

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-139

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

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 case on May 23, 2008, upon receipt of the completed application, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 12, 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

The applicant, a chief intelligence specialist (ISC/E7) asked the Board to correct his record to show that he was advanced to senior chief petty officer intelligence specialist (ISCS/E-8), retroactive to January 1, 2008, with back pay and allowances. Prior to January 1, 2008, the applicant was a chief petty officer in the operations specialist rating (OSC/E-7). He took the service wide examination (SWE) for advancement to OSCS (E-8) and was number 8 on that list. No cutoffs were established for OSCS, meaning that there were no guaranteed advancements.¹

¹ There are 9 pay grades or rates in the enlisted system: they are grades E-1 to E-9. Most enlisted members come into the Coast Guard in pay grade E-1 (SR). Advancement to pay grades E-2 through E-4 is usually done at the command level or upon graduation from a Service "A" school. For advancement beyond E-4, enlisted members must participate in the Service Wide Competition, in which they can earn a total of 200 total points. Maximum points are assigned as follows: 80 points for the examination, 50 points for the performance factor, 20 points for the time in service, 10 points for the time in pay grade in present rating, 10 points for medals and awards, and 30 points for sea/surf duty. After the scoring of the service examination (SWE), an advancement list for each rating is created and members are ranked on that list according to their total service wide competition score from highest to lowest. Advancements are made from the list in the order ranked when announced by CGPC. The Coast Guard anticipates the number of vacancies for each rating and makes that the cutoff point for each rate. Only the member's whose names appear above the cutoff are guaranteed advancements. Those below the cutoff must compete for advancement the following year. The effective period of the advancement eligibility list is published with the advancement list. Normally, each list remains in effect until superseded by a new eligibility list resulting from a later SWE competition. When the new list is published, the candidates above the cutoff on the superseded list are carried over to the top of each new list. Article 5.C. of the Personnel Manual.

The applicant applied and was accepted for a lateral transfer to a new IS rate that the Coast Guard was in the process of creating that year. On October 2, 2007, an IS advancement list was created and published. The applicant was 5th on the newly created IS advancement list. It appears that no cutoff was established for the ISCS advancement list until December 31, 2007, when the Coast Guard issued revised cuts for the entire May 2007 SWE. The December 31, 2007 revised cut for the OCS rate was extended to number 13 (earlier the cut had been 0) and the cutoff for the ISCS advancement list was placed at 3. The applicant was below the cut on the ISCS list at No. 5. The applicant alleged, as discussed below, that he should have been placed above the cut on the IS advancement list as a result of the December 31, 2007 revised cutoff that extended the cutoff in his legacy rate to the 13th position.

BACKGROUND CHRONOLOGY

In the fall of 2006, the Coast Guard announced that it would create the Intelligence Specialist (IS) rating for enlisted members and the intelligence systems specialist (ISS) for warrant officers. ALCOAST 078/07, dated February 14, 2007, announced the procedures for applying for a lateral to the new rate and that August 14, 2007 was the deadline for applications.

In May 2007, the applicant took the SWE for advancement to OCS/E-8. The results of that SWE were published on June 29, 2007, and the applicant was number 8 on the OCS list.

On July 13, 2007, the Coast Guard published ALCOAST 341/07 that contained the procedure for creating the IS advancement list. The ALCOAST directed the following:

A. 2007 Advancements. Members selected to lateral to IS whose names are on advancement lists in their legacy ratings will continue to advance as scheduled in their legacy ratings through [December 31, 2007].

B. 2008 Advancements. 1. [January 1, 2008 – December 31, 2008] E7, E8, Advancements and [January 1, 2008 – 30 June 2008], E5/E6 advancements. On January 1, 2008, IS members on May 2007 SWE eligibility lists for advancement in their legacy ratings will be removed from their legacy advancement lists and merged into new IS advancement lists. Placement on the new advancement lists will be based on the May 2007 final multiple score excluding SWE points. The removal of the SWE points will eliminate SWE calculation discrepancies that may result from different legacy rating exams. If there are any members remaining above the cut from prior advancements lists, they will be ordered separately and placed above the cut at the top of the IS advancement lists.

