DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-148

XXXXXXXXXX
xxxxxxxxxxxxxx

FINAL DECISION ON RECONSIDERATION

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 Chair docketed the case on June 9, 2008, upon determining that the applicant's request for reconsideration met the requirements of 33 C.F.R. § 52.67(a), and assigned it to staff members D. Hale and J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 26, 2009, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

BACKGROUND: BCMR DOCKET NO. 2007-088

In BCMR Docket No. 2007-088, the applicant, who alleged that he had been miscounseled about his eligibility for a selective reenlistment bonus (SRB)[1], asked the Board to cancel his June 21, 2006, extension contract and reenlist him for six years on February 14, 2007, to receive a Zone "A" SRB. He alleged that he was told by the executive petty officer (XPO) and officer in charge (OINC) at Station Valdez, Alaska, that he could cancel the extension after he advanced to E-5 and reenlist for an SRB not reduced by any previously obligated service. He also alleged that when he arrived at his new duty station in Florida and attempted to cancel the extension contract and reenlist as an E-5, he was told that his SRB would be reduced by the service obligated by the June 21, 2006, extension contract. Finally, he alleged that if he had known that his SRB would be reduced by previously obligated service, he would have refused

[1] SRBs allow the Coast Guard to offer a reenlistment incentive to members who possess highly desired skills at certain points during their career. SRBs vary according to the length of each member's active duty service, the number of months of service newly obligated by the reenlistment or extension of enlistment contract, and the need of the Coast Guard for personnel with the member's particular skills, which is reflected in the "multiple" of the SRB authorized for the member's skill/rating, which is published in an ALCOAST. Coast Guard members who have at least 21 months but no more than 6 years of active duty service are in "Zone A", while those who have more than 6 but less than 10 years of active duty service are in "Zone B". Members may not receive more than one SRB per zone. Personnel Manual, Articles 3.C. and 3.C.4.a.

the transfer orders, continued serving at Station Valdez until he advanced to E-5 on November 1, 2006, and signed a six-year reenlistment contract when his enlistment expired on February 14, 2007, to receive an SRB not reduced by previously obligated service.

The Board denied the applicant's request in Docket No. 2007-088 because it found that (a) the applicant had not proved that the XPO and OINC had inaccurately counseled him about the effect of his extension contract on his future SRB entitlement; and (b) the applicant had not proved that he would have rejected his transfer orders from Valdez, Alaska, to Ponce de Leon, Florida, if he had fully understood the SRB regulations.

SUMMARY OF APPLICANT'S REQUEST FOR RECONSIDERATION

In his request for reconsideration, the applicant argued that

> … if I had been properly counseled, under no circumstances would I have transferred to Station Ponce de Leon Inlet, FL, knowing that I would lose out on the full SRB that I would have been entitled to. I could and would have stayed at Station Valdez until I made E-5 and then re-enlisted and transferred the following summer. Staying in Alaska for one more year and turning down orders to Florida so I could have received the $25,000 authorized by the SRB entitlement, would have been an easy decision for me. Once I arrived at Station Ponce de Leon inlet I immediately passed the BM2 EOCT [end of course test] and was promoted to BM2/E5 very quickly and within the time frames of my first enlistment.

The applicant also submitted an e-mail from BMC G to BMC B dated December 26, 2007. In the e-mail, BMC G asked BMC B the following questions, and BMC B responded by typing his answer in the original e-mail and sending it back to BMC G:

> Would you have recommended [applicant] for reenlistment upon his expiration of enlistment in Feb 07, even if he had cancelled his orders to STA Ponce?
>
> Answer – "Yes"
>
> Would you have recommended [applicant] for advancement to E5 if he had completed all requirements to advance?
>
> Answer – "Yes, as indicated on EER"

The applicant also submitted an e-mail from BMC B to BMC G dated January 24, 2008, in which BMC B stated that he was the one who would have made the decision to allow the applicant to reenlist, and that the XPO (BM1 S) counseled the applicant regarding SRB requirements and eligibility.

DECISION OF THE CHAIR TO GRANT RECONSIDERATION

The Chair advised the applicant that, in accordance with the Board's regulations under 33 C.F.R. § 52.67, she granted reconsideration on the basis of the e-mail from BMC B which supports the applicant's allegation that the Board wrongly concluded in Finding 5 of the Final Decision that he would not have been allowed to reject his transfer orders to Florida. The Board's Finding 5, stated the following:

Even if the applicant did not understand the effect the 40-month extension could have on a possible future SRB, the Board is not persuaded that he would have rejected his transfer orders from Valdez, Alaska, to Ponce de Leon, Florida, by refusing to sign the extension contract. Under Article 4.A.6.a. of the Personnel Manual, members must be available for unrestricted duty assignments worldwide, and the Coast Guard is not required to reenlist a member who has rejected transfer orders.

