

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-090

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

**DECISION OF THE DEPUTY GENERAL COUNSEL
AS THE OFFICIAL WITH DELEGATED AUTHORITY TO TAKE
FINAL ACTION ON BEHALF OF THE SECRETARY OF
THE U.S. DEPARTMENT OF HOMELAND SECURITY**

After considering the unique facts of this case, I approve the majority's Recommended Final Decision of the Board for Correction of Military Records of the United States Coast Guard and grant the relief recommended therein.

Date: [12/24/09]_____

/s/_____
Joseph B. Maher
Deputy General Counsel
U.S. Department of Homeland Security

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RECOMMENDED 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 after receiving the applicant's completed application on February 24, 2009, 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 November 10, 2009, is approved and signed by the majority of 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 chief machinery technician (MKC/E-7) on October 1, 2007, off the advancement eligibility list (hereinafter "2006 list") resulting from the May 2006 service-wide examination (SWE), asked the Board in his application (Tab C) to correct his record by backdating his date of advancement to December 1, 2006, which is the date, he alleged, that he should have been advanced off the eligibility list (hereinafter "2005 list") resulting from the May 2005 SWE (Tab G).

The applicant alleged that after he took the May 2005 SWE to advance from first class machinery technician (MK1/E-6) to MKC, his name was #126 on the 2005 list for advancement to MKC. However, advancements were made down only as far as #125 before the 2005 list expired on December 16, 2006, so he was not advanced. The applicant alleged, however, that he recently learned that MK1 Xxxxxxx, who was above him on the 2005 list and did get advanced to MKC off that list, had committed fraud and was improperly advanced. The applicant further alleged that had MK1 Xxxxxxx not been improperly advanced, the applicant would have advanced to MKC on December 1, 2006. Therefore, he asked the Board to backdate his date of advancement to what it would have been had MK1 Xxxxxxx not been improperly advanced.

In support of his request and allegations, the applicant submitted a series of emails showing the following: On October 27, 2008, a Coast Guard attorney sent an email to several members, including the applicant, reminding them that they were scheduled to serve as witnesses at the court-martial of MK1 Xxxxxxx (who was an MKC at the time of trial) beginning on Decem-

ber 15, 2008, in Seattle, Washington (Tab B). The applicant, who was then serving in Kuwait, replied to the attorney saying, "I am thinking this is an accidental mail? Please advise." On October 28, 2008, the attorney responded to the applicant saying,

Thanks for checking in. It wasn't a mistake.

The story is that a Coast Guard member was improperly advanced to Chief in front of you off of the 2005 SWE because he did not correct his PDE which said he had 2 more achievement medals than he actually had. You were the individual that would have made Chief off of that SWE had the member's PDE been correct.

The member is being tried by court-martial for his conduct and we would like to have you testify at his sentencing, probably via telephone, if/when he is convicted. What we need now from you is a new email (not a response to this email) explaining your feelings about being promoted to Chief a year later than you should have been because of the member's conduct in not correcting his PDE.

I know this is out of the blue, but your assistance will help in ensuring the member's conduct is properly punished. [Tab B]

On October 29, 2008, the applicant sent an email to a chief yeoman (YNC) asking about the differences in pay and benefits for an MK1 versus an MKC from December 2006 through September 2007 (Tab A). The YNC replied that the total difference in pay and benefits was \$5,577.60. The applicant forwarded the YNC's email to the Coast Guard attorney asking for the name of a contact within the Personnel Service Center (PSC) who could correct his date of advancement and pay. The attorney forwarded this email string to another officer asking whether the applicant could "receive back pay, etc., for the time that he should have been a Chief."

VIEWS OF THE COAST GUARD

On April 30, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion (Tab L) recommending that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided by the PSC in an enclosed memorandum on the case (Tab K).

The PSC stated that the applicant placed #126 on the May 2005 MKC advancement list (Tab E), and MK1 XXXXXXX placed ahead of him on the list at #97 (Tab F). The "cut" for guaranteed advancement was ultimately revised down to #121—below MK1 XXXXXXX but above the applicant (Tabs D & E). MK1 XXXXXXX was advanced to MKC off the 2005 list on November 1, 2006 (Tab K). On December 1, 2006, the last advancements off the 2005 list were made, and MK1s down to place #125 were advanced to MKC before the list expired (Tab K). At #126, the applicant did not advance. However, the applicant had competed in the May 2006 SWE and placed #119 on the 2006 MKC advancement list (Tab O). He advanced to MKC off the 2006 list on October 1, 2007 (Tab K).