On July 13, 2007, the Coast Guard also issued ALCOAST 338/07. It authorized the early advancements off the May 2007 list when advancements from the 2006 list for a particular rate had been exhausted. It provided for the following in pertinent part: “Once a rating on the November 2006 SWE advancement eligibility list is cleared, CGPC-epm is authorized to

advance personnel to fill vacancies using the May 2007 SWE advancement eligibility list for that rating.”

On August 27, 2007, CGPC issued ALCGENL 134/07 announcing the cut for the May 2007 SWE. The cut for the OSCS, OSC, OS1, and OS2 was zero, meaning there were no guaranteed advancements in these OS pay grades for the May 2007 advancement list.

On October 2, 2007, Commander, Coast Guard Personnel Command (CGPC) issued a memorandum announcing the IS eligibility list for advancement to pay grade E-5 through E-9. The IS advancement eligibility list was attached as enclosure (1) to the memorandum. The applicant was in the 5th place on the list for advancement to ISCS. The CGPC memorandum provided the following guidance and information:

3. Background.

a. [SWEs] were held for pay grade E-5 through E-9 in May 2007 and the eligibility list was published on [June 29, 2007].

b. The selection panel for lateral to the IS Rating was convened August 27, 2007 and an IS advancement list was compiled from selectees . . . utilizing guidance in [ALCOST 341/07].

c. For advancement to E-5 and E-6, the list in enclosure (1) becomes effective 1 January 2008 and expires 16 June 2008. For advancement to E-7 through E-9, the list in enclosure (1) becomes effective 1 January 2008 and expires on 16 December 2008.

4. General Information.

a. The eligibility list contains the rank order, number, name, and unit for each candidate. Cutoffs for the SWE are not included on the eligibility lists and will be included in the first revision [of the list].

b. Personnel whose names appear at or above the cutoffs, or on subsequent EPAAs will not have to compete in the next examination cycle . . .

On October 7, 2007, CGPC issued ALCGENL 174/07 that authorized advancements with an effective November 1, 2007 date. Of particular interest to this case, was the authorization for advancement of two OS2s to OS1. These two individuals were also included on the IS advancement list created on October 2, 2007.

On December 17, 2007, CGPC issued ALGEN 204/07 that authorized the advancement of personnel to fill vacancies effective January 1, 2008. Numbers 1 and 2 from the new ISCS advancement list were authorized advancement to ISCS, twelve ISCs (E-7s) were authorized advancement. There were no authorizations for advancement to ISCM or IS1.

On December 31, 2007, CGPC issued ALGENL 206/07 revising the cut for the May 2007 SWE. Cuts for both the IS and OS rates were included on the ALGENL. (There was nothing in this message explaining that those individuals who had lateraled to the IS rate had been removed from their legacy rate. Nor was there any statement that the revised cuts were effective January 1, 2008. The revised cut for OSCS was increased to the 13th position. The applicant previously held the 8th place on the OSCS list. The revised cut for the new ISCS rate was placed at number 3; the applicant was below the cut at number 5.

The applicant applied and was accepted for a lateral transfer to a new IS rate that the Coast Guard was in the process of creating that year. On October 2, 2007, an IS advancement list was created and published. The applicant was 5th on the newly created IS advancement list. As best the Board can be determined from the record, no cuts were established for the ISCS advancement list until December 31, 2007, when the Coast Guard issued revised cuts for the entire May 2007 SWE. The December 31, 2007 revised cut for the OSCS rate was extended to number 13 (earlier the cut had been 0) and the cut for the ISCS advancement rate was placed at 3. The applicant was below the cut on the ISCS list at No. 5.

APPLICANT'S ALLEGATIONS AND ARGUMENTS

The applicant argued that he should have been advanced to ISCS on January 1, 2008 because the revised cutoff for OSCS was extended to No. 13 and he was not removed from his legacy rate until January 1, 2008 according to ALCOAST 341/07. He stated that on January 7, 2008 he contacted Mr. H who was the Chief of the enlisted advancement and separation division at Coast Guard Headquarters to ask why he was not advanced to E-8. According to the applicant, Mr. H told him that members selected for the IS rating were removed from their legacy rating advancement lists on October 2, 2008, when the IS list was published. The applicant stated that he was shocked by this statement because ALCOAST 341/07 stated that members would not be removed from their legacy ratings until January 1, 2008. In fact, the applicant contended that two OS2s who were on the advancement list for OS1 and supposedly removed from their legacy rate on October 2, 2007, were actually advanced to OS1 on November 1, 2007.

