

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-099

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

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 April 11, 2008, upon receipt of the applicant's completed application, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated January 22, 2009, is approved and 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, who advanced to master chief boatswain's mate (BMCM/E-9) on September 1, 2005, off the advancement list resulting from the May 2004 service-wide examination (SWE), asked the Board to correct his record by backdating his date of advancement to December 1, 2003. He alleged that this is the date he should have been advanced.

The applicant alleged that following the May 2001 SWE, he was a senior chief boatswain's mate (BMCS/E-8) #9 on the list for advancement to BMCM. Another BMCS—BMCS X—was #8 on the list. The designated cutoff for guaranteed advancement from the list was #8. When the list expired, only three BMCSes had been advanced to BMCM. Therefore, the Coast Guard Personnel Command (CGPC) "carried over" the names of the members who were #4 through #8 on the list, including BMCS X, to the top of the May 2002 advancement list.

The applicant alleged that in 2002 BMCS X lost his commanding officer's (CO's) recommendation for advancement. He alleged that under the Personnel Manual, the CO should have promptly notified CGPC to remove BMCS X's name from the advancement list. If the CO had done so, the applicant alleged, his own name would have risen to be #8 on the list and been carried over to the next list, and he would advanced to BMCM on December 1, 2003.

The applicant alleged that because BMCS X's command improperly delayed notifying CGPC of BMCS X's loss of his CO's recommendation for advancement, CGPC erroneously "carried over" BMCS X's name instead of the applicant's name. The applicant alleged that the

CO of xxxxxxxxxxxxxxxxxxx did not notify CGPC of BMCS X's loss of recommendation for advancement until February 2003. Therefore, he argued, his own advancement date should be backdated to December 1, 2003.

The applicant stated that enlisted members competing for advancement through the SWE process "expect a fair opportunity to advance" and that to ensure fairness, all commands must obey the performance evaluation and advancement rules in the Personnel Manual. The applicant argued that he was improperly denied advancement on December 1, 2003, because of the long delay of BMCS X's CO at xxxxxxxxxxxxxxxxxxx.

In support of his allegations, the applicant submitted a copy of the May 2001 BMCM SWE advancement list, which bears his name as #9 and BMCS X's name as #8. He noted that Article 5.C.5.d.4. of the Personnel Manual states that if a member whose name is on an advancement list to pay grade E-9 receives any court-martial or civil conviction, non-judicial punishment, unsatisfactory conduct mark, or low performance marks, the member's CO must notify CGPC to remove the member's name from the advancement list.

The applicant also submitted a copy of a letter he sent to CGPC dated February 4, 2004, in which he requested advancement to BMCM with back pay. He argued that when BMCS X lost his CO's recommendation for advancement, his name was removed from the list, and the applicant's name became #8, which was above the cutoff for guaranteed advancement to BMCM. The applicant's CO forwarded this letter to CGPC with a very strong endorsement in favor of the applicant's advancement. The CO stated that the applicant had already been "hand-selected to fill two different E-9 billets on the District xxxxxxxx staff." The applicant also submitted CGPC's response to his request, dated February 11, 2004, in which CGPC stated that his request had been carefully reviewed and disapproved. CGPC stated that it

appears from your memo there is a misinterpretation of the way revised cuts are calculated. If one member is removed from the [advancement list], the members below the cut do not move up on the list. In this particular case, the May 2001 [SWE] List revised cuts were announced in March 2002 by ALCGENL 012/02 when the BMCM cut was revised to #8. ... [T]here were 5 BMCM carryovers from the May 2001 [list] to the May 2002 [list]. These carryovers were announced in December 2002. The BCMC cuts were not revised from what was announced earlier. Therefore, your request for a retroactive advancement is not justified.

VIEWS OF THE COAST GUARD

On September 2, 2008, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided by CGPC in an enclosed memorandum on the case.

CGPC stated that the applicant placed #9 on the BMCM advancement list following the May 2001 SWE. Under ALCGENL 047/01, issued on August 15, 2001, the original cutoff for guaranteed advancement to BMCM was #3. However, on November 20, 2001, the cutoff was revised to #4 in ALCGENL 063/01, and on March 7, 2002, the cutoff was revised again to #8, which was BMCS X, in ALCGENL 012/02.