VIEWS OF THE COAST GUARD

On October 22, 2008, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny the requested relief.

The JAG argued that although the applicant alleged that he would have remained at Station Valdez until he advanced to E-5 and then reenlisted for an SRB, the applicant could not have predicted his advancement. The JAG stated that the applicant's claim "is not supported by his test results, as applicant had attempted unsuccessfully to pass the BM2 EOCT, on two separate occasions while stationed at Station Valdez (See Test Results for [applicant's name]). It was not until after he had reported for duty at Station Ponce de Leon Inlet, and even with two more test attempts there, that he successfully passed the BM2 EOCT." The JAG also argued that the statements from BMC B have "no relevance to the full SRB entitlement issue, as there is no way of knowing that applicant would have made BM2 (E-5) at Station Valdez, even if he had continued to stay. Therefore, the JAG concluded, "the Applicant's claim to a future full SRB entitlement by remaining at Station Valdez until he made E-5 is unfounded" because he had no way of knowing that he would advance to E-5 prior to the end of his enlistment on February 14, 2007.

The records submitted by the JAG indicate that the applicant failed the BM2 EOCT on April 6, 2006, July 12, 2006, and August 30, 2006, and passed it on September 25, 2006. He signed a signed a six-year reenlistment contract on February 14, 2007, for which he received a Zone "A" SRB, reduced by the service obligated by his June 21, 2006, extension contract.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

In his response to the views of the Coast Guard, the applicant provided the following statement:

Per the Coast Guard's recommendation, I would like to share my final thoughts with the Board regarding my case. I was counseled on the potential outcomes that my extension to transfer could have on me once I made second class and was eligible for an SRB. From the beginning I have been making the same point; I was improperly counseled plain and simple. With that said I realize that I wasn't a second class yet at that time, and that I wasn't eligible for an SRB before making second class. I'll state my case one more time.

On the day I was counseled, I repeatedly asked my XPO if he was sure that I could cancel the extension orders once I made second class for the purpose of reenlisting for the full amount of the SRB. He said he was sure. Wanting a second opinion, I asked my OINC. He also stated that I could cancel the extension once I transferred and made second class. After all my research on this subject, both my OINC and XPO were not aware of the

change in 2005 regarding SRB entitlements stating that you could no longer transfer on extensions then cancel and reenlist for the purpose of a full SRB.[2] I have been dealing with this for 2 and ½ years and I have gotten every bit of information that I could to support my case. Even my OINC's statements supporting my claims that I could have stayed in Alaska for another year, and been recommended for advancement. The only statement that I couldn't get, when I knew all along that this is what it would have come down to, was the statement of my former XPO, the one who counseled me. I believe it is unjust that I've done all of this work to get where I'm at in my career, put this much time and energy into this case, and then this guy doesn't have to tell the truth. There's no way anyone would transfer if they knew they were going to lose out on $25,000 dollars.

My XPO extended me there in Alaska for 30 days because he needed me. They asked me several times to extend another year. My XPO states in the email (documented in this case) that I was counting the days before I left and that it seems I may have left there not recommended for advancement. Well that is completely absurd. Direct Access shows that I received good marks 3 months prior to leaving Station Valdez, and my transfer marks show that I was recommended for advancement by the OINC of Station Valdez. Also there is no documentation between the time of those last set of marks and my transfer marks of me being a bad performer or not performing my duties. So my XPO's remarks above are irrelevant and are without supporting evidence. I remember that it seemed like, once they knew I was leaving I was given the cold shoulder every day. But they still let me run the station as the Officer of the Day and Duty Coxsn. They didn't replace my position with someone else until the last week I was there. I feel it's only fair that my former XPO provides an honest statement on the counseling that happened that day. Furthermore, he did not complete a Page 7 (3307) documenting that I was even counseled. That demonstrates discrepancies on his part.

In response to the Coast Guard's Advisory Opinion, I would like to say it doesn't make much sense. The first time around the Coast Guard recommended relief in my case. The BCMR did not. I appealed and it went back to the Coast Guard. This time the Coast Guard did not recommend relief. When I was notified I was concerned, so I contacted the Coast Guard. I was told that the Coast Guard didn't grant relief this time due to new evidence. The new evidence was that it wasn't clear I was going to pass the BM2 EOCT. My test scores were brought up. This is not new evidence. This same evidence was present the first time the Coast Guard made a decision when they recommended to the BCMR to grant relief. So if the test scores were present the first time and they recommended me for relief why not the second time. This doesn't make any sense. Plus after speaking to the BCMR recently I have reason to believe that the Coast Guard wasn't even aware of the new supporting evidence provided in my case by my former OINC. My test scores had improved each time. I will also add that transferring in July, from Alaska to Florida is not the quickest or easiest move. If I would have had more time in one location, I would have passed the [EOCT] test a lot sooner than I did.