On January 7, 2008 the applicant sent a letter to CGPC in which he asserted that the Coast Guard did not follow the procedures set forth in ALCOAST 341/07 for establishing the IS advancement list. In this regard, the applicant made three contentions:

1. He questioned whether members were removed from their legacy rating and merged into the IS rating on January 1, 2008, as required by para. 2.B.1 of ALCOAST 341/07.
2. He contended that the calculations for placement on the IS list, although done properly, were premature because they did not take into account ALGEN 206/07 issued on December 31, 2007 that revised the cuts for the May 2007 SWE.
3. He contended that members remaining above the cut from prior advancement lists were not ordered separately and placed above the cut at the top of the IS advancement lists as required by the last sentence of paragraph of 2.B.1 of ALCOAST 341/07 which reads: "If there

are any members remaining above-the-cut from prior advancement lists, they will be ordered separately and placed above the-the-cut at the top of the IS advancement lists.” He further argued as follows:

[ALGENL 206/07] established revised cutoffs for the May 2007 SWE, however, members such as myself were not “ordered separately and placed above-the-cut at the top of the IS advancement lists.” I disagree with the argument that the mention of prior advancement lists refers to the year 2006 or earlier. Since all three actions listed in [ALCOAST 341/07] occur in 2008, the 2007 advancement list would be a prior advancement list. In addition, if I knew [that] the result of my 2007 [SWE] would be irrelevant to the 2008 advancement path for [IS], if this argument were true, I certainly would not have submitted a package to become an intelligence specialist. Anything other than application of [ALGENL 206/07] would indicate this policy to be deceptive and clearly ambiguous; certainly not as advertised.

On January 22, 2008, CGPC issued a corrected copy of a letter responding to the applicant’s letter of January 8, 2008. CGPC denied the applicant’s request for retroactive advancement to ISCS. CGPC stated the following, in pertinent part:

As directed by reference [ALCOAST 341/07] in preparation for standing up the new IS rating on 1 January 2008, PSC and CGPC-epm created an IS rating advancement eligibility list from the candidates selected to lateral to the new rating. This list was published on 2 October 2007 and was effective on 1 January 2008.² [The 2 October 2007 memo establishing the list] was published to the field via the Gold Badge Network and was added to the PSC website and CG Central on 3 October. Your name is shown on that list as # 5 for ISCS. [ALGENL 204/07] provided authority to advance enlisted personnel effective on 1 January 2008, including advancements for members of the new IS rating. Advancements to ISCS were included. I conclude from these factors that the new IS list was published and visible at a proper time to enable advancements in the IS rate on 1 January 2008, as required by [ALCOAST 341/07].

Your memo alleges that the development of this revised advancement list did not properly take into account members from prior advancement lists . . . This issue is at the core of your request for relief, and interpretation relies on a careful reading of the policy guidance in paragraph 2.B.1 of [ALCOAST 341/07]. This paragraph has two parts. The first part (through the phrase “different legacy rating exams) discusses the process for placement on the first IS advancement list . . . The final sentence discusses the actions to be taken for any remaining above-the –cut members from prior advancement lists . . . The word “prior” refers to lists prior to the May 2007 list, specifically in your case the May 2006 Advancement Eligibility List. Since there were no personnel remaining above the

² CGPC’s original letter to the applicant stated “[I]n preparation for standing up the new IS rating on a January 2008, PSC and CGPC-epm removed member selected for lateral to the new IS rating from their legacy list and merged them into the new IS Advancement Eligibility list. That list was published on 2 October 2007.”

cut on this list, this last sentence had no effect on the 2007 ISCS advancement eligibility list published on 2 October [2007].

I have denied your request for relief since you were not above the cut for senior chief on any advancement eligibility list prior to May 2007 eligibility list; there is no indication that the IS eligibility List published on 2 October 2007 was improperly developed and the revised cuts published [on December 31, 2007] were properly established considering personnel lateraling to the IS rating from several rating advancement lists.

The applicant stated that prior to making the decision to apply for a lateral to the IS rate he discussed ALCOAST 341/07 with CWO B, the OS/IS enlisted assignment officer, ISCM RT, the intelligence specialist rating force manager, and MCPO R who was a member of the of the intelligence specialist rating implementation team to ensure that he understood the process. The applicant stated that each assured him that members selected to lateral to the IS rating would be allowed advancement opportunities in their legacy rating until January 1, 2008.