In April 2008, the Coast Guard discovered that MK1 XXXXXXX (then an MKC) had concealed the fact that he had been awarded four extra SWE eligibility points (Tab K). He was erroneously credited with the four extra points for having two more Achievement Medals¹ in his

¹ An Achievement Medal is awarded for professional or leadership achievement of a superlative nature that exceeds that which is normally required of the member. In the order of precedence, it is the lowest medal awarded for

record than he had actually received. The PSC stated that MK1 XXXXXXX's "promotion to MKC in November of 2006 was directly effected by the extra four points, and his advancement would not have occurred without the benefit of the extra points."² (Tab J) MK1 XXXXXXX was subsequently tried at court-martial and "reduced to MK1 as a result of a fraudulent advancement." (Tab J) Nevertheless, the PSC argued that the applicant's request should be denied for the following reasons:

Only members above the advancement cut are guaranteed advancement, [citing ALCGENL 118/06]. Had [the applicant] been number 122, he may have been able to make an argument that had [MK1 XXXXXXX] not been advanced, he would have been number 121. However, [the applicant] was number 126 and [MK1 XXXXXXX's] reduction in rank 2 years later had no bearing on him rising above the advancement cut.

Furthermore, the fact that 2 years later the Coast Guard discovered [MK1 XXXXXXX's] fraud and reduced [him] does not mean that [the applicant] should be advanced. This situation is no different from when members' advancements are withheld or who are removed from eligibility lists, or later reduced in grade for disciplinary reasons. We do not go back in history and revise the advancement eligibility lists because members are later reduced in grade for misconduct.

In support of these allegations, the PSC submitted a copy of the report of the investigation (Tab I) into MK1 XXXXXXX's advancement and awards (see summary below) and the following documentation regarding the 2005 list for advancement to MKC:

On July 1, 2005, the Chief of Enlisted Personnel Management at the Personnel Command issued the eligibility lists for advancement resulting from the May 2005 SWE. His memorandum (Tab G) shows that the MKC list would be in effect from January 1 to December 16, 2006. He further stated that members whose names appeared at or above the cutoffs would not have to re-compete for advancement in the next SWE unless their advancements were withheld by their commanding officers beyond the expiration of the list or their names were removed for cause from the list. The 2005 list for advancement to MKC shows the applicant's name at #126 and MK1 XXXXXXX's name above (ahead of) his at #97 (Tabs E & F). The 2005 list also shows

- that fifteen MK1s who placed above the applicant were removed from the list because they had already advanced to MKC off the 2004 list or because they had been appointed to chief warrant officer;³
- that three other MK1s who placed above the applicant was removed from the list for performance or disciplinary problems; and
- that one MK1 who placed above the applicant was voluntarily removed from the list.⁴

personal achievement but higher than a Letter of Commendation Ribbon Bar. U.S. COAST GUARD, COMDTINST M1650.25D, MEDALS AND AWARDS MANUAL, Chap. 2.A.16. and Encl. (22) (May 2008). In determining a member's position on an advancement list, a member receives two eligibility points for each Achievement Medal in his record. U.S. COAST GUARD, COMDTINST M1000.6A, COAST GUARD PERSONNEL MANUAL Art. 5.C.3.b.3. (Change 37, March 2005) (hereinafter PERSMAN).

² Upon inquiry by the Board, the Coast Guard stated that without the four fraudulent advancement eligibility points, MK1 XXXXXXX would have placed #143, below the applicant on the 2005 list, and at #128, instead of #92, on the 2006 list. In addition, the Coast Guard stated that MK1 XXXXXXX began serving on active duty in 1987 (Tab O).

³ Members whose names are above the cutoff on a chief warrant officer eligibility list are not eligible for advancement as an enlisted member. PERSMAN, Art. 5.C.13.d.

⁴ Members whose requests for retirement are approved are ineligible for advancement. PERSMAN, Art. 5.C.13.f.

On August 25, 2006, the Personnel Command issued ALCGENL 118/06 (Tab D) with “revised cutoffs” for guaranteed advancement from the 2005 advancement eligibility lists. The revised cutoff for advancement to MKC was the member who placed #121 on the 2005 list.

