Article 1.D.2.a.9 (Minimum Eligibility Requirements for Appointment to Warrant Officer) states to be eligible for appointment to warrant officer, a member must have no court-martial or civil conviction, or unsatisfactory mark in conduct for the three years immediately prior to the 1 January application deadline through the actual warrant officer appointment. This provision requires COs to submit a message to CGPC to remove any person from the warrant officer appointment eligibility lists who has received a court-martial conviction, civil conviction, NJP, or unsatisfactory mark in conduct any time prior to being appointed to warrant grade.

Article 1.D.10.a.1. (Procedure for Removal from the Preboard or Final Eligibility List) of the Personnel Manual provides that a candidate may be removed from either the Preboard or Final Eligibility List if information is discovered which casts doubt on the candidate's moral or professional qualifications for appointment to warrant grade. This provision further states that the name of any candidate who has received a court-martial, civil conviction, non-judicial punishment, or unsatisfactory mark in conduct at any time after the candidate has been recommended for appointment may be removed from the Preboard or Final Eligibility Lists. The removal action may be initiated by the commanding officer or CGPC without conducting a special board. This provision also states that a commanding officer or superior in the chain of command may recommend the removal of a member's name by submitting a letter to CGPC explaining the reason for withdrawing the recommendation for appointment to CWO.

Article 1.D.10.a.2 states that the candidate shall have an opportunity to review the recommendation and shall be permitted the opportunity to reply to the recommendation. "If [CGPC] initiates the action, the candidate shall be advised in writing of the contemplated actions and the reasons therefore and given the opportunity to communicate to the special board in writing via the chain of command."

Article 1.D.10.a.3. states the recommendation for removal shall be reviewed at the Coast Guard Personnel Command by a special board of senior officers. "After a thorough review of the candidate's record, the special board shall recommend to [CGPC] that the candidate be reinstated on the Final Eligibility List or that the candidate not be reinstated on the Eligibility List."

Article 10.B.5.b. (Special Evaluations) of the Personnel Manual states, in pertinent part, that special performance evaluations shall be prepared on the date a member is awarded NJP, convicted by court-martial, convicted in a civil court, or reduced in rate.

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 applicant requested an oral hearing before the Board. The Chairman, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant's CO concluded that the applicant failed to adequately secure his government issued pistol resulting in theft of the weapon. He chose to document the applicant's failure by giving him a special evaluation with an unsatisfactory conduct mark and a mark of "not recommended" for advancement. The CO did not impose any disciplinary measures against the applicant. Under Article 1.A.2.a.9 of the Personnel Manual, the applicant's name had to be removed from the Preboard Eligibility List because of the unsatisfactory mark in conduct on the June 11, 2001 special evaluation. On June 21, 2001, the applicant's CO informed CGPC that he had withdrawn his recommendation that the applicant be considered for a CWO appointment because of the unsatisfactory conduct mark. CGPC informed the applicant that his name would be removed from the Preboard Eligibility list because of the unsatisfactory conduct mark.

4. The Coast Guard conceded, and the Board finds, that the CO committed an error by causing a special evaluation to be placed in the applicant's record with an unsatisfactory conduct mark. Under Article 10.B.5.b. of the Personnel Manual, special performance evaluations are prepared to document an NJP, court-martial conviction, civil conviction, reduction in rate (resulting from disciplinary action), or reduction for incompetence. The applicant met none of these circumstances because his CO chose not to punish him for failure to secure his weapon. The placement of the special evaluation in the applicant's military record constituted error. The page 7s documenting the

unsatisfactory conduct mark, the mark of "not recommended" for advancement, and the termination of the applicant's Good Conduct award eligibility period are also in error as they were prepared in support of the special evaluation. Because the special evaluation and the page 7s were improperly placed in the applicant's record, using them as a basis to remove the applicant's name from the Preboard Eligibility List was also improper.

5. Since the CO did not impose any disciplinary measures against the applicant, he should not have prepared a special evaluation, but rather he should have recommended that CGPC remove the applicant's name from the Preboard Eligibility List because of his failure to secure his government weapon which resulted in it being stolen. Removal of the applicant's name by CGPC in this manner would have triggered certain rights for the applicant, such as reviewing the CO's recommendation, commenting on it, and having a special board review his record and make a recommendation to CGPC whether the applicant's name should be reinstated on the list, if CGPC had acted to remove it. None of these rights were afforded to the applicant because the Personnel Manual mandated the removal of his name without a special board based solely on the unsatisfactory conduct mark on the erroneous June 11, 2001 special evaluation.

6. In an effort to cure the error of having erroneously removed the applicant's name from the PreBoard Eligibility List, the Coast Guard recommended, and the applicant agreed, that the special evaluation and the three related page 7s would be removed from the applicant's record. The Board will direct this relief based on the agreement between the parties and the fact that the special evaluation did not comport with the Personnel Manual, resulting in prejudice to the applicant. The parties further agreed that if the applicant's CO recommended him for a current CWO appointment, the Coast Guard would recommend that the BCMR direct that the applicant's record be placed before the next CWO (INV (investigative specialty)) appointment board, and if the applicant is selected by that board he will receive a January 1, 2004 date of rank, which is the date of rank for all of those who were selected for CWO in the INV specialty by the 2003 CWO appointment board.