The applicant submitted an email discussion among several senior enlisted personnel about the IS advancement process. On January 17, 2008, CMC C wrote to ISCM RT and CMC J that the applicant's contention that the revised cut in December 31, 2007 included him was a stretch. He stated that on January 1, 2008, the IS advancement list was definitive as established on October 2, 2007, except for those who advanced as a result of the May 2006 SWE prior to December 31, 2007 or anyone that was a "carry-over" from the May 2006 SWE eligibility list. CMC C noted that had the applicant remained an OS he would have been placed above the revised cut for OCS on January 1, 2008.

OSCM R responded to CMC C email with the following pertinent disagreement:

As one of the few senior enlisted members that assisted in developing this message and the process, I completely agree with the [applicant's] logic. There are no gray areas here whatsoever. The thought that the cuts became official on 1 January is unsupportable. The [date/time/group] of the message is the effective date of its direction unless specific language is included to say otherwise. Discussions related to this very point were had during development of the policy and the ALCOAST. The language "on Jan 1" was very specifically chosen. I inquired about that choice during the discussions. We talked over the various consequences of choosing a date. Dates were discussed from the date of the board, through Jan 1st. It was the clear intent of the implementation team that every member would be treated as a member of their legacy rating until Jan 1, and then on Jan 1, all official acts of transition would take place.

This is a simple matter of integrity of the system. The wording in the message is clear. The [applicant] has spoken up for not only for himself, but for other members of which there is at least one more. I will strongly encourage the [applicant] to file a BCMR for himself and all others affected if positive resolution is not reached here. The intent is established in one place here, and that

is the message from the COMDT, ALCOAST 341/07. Practices, procedures, and even policies set by a subordinate command regardless of their good intentions or delegated authorities are secondary. CGPC concurred with the message and are bound by it.

ISCM RT wrote to OSCM R that he was 100% in agreement with the affected members and that he had informed people that the intelligence program would honor any revision to the cuts in their legacy rating up until January 1, 2008. He stated that he did not expect a revision the day before the rating stood up. ISCM RT stated that after discussing the matter with two CGPC personnel he could see their point that once the IS list was created in October 2007, members were removed from their legacy lists. He stated that one can not be on two advancement lists at the same time.

VIEWS OF THE COAST GUARD

On October 28, 2008, the Board received an advisory opinion from the Judge Advocate General (JAG) of the Coast Guard, in which he adopted the memorandum from the Commander, Coast Guard Personnel Command (CGPC). CGPC recommended that the Board deny the applicant's request.

CGPC stated that the Coast Guard complied with the Commandant's policy with respect to the advancement of members in the IS rate beginning on January 1, 2008. The Coast Guard stated that the advancement list from the May 2007 SWE, in which the applicant participated, did not become effective until January 1, 2008. The applicant was not above the cut on the 2006 SWE advancement eligibility list since he did not participate in that SWE cycle. Therefore he was not authorized carry over to the top of the IS advancement list.

The JAG stated that the May 2007 advancement eligibility list and the IS advancement eligibility list became effective on January 1, 2008. However, only the member's placement on the IS advancement list is controlling because the Commandant's policy specified that members would be moved from their legacy lists to the IS list on January 1, 2008.

The JAG noted the applicant's argument that the December 31, 2007 revised cut placed him above the cut for E-8 on the OS legacy advancement list. However, the JAG pointed out that the December 31, 2007 revised cut for OS was derived after considering the loss of those personnel on that list who had been approved for a lateral to IS on January 1, 2008.

The JAG argued that the phrase "prior advancement lists" is misinterpreted by the applicant. The JAG stated that cuts apply only to the effective period of the advancement eligibility list.

The policy refers to those individuals above the cut for advancement on eligibility lists expiring prior to the effective date of the IS advancement eligibility list, January 1, 2008. The only advancement eligibility lists effective prior to 1 January 2008 were the eligibility lists based on the May 2006 and November 2006 SWE, which the applicant did not participate in. Even so, the

applicant was never above the May 2007 cut in the legacy rating as he had been moved to the IS advancement list.