Report of the Investigation into MK1 Xxxxxxx’s Medals and Advancement (Tab G)

The PSC submitted a copy of the May 14, 2008, report of an investigation (Tab G) into MK1 Xxxxxxx’s advancement and awards. The investigator concluded that MK1 Xxxxxxx “availed himself of the servicewide promotion points and the subsequent early advancement that resulted from two Coast Guard Achievement Medals he was not entitled to wear. Further, [he] wore said medals on his uniform with the knowledge that they were not rightfully his and falsely verified official documents to the same effect.” The investigator stated that on April 7, 2008, MK1 Xxxxxxx’s command noticed that MK1 Xxxxxxx (then an MKC) had three Achievement Medals in the Coast Guard’s database, and they were all dated within two months of each other in February and March 2001. A query to the command where MK1 Xxxxxxx was stationed in 2001 revealed that he had received only one award but it had been entered in the new Direct Access database three times by yeomen in training whose work was not checked. MK1 Xxxxxxx also admitted that he had received only one Achievement Award. The investigator stated that during an inspection in December 2007, MK1 Xxxxxxx had worn his Achievement Medal ribbon with two silver stars and was asked if he had won eleven Achievement Awards, which is what two silver stars normally indicate.⁵ MK1 Xxxxxxx had replied that he thought the ribbon with two silver stars represented only three awards. In addition, when asked later by a crewmate about how many SWE points he had received for awards, MK1 Xxxxxxx had replied that he had one more Achievement Medal than the crewmate, who had two of them, and that he would probably be advanced to senior chief because of his points for the three awards.

The investigator reported that a review of MK1 Xxxxxxx’s record had shown that the extra four points probably did not cause his advancement to MK1 in June 2003 because so many MK2s were advanced to MK1 at the time that the four extra points would not have mattered. However, MK1 Xxxxxxx’s “promotion to MKC in November of 2006 was directly effected by the extra four points and would not have occurred without the benefit of the three [Coast Guard Achievement Medals].” The investigator concluded that MK1 Xxxxxxx had clearly intended to deceive because he had worn the ribbon with two stars, had verbally claimed to have received three Achievement Medals, had verbally discussed the probable impact of the three medals on his advancement eligibility, and had signed six personnel data extracts (PDEs)⁶ since 2001 verifying the accuracy of his record prior to taking each SWE. The investigator also wrote that “[n]o other

⁵ A gold star is attached to the Achievement Medal ribbon for each four subsequent awards of the medal. A silver star is attached to an Achievement Medal ribbon in lieu of five gold stars. U.S. COAST GUARD, COMDTINST M1650.25D, MEDALS AND AWARDS MANUAL, Chap. 1.J. (May 2008).

⁶ PERSMAN, Article 5.C.4.a. (stating that it “is each individual’s responsibility to ensure their eligibility in all respects for the SWE. The key to doing so is by verifying and signing the Personnel Data Extract, CG-4902, received prior to the SWE date. By signing the CG-4902, members state all changes noted or information on the form are current and correct and no further corrections are necessary.”).

MKCs were denied promotion at the appropriate time, since [MK1 Xxxxxxx] was promoted ‘below [sic] the cut’⁷ and not in place of another member who might have been above it.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 11, 2009, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a written response within thirty days. No response was received (Tab M).

TIMELINE OF EVENTS

- Feb./Mar. 2001 Coast Guard seamen training on new Direct Access database accidentally enter MK1 Xxxxxxx’s (then an MK2) one and only Achievement Medal into his electronic record three times (Tab H).
- 2001 to 2005 MK1 Xxxxxxx annually verifies the accuracy of a personal data extract (PDE) from his electronic record, thus fraudulently claiming to have received three Achievement Medals instead of just one. He thereby enhances his advancement eligibility by receiving four extra eligibility points (two per medal) (Tab H).
- May 2005 The applicant and MK1 Xxxxxxx take the May 2005 SWE for advancement to MKC. The applicant places #126 on the 2005 list and MK1 Xxxxxxx places above (ahead of) him at #97, although without the four erroneous advancement eligibility points, MK1 Xxxxxxx would have been #143 (Tabs E, F, & O).
- Jan. 1, 2006 The 2005 list goes into effect and the Coast Guard begins making advancements off the top of the list. The applicant, at #126, is below the initial “cut-off” of #78 and so is not guaranteed advancement from the 2005 list (Tab O).
- May 2006 The applicant and MK1 Xxxxxxx take the May 2006 SWE for advancement to MKC because they are still below the cutoff for guaranteed advancement on the 2005 list. The applicant places #119 on the 2006 list. MK1 Xxxxxxx places #92 but would have been #128 without the erroneous points (Tab O).
- Aug. 2006 The Personnel Command revises the “cutoff” for guaranteed advancement on the 2005 list, which is still in effect, down to #121. At #97, MK1 Xxxxxxx is now above the cutoff, but the applicant, at #126, is still below it (Tab D).
- Nov. 1, 2006 MK1 Xxxxxxx is advanced to MKC off the 2005 list (Tab K).
- Dec. 1, 2006 The member at #125 is the last MK1 to advance to MKC off the 2005 list. At #126, the applicant is not advanced (Tab K).
- Dec. 16, 2006 The 2005 list expires.
- Jan. 1, 2007 The 2006 list resulting from the May 2006 SWE goes into effect.
- Oct. 1, 2007 The applicant is advanced to MKC off the 2006 list (Tab K).
- April 2008 MK1 Xxxxxxx’s (then MKC) fraud in claiming two Achievement Medals that he had not earned and the four corresponding advancement eligibility points is