7. It is unclear to the Board whether the applicant has been certified as having met the requirements for a CWO (INV) appointment since the INV specialty was recently created in 2003 and held its first CWO appointment board in that specialty the same year. The applicant has not competed for a CWO appointment since 2001. The Board notes that in 2001, the applicant competed for a CWO appointment in the engineering specialty, which was the normal path of progression for an enlisted member in the machinery technician rating. In making the recommendation to the BCMR that the applicant be considered for an appointment in the INV specialty, the Board presumes that the Coast Guard has verified the applicant's qualification for an appointment in this specialty. Therefore, the Board will direct that the applicant's record be placed before the next duly convened CWO (INV) appointment board, and if

he is selected, his date of rank shall be the date he would have received if he had been selected by the 2003 Warrant Officer (INV) Appointment Board (a date of rank agreed to by the applicant and the Coast Guard).

8. The Coast Guard further recommended that if the applicant's record was not corrected by the June 2004 CWO appointment selection board, that his record be placed before a subsequent "special board" to consider him for appointment to CWO (INV). The Coast Guard failed to explain what it meant by "special board." However, the Board has never directed the convening of a special selection board under any circumstance because the Coast Guard has always taken the position that it does not have authority to convene special selection boards. The Coast Guard provided no authority in the advisory opinion for its recommendation that the applicant be given a special board. Nor did it give a reason for changing its policy.

The applicant indicated that based upon his discussion with Headquarters' personnel, such authority for holding a special board is Article 1.D.8.a. of the Personnel Manual, which states that "[a]t such times as the needs of the Service require, Commander, CGPC shall convene a board to consider eligible candidates for appointment to warrant grade." However, this provision never speaks of convening special CWO appointment boards. A special selection board, by its nature, is not convened to consider all eligible candidates, but rather, it is held to consider only one or two individuals either who were not considered or who failed to be selected for a CWO appointment by an earlier board due to administrative error.⁴ In addition, the Board is persuaded this provision does not authorize the convening of special appointment boards because it provides no guidance or procedures for holding such boards. The Coast Guard has failed to provide the BCMR with sufficient evidence for it to conclude that the Coast Guard has the authority to hold a special CWO appointment board in this case. Therefore, the Board will direct the relief normally given when an applicant is not considered by a selection board due to a prejudicial administrative error, which is to direct the Coast Guard to place the applicant's corrected record before the next selection to consider members for appointment to warrant officer, and if he is selected by the first board to consider him based on a corrected record, his date of rank shall be the date he would have received if he had been selected by the 2003 Warrant Officer (INV) Appointment Board.

9. The applicant disagreed with the Coast Guard's recommendation that a new page 7 be placed in his record documenting his misconduct and the CO's recommendation that his name be removed from the Preboard Eligibility List. The applicant argues that this should be a command decision and not directed by the BCMR. This Board is persuaded that it was the CO's intention to document the

⁴ See 10 U.S.C. § 628 for the definition of special selection boards as it applies to the other branches of the Armed Forces.

applicant's failure to secure his weapon, resulting in the weapon being stolen. Whether the CO would have withdrawn his recommendation for the applicant's selection for a CWO Appointment had he not prepared the special evaluation with the unsatisfactory conduct mark is unclear. If the removal of the applicant's name had been proper, the applicant would have been eligible to compete for a CWO appointment in one year (2002)⁵ and he would have been entitled to limited due process in the form of a special board to consider whether his name should have been reinstated on the Eligibility List. In light of these errors and the fact that the applicant has already missed three CWO appointment boards as a result of the errors, this Board finds that placing a page 7 in the applicant's record at this point serves little purpose and could create confusion. Moreover, the Board's policy is not to direct the placement of adverse documents into a record. Therefore, the Board will not direct that a new page 7 be placed in the applicant's record. The Board agrees with the applicant that this should be a command decision.

9. The Board notes that the applicant initially requested that the Board promote him to CWO. However, this Board does not act as a selection board and finds that a CWO selection board is the proper avenue to determine if the applicant is indeed suited for a CWO appointment.

10. Accordingly, the applicant is entitled to limited relief.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

⁵ See, Article 1.D.10.a.5.c. of the Personnel Manual.

ORDER

The application of XXXXXXXXXXXXXXXXXXXX, USCG, for correction of his military record is granted. His record shall be corrected as follows:

Remove the special performance evaluation marks for the period ending June 11, 2001.

Remove the negative Page 7 dated June 11, 2001 documenting the unsatisfactory conduct mark on the June 11, 2001 evaluation.

Remove the negative Page 7 date June 11, 2001, documenting the mark of "not recommended for advancement" on the June 11, 2001 evaluation.

Remove the negative Page 7 dated June 11, 2001, documenting the termination of the period of eligibility for a Coast Guard Good Conduct award.

Restore the applicant's eligibility period for a Good Conduct Award retroactive to June 11, 2001.

Place the applicant's corrected record before the next duly convened CWO (INV) appointment board and if he is selected for an appointment, his CWO date of rank shall be January 1, 2004, with back pay and allowances.

Julia Andrews

James E. McLeod

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