The JAG stated that any favorable determination in the case by the BCMR should be subject to DHS General Counsel review as it would represent a significant divergence for standard application of Coast Guard policy with regard to the stand-up of the IS rating and placement on the advancement lists.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 17, 2008, the Board received the applicant's response to the views of the Coast Guard. He disagreed with them. The applicant restated arguments made in his basic application.

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 participated in the May 2007 service wide competition for advancement to OCS (E-8). The advancement list from the May 2007 competition was issued in June 2007 and the applicant placed number 8 on that list. CGPC also announced that the advancements resulting from the May 2007 SWE would not become effective until January 1, 2008. The cutoff for OCS at that time was 0. During 2007, the Coast Guard was in the process of creating an entirely new IS rate and members from pay grade E-4 through E-9 were eligible to apply for a lateral transfer to the new rate. The applicant applied for a lateral to the new rate and was selected. On July 13, 2007, the Coast Guard issued ALCOAST 341/07 explaining the advancement process for the new rate. The ALCOAST provided the following for 2008 Advancements, in pertinent part: "[January 1, 2008 – December 31, 2008] E7, E8, & E9 Advancements and [January 1, 2008 – 30 June 2008], E5/E6 advancements. On January 1, 2008, IS members on May 2007 SWE eligibility lists for advancement in their legacy ratings will be removed from their legacy advancement lists and merged into new IS advancement lists . . . If there are any members remaining above the cut from prior advancements lists, they will be ordered separately and placed above the cut at the top of the IS advancement lists." On October 2, 2007, CGPC issued a memorandum announcing the IS advancement list. On December 31, 2007, the Coast Guard issued ALGENL 206/07 that revised the cuts for the May 2007 SWE. The cut for the OS rate, which was the applicant's legacy rate until January 1, 2008, was revised from 0 to No. 13 (the applicant had been No. 8 on that list). The cut for the new IS rate was at No. 3, but the applicant was placed at No. 5 on the ISCS list and not guaranteed advancement to ISCS. The applicant alleged that since he was still a member of his legacy rate on December 31, 2007 when the revised cutoffs were issued, he should have been promoted to OCS/ISCS on January 1, 2008 or at the very least moved as above the cutoff to the top of the ISCS advancement list.

3. It is important to note that under normal circumstances an applicant who is above the cut, whether an original or revised cut, would normally be carried over to the top of the next advancement list in that rate. However, in this case, the Commandant could deviate from the Personnel Manual in establishing the new IS rate because Article 5.C.11.e. states, "The Commandant may authorize deviations from the normal path of advancement in Commandant Instructions or Notices to establish, disestablish, or merge ratings." Therefore, this case turns mainly on the interpretation of para. 2.B of ALCOAST 341/07 issued on July 13, 2007. The entire paragraph read as follows:

B. 2008 Advancements. 1. [January 1, 2008 – December 31, 2008] E7, E8, Advancements and [January 1, 2008 – 30 June 2008], E5/E6 advancements. On January 1, 2008, IS members on May 2007 SWE eligibility lists for advancement in their legacy ratings will be removed from their legacy advancement lists and merged into new IS advancement lists. Placement on the new advancement lists will be based on the May 2007 final multiple score excluding SWE points. The removal of the SWE points will eliminate SWE calculation discrepancies that may result from different legacy rating exams. If there are any member remaining above the cut from prior advancements lists, they will be ordered separately and placed above the cut at the top of the IS advancement lists.

4. The applicant maintained that he remained in his legacy rate until January 1, 2008 under para. 2.B.1. of ALCOAST 341/07. The Coast Guard seems to agree by stating that the IS advancement list and the OS advancement list became effective on the same date, but the IS advancement list controls because the policy in ALCOAST 341/07 specified that members would be moved from their legacy rate list to the IS list on January 1, 2008. So on January 1, 2008, the applicant became an ISC and was at No. 5 on the list for advancement to ISCS. Paragraph 2.B.1 of ALCOAST 341/07 states in pertinent part: "On January 1, 2008, IS members on [the] May 2007 SWE eligibility lists for advancement in their legacy ratings will be removed from their legacy advancement lists and merged into new IS advancement lists," which was effective from January 1, 2008, to December 31, 2008.