⁷ Because MK1 Xxxxxxx placed #97 and the cutoff had been revised down to #121 prior to his advancement to MKC, he was actually “above the cut” on the 2005 list as of August 25, 2006. U.S. COAST GUARD, ALCGENL 118/06 (Aug. 25, 2006) (Tab D).

discovered and investigated (Tab K).

Dec. 2008 MK1 XXXXXXXX is convicted of fraud at court-martial (Tab J). In the sentencing phase, the applicant is called as a witness to testify to the harm done to him in not having been advanced off the 2005 list on December 1, 2006 (Tab B). A YNC determines that the applicant lost \$5,577.60 in pay and allowances because he did not advance to MKC until October 1, 2007 (Tab A).

APPLICABLE REGULATIONS

Article 5.C.1.a. of the Personnel Manual in effect in 2005 (COMDTINST M1000.6A, Change 39) 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.3.a.1. states that “[w]hile it cannot be guaranteed that any one person will be advanced, the SWE ensures a fair and an impartial opportunity for advancement and a guarantee that all enlisted personnel of a particular rating shall have an equal advancement opportunity.”

Article 5.D.1.a. states that the “Personnel Data Extract (PDE) is the command and members’ tool to verify that the information for correctly computing the Servicewide Examination (SWE) Final Multiple.” Article 5.D.1.b. states that “Commanding Officer, Personnel Service Center (PSC/adv) collects the PDE information from the members’ Direct Access data. A crucial part of accurate data collection is timely entry in Direct Access. Members, commands, and PERSRUs should ensure the necessary Direct Access entry is completed promptly.”

Article 5.C.3.b.1. states that prior to the SWE, the PSC provides each member with a personnel data extract (PDE), and the member “must take corrective action if it’s incorrect.” Article 5.C.4.a. states that members must verify and sign the PDE prior to taking the SWE. Under Article 5.C.3.b., the candidates for advancement to a particular rate, such as MKC, are ranked on the advancement eligibility list according to a calculation that assigns points for each candidate’s SWE score (up to 80 points), performance marks (up to 50 points), time in service (1 point per year for up to 20 years), time in present pay grade (2 points per year for up to 5 years), medals and awards (varying from 1 point per Good Conduct Medal and 2 points per Achievement Medal up to 10 points for a Medal of Honor), and sea duty (1 point per month and a maximum of 2 points per year for up to 30 points), as shown on the PDE.

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 eligi-

bility 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.38.e. states that “[i]f an enlisted member is advanced in error due to no fault of his or her own and solely as a result of administrative error, the member shall be reduced to the correct rate as of the date the erroneous advancement is noted. In such cases, time in grade in present rating will be computed from the date originally advanced to the correct rate. The member shall not be required to repay any overpayments caused by this erroneous advancement if the following conditions are met ... “

PRIOR BCMR DECISION

In BCMR Docket No. 94-89⁸ (Tab P, Q & R), a senior chief petty officer asked the Board to promote him retroactively to chief warrant officer (CWO) in 1984 after it was proved in 1988 that the member who had been ranked #3 on the list for appointment to CWO in 1984 had cheated on the SWE. The applicant had ranked #14 on that list, and appointments had been offered to the top thirteen members on the list before it expired (Tab R). The applicant had not received an appointment to CWO in the interim (Tab R).