CGPC stated that ALCGENL 087/02, issued on December 2, 2002, authorized the carry-over of the members at #4 through #8 on the 2001 list to the top of the 2002 list because the 2001 list was expiring. CGPC stated that when members at the top of an advancement list are advanced or removed from the list, the members below do not “move up” the list. Their names are not renumbered. CGPC noted that Article 5.C.31. of the Personnel States that the cutoff is established according to the expected numbers of vacancies in the higher pay grade, and only members whose names are above the cutoff are guaranteed advancement.

CGPC stated that cutoffs are set and revised based on the number of anticipated vacancies, and the actual number of vacancies that occur depends upon retirements, discharges, appointments to chief warrant officer, billet fluctuations, and service need. The cutoff on the May 2001 BMCM was ultimately revised to #8 in anticipation of certain vacancies that did not occur. When the number of vacancies fell short of what had been anticipated, CGPC had to carry over the names of the members that had been above the revised cutoff to the May 2002 list. Because the cutoff was #8 and had never been revised to #9 or below, the applicant was never above the cut for advancement to BMCM and his name was not carried over.

CGPC further explained that “[c]uts are actual names, not numbers. Anticipated vacancies may change on a daily basis, and sometimes the cutoff is higher than the actual need, resulting in carryovers. Personnel do not move up an [advancement] list as others are removed. ... The personnel actions relative to members on [an advancement list] do not change the numbering of those below them.” Instead, if extra vacancies are anticipated, the cutoff may be revised down the list, but CGPC does not necessarily revise the cutoff just because someone above the cut has been disqualified for advancement. CGPC stated that the names on an advancement list are only renumbered if a member proves that there has been a computation error in his placement. CGPC refused to discuss any personnel matter with regard to BMCS X due to Privacy Act considerations.

CGPC stated that there is no precedent for renumbering the applicant’s place on the list from #9 to #8 just because the person at #8 was disqualified due to loss of his CO’s recommendation for advancement. “The Coast Guard did not adjust the cutoff to include #9 as there was no service need for additional BMCMs and the Coast Guard had already overestimated the number of vacancies as indicated by those carried over to the subsequent [advancement] list. ... The May 2001 SWE Eligibility List expired on December 16, 2002, without further revision, and only those candidates above the cutoff at that point were carried over to the 2002 list.” CGPC concluded that the applicant is not entitled to have his advancement backdated.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 16 and 30, 2008, the applicant submitted statements in response to the Coast Guard’s advisory opinion.

The applicant asserted that when BMCS X was disqualified, the applicant replaced him as #8 on the advancement list. The applicant argued that while CGPC may claim that the cutoff is a candidate’s name, in CGPC’s correspondence in 2001 and 2002, CGPC always referred to the cutoff by number. The fact that CGPC has recently changed its cutoff announcements to omit the numbered rank of the last member above the cut does not mean that in 2001 and 2002 the

cutoff was not associated with the number, rather than the person. The applicant further argued that because CGPC clearly intended to advance the top eight candidates from the list, he should have been advanced when BMCS X was disqualified. He also argued that a “lack of precedence should not prevent this disservice from being corrected.” The applicant also asked the Board to consider his CO’s endorsement of his 2004 request, in which the CO noted that CGPC had transferred the applicant to two E-9 billets during the lifecycle of the May 2001 list, while he was still an E-8, which clearly shows that he was ready to fill an E-9 billet.

The applicant alleged that BMCS X had offered to provide information about his disqualification for advancement in 2002, but he did not submit any statement from BMCS X.

APPLICABLE REGULATIONS

Article 5.C.1.a. of the Personnel Manual in effect in 2002 states that “[t]he objective of the enlisted advancement system is to ensure the required degree of proficiency at the various grade levels within each specialty and promote those best qualified to fill vacancies which occur.”

Article 5.C.4.b.1.i. states that a member is not eligible to compete for advancement by taking the SWE unless the member is recommended for advancement by his or her CO. Article 5.C.4.e.4. states that “[t]he commanding officer’s recommendation for advancement is the most important eligibility requirement in the Coast Guard advancement system.”