5. The second portion of the applicant's contention is not so simple. The applicant argued that he should have been advanced to E-8 on January 1, 2008 because on December 31, 2007 the cut for advancement on the OSCS list was revised to No. 13 and he had been No. 8 on that list. He argued that since he was not removed from his legacy rate until January 1, 2008, he was still on the OSCS list on December 31, 2007, when the revised cuts were issued and therefore he was entitled to be carried over to the top of the IS list, which would have guaranteed him eventual advancement to ISCS without any further SWE participation. The applicant argued that the last sentence of para. 2.B.1 of the ALCOAST 341/07, supports his position. The last sentence of para. 2.B.1 of the ALCOAST 341/07 reads: If there are any members remaining above the cut from prior advancements lists, they will be ordered separately and placed above the cut at the top of the IS advancement lists." The Coast Guard's view is that the last sentence referred to those individuals above the cut on the May 2006 or earlier advancement lists. As the Coast Guard noted the applicant was not on the May 2006 advancement list, or above the cut on any earlier lists, and therefore, he was not entitled to be carried over to the top of the new IS list.

To clarify: the applicant argued that “prior advancement lists” referred to the May 2007 or earlier lists and the Coast Guard argued that “prior advancement lists” referred only the May 2006 or earlier advancement lists.

6. The issue before the Board is the meaning of the term “prior advancement lists” in ALCOASTS 341/07. Webster’s Ninth New Collegiate Dictionary defines “prior” as “earlier in time or order.” *Id* at 936. Therefore, the Board agrees with the Coast Guard that the use of the term “prior advancement lists” under the circumstances of para 2.B.1 of ALCOAST 341/07 meant advancement lists that existed before the 2007 advancement list. The Board is persuaded in this finding based upon the entirety of para 2.B.1 of ALCOAST 341/07. When the paragraph is read in its entirety, it becomes clear that the last sentence is referring to advancement lists earlier than 2007 because the first part of that paragraph discusses quite thoroughly what is to happen to those on the 2007 advancement list. In this regard, it states that such individuals would be moved from their legacy list into the new IS list on January 1, 2008. There was no discussion in this portion of the paragraph about bringing any member from the legacy rate who was above the cut on any 2007 lists onto the IS list as above the cut. Even if there were some ambiguity as to the meaning of this provision, the Coast Guard’s interpretation of its regulation and policy, if reasonable, would be entitled to deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-4 (1984).

7. Also, para. 2.B. of ALCOAST 341/07 stated that placement on the IS advancement list would be based on the May 2007 multiple excluding the SWE, to eliminate SWE calculation discrepancies that may result from different legacy rating exams. In other words, the calculation to be used for the IS advancement list would in effect create a more level playing field. To bring members to the top of the IS list who were above the cut on their legacy rating, would in effect cause the recalculation provision of the ALCOAST to have no effect. Accordingly, the Board finds that the last sentence of para. 2.B.1 of ALCOAST 341/07 did not apply to the May 2007 advancement list, and the applicant was not entitled to be promoted to ISCS or carried over to the top of the IS list on January 1, 2008.

8. The Board is persuaded that if the Coast Guard had intended to bring enlisted members who were above the cut in their legacy rate on the May 2007 SWE advancement list to the top of the new IS advancement list as above the cut, it would have specifically spelled that out in the ALCOAST as it did for warrant officers lateraling to the ISS specialty. Paragraph 4. §§ A. & B. of ALCOAST 341/07 clearly stated that warrant officers selected to lateral to the new ISS specialty who were above the cut on either the 2006 and 2007 CWO eligibility list “will be ordered separately and placed above-the cut at the top of the new ISS CWO eligibility list.” It is appropriate for the Board to consider para. 4 in determining the intent of para. 2 of ALCOAST 341/07. In *Gottlieb v. Carnival corporation*, 436 F.3d 335 (2d Cir. 2005), *citing Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 98 (2d. Cir. 2001), the court stated that “when determining the meaning of a statutory provision, “the text should be placed in the context of the entire statutory structure.” That court relying on *United States v. Dauray*, 215 F.3d 257, 262 (2d Cir. 2000) further stated that “[A] statute is to be considered in all its part when construing any one of them.” The Board is satisfied based upon the entirety of the ALCOAST and specifically the text of para. 2.B. of that ALCOAST that the phrase “prior advancement lists” refers to the 2006 or earlier advancements lists. If the Coast Guard had intended to transfer members who

were above the cut in their legacy ratings to the top of the IS list, it would have specifically stated that in the ALCOAST.