The Board’s initial decision (Tab P) and decision on remand (Tab Q) recommended granting relief and argued that the applicant’s position on the list had been usurped by a cheater, which constituted a “manifest injustice,” which “detract[ed] from the integrity of the advancement system.” (Tab Q)

The delegate of the Secretary, however, denied relief (Tab R). She stated that promotion or appointment is “not a matter of right, but of discretion” and that placement on an eligibility list does not entitle a member to promotion or appointment. She stated that promotion “results from both placement as the next member in line from the top of the eligibility list and also the appearance of a vacancy.” She concluded that the applicant was not entitled to promotion because the cheater had in fact “encumbered” a CWO position and so no vacancy in the CWO ranks occurred for the member at #14 on the advancement list prior to that list’s expiration. She stated that the vacancy did not occur until 1988, when the other member’s cheating was discovered. Furthermore, she pointed out that there were other factors, besides the member’s cheating, that affected the circumstances of the case. She noted that the Personnel Command had set the cutoff at #7, so that the applicant could not have had an expectation of appointment. She also noted that only ten appointments were made off the list; so the member at #13 was appointed only because three members higher on the list had declined the appointment. Therefore, she stated, the causal nexus between the cheating and the applicant’s failure to be appointed was very weak, as his rise to the top of the list “was more of an aberration in probability than a legitimate expectation that the applicant came so close to being promoted.”

Finally, the delegate stated, “the reactivation of expired eligibility lists raises not only legal concerns, [citing *Kletzing v. Young*, 210 F.2d 729 (D.C. Cir. 1954) (where blind applicant to the civil service brought suit to have his name restored to the eligibility list after it was alleg-

⁸ Docket No. 94-89 (DOT BCMR, Sept. 18, 1990). Under the old numbering system, BCMR Docket No. 94-89 was the 94th application received in docket year 1989.

edly wrongfully removed because of his handicap, the Circuit Court considered his claim moot because that eligibility list had expired and could not be revived)] but also equitable ones.” She pointed out that promoting the applicant would mean that the member who was at the top of the list in 1988 would not be promoted to fill the next vacancy—the one created by the discovery of the cheating—as required by the Personnel Manual. “Thus, in effect, the BCMR now would repeat through official action the wrong of bumping an otherwise qualified member to a position below the number of vacancies for the year.” She stated that although it is unfortunate that the cheating negatively affected the applicant, the Coast Guard neither condoned it nor covered it up. Moreover, she stated “[i]n its proper perspective, the injury done here was not by the Coast Guard against [the applicant], but by one member against another. I do not find here that the Coast Guard must be obligated, at the cost of inflicting injury upon another service member as well as itself, to correct this type of ‘inequity’.” (Tab R)

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. The application is timely as it was filed within three years of the applicant's discovery of the alleged error.⁹

2. The applicant alleged that his date of advancement as an MKC is erroneous and unjust because a member, MK1 Xxxxxxx, who advanced to MKC before him committed fraud in gaining that advancement and the applicant's name was at the top of the 2005 advancement eligibility list when it expired. Therefore, the applicant asked the Board to backdate his date of rank as an MKC from October 1, 2007, to December 1, 2006 (Tab C). The Board begins its analysis in every case by presuming that the disputed information—in this case, the applicant's date of advancement to MKC—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.¹⁰ Absent evidence to the contrary, the Board presumes that Coast Guard officials have carried out their duties “correctly, lawfully, and in good faith.”¹¹

3. The applicant has proved by a preponderance of the evidence that the Coast Guard committed error by entering one Achievement Medal into MK1 Xxxxxxx's record three times in February and March 2001. The May 2008 report of the investigation (Tab I) into the three medals shows that the Coast Guard committed this error when in 2001 Coast Guard yeomen in training entered MK1 Xxxxxxx's first and only Achievement Medal into the new Direct Access database three times and that the Coast Guard then failed to detect the two erroneous awards for seven years (Tab H). Over a period of seven years, the Coast Guard failed, on at least six occasions, to detect the obvious abnormality of a member receiving three separate achievement med-

⁹ See also *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).

¹⁰ 33 C.F.R. § 52.24(b).

¹¹ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

als in two months (Tab H). Such an event is probably unprecedented in history of this medal or any like it. The Coast Guard's errors enabled MK1 XXXXXXX, who was, like the applicant, a candidate for advancement to MKC in 2005 and 2006, to commit fraud by verifying his personal data extract (PDE) with the two extra, erroneous Achievement Medals therein and thus to be credited with four advancement eligibility points to which he was not entitled (two points per unearned medal).¹²