Article 5.C.25.d. states that “[i]f at any time prior to effecting an advancement, a commanding officer wishes to withdraw his or her recommendation because an individual has failed to remain eligible and it appears that eligibility will not be attained prior to expiration of the current eligibility list, the commanding officer shall advise the Human Resources Service and Information Center [HRSIC] by message with Commander, (CGPC-epm), as an information addressee, to remove the individual’s name from the eligibility list.” Article 5.C.5.d.4. states that “[a]fter the individual has been recommended for advancement, but has not been advanced, commanding officers will submit a message to HRSIC (adv), with Commander, (CGPC-epm-1) as information addressee, to remove from the current advancement eligibility list any person who has received any of the following: CM [court-martial] or civil conviction, NJP, an unsatisfactory conduct mark, or a factor mark less than those provided for in Art. 10.B.9.”

Article 5.C.31.f. states that an “individual’s name may be removed by Commander, CGPC as a result of disciplinary action, or for other good and sufficient reasons, whereby the individual is no longer considered qualified for the advancement for which previously recommended. Commanding officers shall withhold any advancement under such circumstances and advise Commander, CGPC of their intentions relative to removal from the list. A commanding officer may also direct that the individual not be removed from an eligibility list but that advancement is being withheld for a definite period. [See] Article 5.C.25. Individuals who have their names removed from an eligibility list must be recommended and qualify again through a subsequent SWE competition.”

Under Article 5.C.3.b., following the SWE in May each year, the candidates for advancement to a particular rate, such as BMCN, are ranked according to a calculation that assigns

points for each candidate's SWE score, performance marks, time in service, time in present pay grade, medals and awards, and sea duty. Article 5.C.31.a. states that HRSIC prepares the advancement eligibility lists for approval by Commander, CGPC.

Article 5.C.3.a.2. states that a "cutoff point is established for each rating and rate based upon vacancies anticipated at the time the eligibility list is compiled. Personnel who are below the cutoff point should plan on participating in subsequent SWEs in order to maintain eligibility." Article 5.C.31.b. states that "[c]utoff points on eligibility lists will be established by Commander, CGPC, according to the number of advancements anticipated during the effective period of the respective lists. The cutoff point on each list is shown by a mark adjacent to the rank-order number of the last name above the cutoff, e.g., 21. Only those personnel [whose] names appear above the cutoff are assured of advancement."

Article 5.C.31.c. states that the "effective period of the advancement eligibility list will be published with the list. Normally, each list will remain in effect until superseded by a new eligibility list resulting from a later SWE competition. When the new list is published all candidates above the cutoff on the superseded list will be carried over to the top of each new list."

Article 5.C.31.d. states that CGPC may amend an advancement eligibility list "when necessary to insert candidates whose regular or substitute examination were received too late for computer scoring."

Article 10.B.5.a.1. states that members in pay grade E-8 receive regular, annual performance evaluations, with recommendations for or against advancement, on November 30th each year. Under Article 10.B.5.b., special performance evaluations must be prepared on certain occasions, such as when a member receives NJP, a documented "alcohol incident," or performance probation or when a member is convicted by court-martial or civil court.

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 over this matter pursuant to 10 U.S.C. § 1552.
2. Although the application was not filed within three years of the applicant's failure to be advanced on December 1, 2003, it is considered timely under *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994).¹
3. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

¹ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

4. The applicant alleged that the Coast Guard erroneously failed to advance him to BMCM on December 1, 2003, and asked the Board to order the Coast Guard to backdate his advancement to that date. The Board begins its analysis in every case by presuming that the disputed information—in this case, the applicant date of advancement—is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.² Absent evidence to the contrary, the Board presumes that Coast Guard officials have carried out their duties “correctly, lawfully, and in good faith.”³

5. The applicant argued that he should have been advanced because he was #9 on the advancement list, the cutoff for advancement was #8, and the person ranked #8 on the advancement list—BMCS X—became disqualified for advancement. He argued that when BMCS X was disqualified, his name should have been removed from the list, and the list should have been renumbered so that the applicant’s name would rise to #8 and be above the cutoff. The applicant failed to submit any evidence to show that BMCS X was disqualified for advancement in 2002. However, even assuming the applicant could prove that BMCS X became disqualified for advancement in 2002, the applicant’s claim fails for the reasons stated below.