This ordeal has affected my whole career greatly, both financially and emotionally. The transfer from Alaska to Florida and making rank was all based on qualifying for that SRB. That's why I transferred, and that was my motivation to pass the test and advance. I don't think it's right to have someone in a management position such as an XPO counseling a member on SRB's, when they don't specialize on the subject matter,

[2] Actually, there have not been any significant changes to the SRB regulations in more than 20 years.

> especially when it is concerning large amounts of money. There should be a Yeoman assigned to handling those matters, but in this case it was a Boatswain's Mate. In Valdez, Alaska there was a MSO unit who had Officers and Yeomans who could have better assisted me with that counseling and transfer process. So to me there's another discrepancy. I could have been afforded the opportunity to speak with someone more qualified.
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> It was recommended to me by the Coast Guard that I share my thoughts and speak freely on this matter as I have in this letter. I greatly appreciate the time that the BCMR has spent dealing with my case and I hope that I have provided sufficient information for the Board to grant relief.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's submissions, the Coast Guard's submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The applicant's request for reconsideration was timely submitted under 33 C.F.R. § 52.67(e).

2. The applicant alleged that BMC B's e-mail stating that he would have recommended the applicant for advancement to E-5 and would have recommended him for reenlistment upon the expiration of his enlistment on February 14, 2007, support his allegation that he could have refused the transfer orders to Florida and remained at his unit in Alaska for a year without negative repercussion. The applicant further alleged that if he had remained in Alaska, then after advancing to BM2 (E-5) on November 1, 2006, he would have signed a reenlistment contract at the end of his enlistment to receive an SRB not reduced by any previously obligated service.

3. The applicant submitted a copy of an e-mail in which BMC B acknowledged that he would have recommended the applicant for reenlistment and for advancement to BM2 even if the applicant had rejected his transfer orders. Accordingly, the Board finds that the additional evidence submitted by the applicant proves that his OINC would have reenlisted the applicant when his enlistment expired on February 14, 2007, even if the applicant had refused his transfer orders in June 2006.

4. The Board granted reconsideration in this case because the applicant submitted evidence to refute the Board's finding in BCMR Docket No. 2007-088, which stated that he would not likely have been allowed to reenlist if he had rejected his transfer orders to Florida. However, to prevail in the instant case the applicant also needs to refute the Board's finding that he failed to prove that he was miscounseled about the effect of his June 21, 2006, extension contract on his future SRB eligibility. In BCMR Docket No. 2007-088, the Board found that the applicant did not prove that he was erroneously counseled by the XPO and OINC about the effect his extension contract would have on his future SRB entitlement. The Board stated that

> [b]y signing the contract, the applicant affirmed that he understood the effect of the extension on his future SRB eligibility. Therefore, although his command

failed to document the applicant's SRB counseling on a Page 7, the Board finds that he has not proved by a preponderance of the evidence that he received inaccurate counseling about the effect the 40-month extension could have on a possible future SRB.

5. The applicant has not submitted any additional evidence to prove that he was inaccurately counseled regarding his SRB eligibility when he signed the extension contract on June 21, 2006. Thus, the applicant has not overcome the presumption that he was accurately counseled regarding the effect his June, 21, 2006, extension contract would have on his future SRB eligibility. *Arens v. United States*, 969 F.2d. 1034, 1037 (1992); *Sanders v. United States*, 594 F.2d. 804, 813 (Ct. Cl. 1979).

6. After reviewing the additional evidence submitted by the applicant, the JAG recommended that the Board deny relief. The JAG argued that there is no way the applicant could have known that he would be advanced to E-5 before the end of his enlistment on February 14, 2007. The JAG further argued that the applicant had "attempted unsuccessfully to pass the BM2 EOCT on two separate occasions while stationed at Station Valdez. It was not until after he had reported for duty at station Ponce de Leon Inlet, and even with two more test attempts there, that he successfully passed the BM2 EOCT. Therefore, the applicant's claim to a future full SRB entitlement by remaining at Station Valdez until he made E-5 is unfounded."

7. The applicant has submitted evidence which proves that he would have been allowed to remain in Alaska and reenlist in February 2007 if he had refused the transfer orders to Florida. However, the applicant has not provided the Board with any evidence to show that the Board was incorrect in finding that he had failed to prove that he was miscounseled about the SRB regulations.

8. Accordingly, relief should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of BM2 XXXXXXXXXX, xxxxxxx, USCG, for correction of his military record is denied.

Randall J. Kaplan

Dorothy J. Ulmer

Ryan J. Wedlund