4. The Coast Guard has further stated that because of the four unearned eligibility points, MK1 XXXXXXX placed #97 on the 2005 list for advancement to MKC (Tab F)—above the applicant who placed #126 (Tab E)—whereas without the four unearned points, MK1 XXXXXXX would have placed below the applicant at #143 (Tab O). In addition, the Coast Guard has stated that the last advancements to MKC were made off the 2005 list on December 1, 2005, and were made down to and including the person at #125 (Tab K). The applicant was #126 on the 2005 list and therefore at the top of the list when it expired on December 16, 2006 (Tab E). In an email dated October 28, 2008, a Coast Guard attorney advised the applicant that he would have advanced to chief (MKC) on December 1, 2006, had MK1 XXXXXXX not been improperly advanced, and called on the applicant to testify to the harm done to him during the sentencing phase of MK1 XXXXXXX's court-martial (Tab B). By soliciting and advancing the applicant's testimony (offered in federal court subject to perjury) that he had been uniquely harmed by the errors in question, the Coast Guard, at the very least, should acquiesce in the conclusion that the applicant has been uniquely harmed. Therefore, the Board finds that but for the Coast Guard's errors in entering two unearned medals in MK1 XXXXXXX's record, the applicant would have advanced to MKC on December 1, 2006. In this regard, the Coast Guard's errors constitute a proximate cause of the applicant's failure to advance off the 2005 list. Instead, the applicant advanced to MKC on October 1, 2007, off the 2006 list (Tab K). A YNC has calculated that the applicant lost \$5,577.60 in pay and allowances as a result of MK1 XXXXXXX's improper advancement on November 1, 2006 (Tab A).

5. In attributing the applicant's failure to advance to MKC off the 2005 list on December 1, 2006, to the Coast Guard's errors, the Board is not ignoring the fraud committed by MK1 XXXXXXX. If MK1 XXXXXXX had honestly alerted the Coast Guard to the erroneous Achievement Medals in his PDE, as required by the Personnel Manual,¹³ the applicant would have placed #125 on the 2005 list and would have advanced to MKC on December 1, 2006. However, the Coast Guard erroneously placed the two unearned Achievement Medals in MK1 XXXXXXX's record, did not (and does not) require any other check on the accuracy of PDEs (Tab O), and instead relies on enlisted members to verify their own PDEs,¹⁴ which greatly affect their ultimate placement on the advancement eligibility lists. Thus, the Coast Guard requires enlisted members, such as the applicant, to trust in the integrity of the advancement system and honor system but then provides no remedy for the victims when those systems fail. The Coast Guard's reliance on honor among its members carries the duty to show respect for those members who are injured by their reliance on that system. The Coast Guard committed a series of errors that prevented the applicant from being promoted in a timely fashion. Its response is to avoid any responsibility to its innocent member by assigning all guilt to the person who exacerbated the

¹² PERSMAN, Art. 5.C.3.b.3.

¹³ PERSMAN, Arts. 5.C.3.b.1. and 5.C.4.a.

¹⁴ *Id.*

Coast Guard's errors by criminal conduct. As the Coast Guard operates on a system where it takes a man or woman at their word, Coast Guard members are entitled to (and must) rely on their fellow members. Where such reliance causes injury, the Coast Guard must repair that injury. Failure to restore the applicant to his correct time in grade would constitute a failure of its own honor system and respect for this Coast Guardsman. Honor and respect are two of the three core values of the Coast Guard.¹⁵ The Board is not persuaded that the Coast Guard has done enough by punishing the criminal and ignoring his victim. It does the victim little good to know that the United States punished the thief and pocketed his ill gotten gains. The money the Coast Guard asked the applicant to tell a court of law that he lost, \$5,577.60, should not remain in the U.S. Treasury.