6. In the Board’s experience and as stated by CGPC, advancement eligibility lists are never renumbered when members’ names are removed from the top of the list due to either advancement or disqualification. For instance, when CGPC authorizes the advancement of members ranked #1, #2, and #3 on an advancement list, the members ranked #4, #5, and #6 do not then become #1, #2, and #3, respectively. Members retain their numbered positions on an advancement list unless CGPC discovers scoring errors or must insert missed personnel in an advancement list in accordance with Article 5.C.31.d. of the Personnel Manual. When a member’s name is removed from an advancement list for any reason, both the name and the assigned number are simply struck out. For example, on December 20, 2002, when CGPC issued ALCGENL 087/02 to announce the “carryover” of members above the cutoffs from the May 2001 advancement lists to the top of the May 2002 advancement lists, CGPC listed for carryover to the 2002 BMCM advancement list personnel numbered #4, #5, #6, #7, and #8 on the 2001 BMCM advancement list. If the 2001 list had been renumbered upon the removal from the list of #1, #2, and #3, due to their advancement, then ALCGENL 087/02 would have announced the carryover of members numbered #1, #2, #3, #4, and #5, instead of those numbered #4, #5, #6, #7, and #8. Therefore, assuming *arguendo* that BMCS X’s name should have been struck from the BMCM advancement list sometime in 2002, the #8 position would have been struck out along with his name, and the applicant would have remained #9 on the list.

7. Under ALCGENL 012/02, the cutoff on the May 2001 BMCM advancement list was lowered to “8 [BMCS X’s name].” There is no evidence in the record indicating that the cutoff was ever lowered to the applicant’s position at #9 or below. Under Article 5.C.31.b. of the Personnel Manual, only members whose names are above the cutoff are assured of advancement. Article 5.C.3.a.2. states that members whose names do not appear above the cutoff on an

² 33 C.F.R. § 52.24(b).

³ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

advancement list should plan to re-compete for advancement by participating in the next SWE. Members are advanced off a list only as vacancies arise, and members whose names appear above the cutoff are only assured advancement because, under Article 5.C.31.c. of the Personnel Manual, when the advancement list expires, “all candidates above the cutoff on the superseded list will be carried over to the top of each new list.” The record indicates that the applicant was #9 on the 2001 advancement list and was never above the cutoff. Therefore, he was not entitled to have his name carried over to the top of the 2002 list under either Article 5.C.31.c. or ALCGENL 087/02.

8. The Board notes that the applicant never alleges exactly when in 2002 BMCS X’s name would or should have been removed from the advancement list. ALCGENL 021/02, which revised the cutoff to BMCS X at #8, was issued on March 7, 2002. It is theoretically possible that, if BMCS X’s name and the #8 position had been struck from the advancement list before March 7, 2002, CGPC might have decided to revise the cutoff down to #9 instead of #8. However, this inquiry is entirely speculative. Under the circumstances of this case, even if the applicant’s could prove that BMCS X’s name and the #8 position should have been struck from the advancement list before March 7, 2002, the Board would not grant relief on the basis of retroactive speculation about how CGPC might have revised the cutoff to a lower position more than six years ago.

9. The applicant has not proved by a preponderance of the evidence that his failure to be advanced to BMCM on December 1, 2003, was erroneous or unjust.⁴ Members do not rise above the cutoff when names are removed from the top of the list; instead, Commander, CGPC, at his discretion, may revise the cutoff downward on an advancement list when increased vacancies are anticipated. The applicant’s name was never above the cutoff on the May 2001 SWE advancement eligibility list. Therefore, he was never assured advancement under Article 5.C.31.b. of the Personnel Manual, and he was not entitled to have his name carried over to the top of the 2002 list under Article 5.C.31.c.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁴ For the purposes of the BCMRs, “[i]njustice’, when not also ‘error’, is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal.” *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976).

ORDER

The application of BMCM xxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

Bruce D. Burkley

Patrick B. Kernan

David A. Trissell