9. The applicant has demonstrated through the submission of evidence that confusion existed among the senior enlisted personnel as to meaning of the pertinent provision of the ALCOAST. In this regard, the applicant alleged that prior to his decision to request a lateral to the IS rate, he consulted with CWO B, the OS/IS enlisted assignment officer; ISCM RT, the intelligence specialist rating force manager; and MCPO r who was a member of the intelligence specialist rating implementation team to ensure that he understood the process. He claimed that each one assured him that members selected to lateral to the IS rating would be allowed advancement opportunities in their legacy rating until January 1, 2008. Two of the three he claimed to have consulted appear to support the applicant's contention that he was to be treated as a member of his legacy rate until January 1, 2008. ISCM RT wrote that he had informed "people that the intel[lignce] program would honor any revision to the cuts in their legacy rating up until January 1, 2008." Also, OSCM R stated that it was the intent of the implementation team for the new rate that every member would be treated as a member of their legacy rate until January 1, 2008. However, the applicant has not provided sufficient evidence that he was personally given erroneous information by these two individuals. In this regard, neither of these two individuals ever stated that they specifically discussed the matter with the applicant. Moreover, the cut for the OSCS rate was 0 until December 31, 2007 and the Board questions why the applicant would discuss the issue of a revised cut with senior enlisted personnel prior to August 15, 2007, the date on which applications to lateral to the IS rate were due. If the applicant had produced evidence that senior enlisted members specifically counseled him in a manner contrary to the Coast Guard's interpretation of the pertinent provision of the ALCOAST, the applicant would arguably have a claim for relief based upon that erroneous counseling. However, as stated, the applicant has not provided sufficient evidence that he was misled into requesting a lateral to the IS rate by senior enlisted personnel. OSCM R stated that he agreed with the applicant's interpretation of ALCOAST 341/07, but he never stated that he gave the applicant any specific advice. ISCM RT stated that he had informed people that the intelligence program would honor any revision to the cut in their legacy rating up until January 1, 2008. However, he never stated that he gave this advice to the applicant.

10. The applicant alleged that the fact that on November 1, 2007, two OS2s on the May 2007 OS1 advancement list were actually advanced to OS1 even though they had been selected for the new IS rate is evidence that the Coast Guard manipulated the IS advancement process. It is unclear whether the OS2s were advanced in rate to OS1 or IS1. The Coast Guard argued that they were advanced under the early advancement authority issued in ALCOAST 338/07 of July 13, 2007, which permitted advancements from the May 2007 advancement list when a list from the November 2006 SWE had been exhausted. However the Coast Guard's argument in this regard appears to be an expedient and self-serving one. The problem with the argument is that the IS rate did not officially begin until January 1, 2008 and all IS billets from E-5 through E-9 were vacant, not just the two IS1 billets, so why would it have been necessary to advance only these two individuals in November 2006. Further, it does not appear reasonable to have advanced these two members in their legacy rate for only two months, since they would transfer to the IS rate effective January 1, 2008, and since they were not above the cut on their legacy rate advancement list. The advancement of the two OS2s supports the applicant's suggestion of an

appearance that the rules related to the IS advancement process were unclear. However, even if the two IS1s were advanced mistakenly, such a mistake would not entitle the applicant to be advanced to ISCS because he has not demonstrated that he was harmed by Coast Guard's mistake in advancing them. In this regard, the advancement of the two IS1s appears to have been an isolated incident and since they were in a different pay grade from that of the applicant, their advancements did not impact the applicant's advancement opportunity (or lack of opportunity) in any manner. The applicant has not established a causal connection between their mistaken advancement, if any, and his non advancement to ISCS. See *Quinton v. United States*, 64 Fed. Cl. 118, 125 (2005), in which the court stated that a finding of harmlessness requires that there be "no substantial nexus or connection" between a proven error and the prejudicial record that the applicant wants corrected.

11. Accordingly, the applicant has failed to establish by a preponderance of the evidence that the Coast Guard committed an error or injustice against him that required corrective action by this Board.

12. The applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXXXXXXXXXXXX, USCG, for correction of his military record denied.

Lillian Cheng

Paul B. Oman

Darren S. Wall