6. While the Personnel Manual contains a provision (Article 5.C.38.e.) addressing the situation wherein an enlisted member is advanced due to an administrative error, it contains no provisions for reviewing past advancements or promotions and revising dates of rank when a member is not advanced due to such an error. The Board recognizes that, if authorized by regulation, such corrections would likely affect several members' dates of rank. For example, because MK1 XXXXXXX was improperly advanced to MKC on November 1, 2006, (a) another MK1 who would have advanced on that date, instead of MK1 XXXXXXX, was not advanced until December 1, 2006; (b) the applicant was not advanced to MKC until October 1, 2007, off the 2006 list; and (c) another MK1 on the 2006 list would have advanced off that list on October 1, 2007, in lieu of the applicant. Here these other potential claimants fall closer to the "aberration of probability" noted by the delegate of the Secretary in BCMR Docket No. 94-89 (Tab R). It is indeed difficult to point to subsequent advancement lists and attempt to maintain a "proximate cause" of error. It is totally irrelevant to discuss matters that happen after a list is created, such as subsequent misconduct, retirements, and commissioning, and to attempt to equate those with the facts in this case. This case can be distinguished from BCMR Docket No. 94-89 by the very unique facts. The Coast Guard, through the attorney who called on the applicant to testify at MK1 XXXXXXX's court-martial (Tab B), recognized that the applicant is uniquely placed as the most obvious and significant victim of the Coast Guard's several errors and the improper advancement of MK1 XXXXXXX. The Coast Guard should not compound its errors by hiding behind the criminal acts of MK1 XXXXXXX. While those standing between the applicant and MK1 XXXXXXX on the 2005 list might show some level of harm, none will approach the ten-month delay of the applicant's advancement. In addition, the applicant had to endure the anxiety of another SWE. These facts place this applicant in a unique status. They shock our sense of justice.¹⁶ The Board finds that the injury to the applicant is due to error by the Coast Guard. But even if we did not reject the Coast Guard's assertion that its errors were overcome by MK1 XXXXXXX's criminal act of certification and found no error on the part of the Coast Guard, we would still conclude that there must be some equity in a case as it shocks our sense of justice.

¹⁵ PERSMAN, Art. 8.K.2.a.; *see also* <http://www.uscg.mil/leadership/values.asp>, noting that the Coast Guard's three core values are honor, respect, and devotion to duty.

¹⁶ 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). The Board has authority to determine whether an injustice exists on a "case-by-case basis." Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

7. The loss of more than \$5,500 in pay and allowances and the loss of time in rate,¹⁷ which will negatively affect future advancements, are not only very harmful to the applicant's financial well-being but also, potentially, to his and all enlisted members' morale and trust in the Coast Guard's advancement system and honor system. The applicant is the victim of a manifest injustice¹⁸ attributable not only to MK1 XXXXXXX's fraud in verifying his PDE with two unearned Achievement Medals therein, but also to the Coast Guard's errors in entering one medal in MK1 XXXXXXX's record three times and the failing to detect the errors for seven years (Tabs B & H). Although correction of the applicant's date of rank under such circumstances is not required by regulation, the Board believes that it is required in the interest of justice.¹⁹ As the United States Court of Appeals for the Federal Circuit has stated, "when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate."²⁰ And, "[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious."²¹ Moreover, 10 U.S.C. § 1552(a) does not limit the injustices that the Board is authorized to remove to those that are solely attributable to the Coast Guard's errors or actions.²² The Board strongly believes that it is grossly unjust for the Personnel Manual to address administrative errors that benefit a candidate for advancement²³ while ignoring those errors that hurt him. In light of the clear injustice that the applicant has suffered and the fact that the injustice is attributable in part to the Coast Guard's errors, the Board finds that the applicant is entitled to relief.

8. The Board notes that there are some similarities between this case and that in BCMR Docket No. 94-89, wherein the delegate of the Secretary denied relief (Tab R). However, this case is easily distinguishable from that case on two significant bases. First, in No. 94-89, the applicant's failure to be appointed to CWO was due to another member's cheating on a test and not to any administrative errors by the Coast Guard. In that case, the delegate of the Secretary stated that the Coast Guard was "as much—if not more—a victim of the cheater's wrongdoing" as the applicant and that the Coast Guard was not obligated to correct one member's injury to another—i.e., the cheater's injury to the applicant in preventing his appointment to CWO. In this case, however, the Coast Guard's administrative errors in entering two erroneous medals in MK1 XXXXXXX's record and failing to detect them for seven years (Tab I) and its absolute reliance on the honor system in verifying PDEs (Tab O) and ranking candidates for advancement enabled MK1 XXXXXXX to perpetrate his fraud and thus directly harmed the applicant. Second, in No. 94-89 (Tab R), the applicant had never been appointed to CWO, and so his retroactive appointment would have prevented the appointment of someone on the CWO eligibility list in effect when the cheating was discovered. The delegate of the Secretary stated that granting relief in that case "would repeat through official action the wrong of bumping an otherwise qualified member to a

¹⁷ PERSMAN, Art. 5.C.3.b.2. (stating that members receive one eligibility point for each six months spent in their current rate).

¹⁸ *Reale*, 208 Ct. Cl. at 1011.

¹⁹ 10 U.S.C. § 1552(a) (authorizing the Secretary, through the BCMR, not only to correct errors but to remove injustices from military records).

²⁰ *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)).

²¹ *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).

²² *See, e.g.*, Docket No. 2002-110 (DHS BCMR, Decision of the Delegate, 2003) (restoring the veteran to the rolls as an active duty officer—but not voiding his discharge, which was based on his plea of *nolo contendere* in a State court—after the child who had claimed he had molested her credibly recanted her story).

²³ PERSMAN, Art. 5.C.38.e.

position below the number of vacancies for the year.” In this case, however, the applicant has already advanced to MKC and asks only that his date of rank be backdated by ten months from October 1, 2007, to December 1, 2006 (Tab C). Therefore, a grant of relief in this case would not “bump” or otherwise prevent the advancement of anyone on the current MKC advancement eligibility list. Given these two significant factual differences between this case and BCMR Docket No. 94-89, the Board is not persuaded that the delegate’s denial of relief in No. 94-89 requires denial of relief in this case.

9. Accordingly, the applicant’s request should be granted.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of MKC xxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted. The Coast Guard shall backdate his MKC date of rank from October 1, 2007, to December 1, 2006, and shall pay him any back pay and allowances due as a result of this correction.

(see dissenting opinion)

Lillian Cheng

Francis H. Esposito

Janice Williams-Jones

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-090

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

DISSENTING OPINION

I respectfully dissent from the recommended decision and order of the majority of the Board and would deny the applicant's request for relief in this case for the following reasons:

1. The May 2008 report of the investigation (Tab I) into MK1 Xxxxxxx's fraud states that inexperienced Coast Guard yeomen in training in 2001 mistakenly and unintentionally entered MK1 Xxxxxxx's single Achievement Medal into the Direct Access database three times (Tab H). The report further states that MK1 Xxxxxxx thereafter annually verified his personal data extract (PDE) as accurate, even though he knew he had received only one Achievement Medal, and that he fraudulently obtained his advancement to MKC off the 2005 list because of the four extra advancement eligibility points that he received for the two unearned Achievement Medals in his PDE.²⁴ The Coast Guard has admitted that without the four extra points, MK1 Xxxxxxx would have placed #143, instead of #97, on the 2005 list (Tab O); that advancements were made down to #125 on the 2005 list before it expired in December 2006 (Tab K); and that the applicant placed #126 on the 2005 list (Tab E). The applicant subsequently advanced to MKC off the 2006 list on October 1, 2007 (Tab K). I agree with the majority of the Board, therefore, that the applicant has proved that the Coast Guard committed an error with respect to MK1 Xxxxxxx's record and awards.

2. The yeomen's error, however, cannot be considered the proximate cause of the applicant's failure to advance off the 2005 list on December 1, 2006, as the majority argues, because MK1 Xxxxxxx's repeated fraud in verifying his PDE is an intervening and superseding cause.²⁵ The majority's insistence that the Coast Guard erred in failing to discover MK1 Xxxxxxx's fraud before 2008 is speculative and not based on any evidence contained within the record. The evidence does not support the majority's conclusion that the errors of the Coast

²⁴ U.S. COAST GUARD, COMDTINST M1000.6A, COAST GUARD PERSONNEL MANUAL Art. 5.C.3.b.3. (Change 37, March 2005) (hereinafter PERSMAN) (stating that a member receives two advancement eligibility points for each Achievement Medal in his record).

²⁵ 57A AM. JUR. 2d *Negligence* § 562 (May 2009) ("Where a new, independent, and efficient cause, which was not reasonably foreseeable, intervenes, the original actor's negligence is not the proximate cause of an injury. [Citations omitted.] In such cases, the causal factor qualifies as a supervening one, and the original negligence may be said to undergo a legal metamorphosis into a remote cause or a mere condition. [Citations omitted.]").

Guard's yeomen were the proximate cause of the applicant's failure to advance off the 2005 list. Article 5.C.3.b.1. of the Personnel Manual states that prior to the SWE, the PSC provides each member with a PDE, and the member "must take corrective action if it's incorrect." Indeed, as noted in section 4.A.6 of the current pre-SWE instruction, ALCOAST 012/09, the "member is solely responsible to review all data [within his or her personal data extract (PDE)] for accuracy." (Tab N)

3. Thus, the Coast Guard reasonably relies on the honor system in ranking candidates for advancement by having the members—who are best positioned to know what should and should not be in their records—verify their own PDEs.²⁶ The Coast Guard did not condone or cover up MK1 XXXXXXX's fraud and, once it discovered the fraud, took action against MK1 XXXXXXX and ultimately convicted him at court-martial for his crime (Tab J). Therefore, although MK1 XXXXXXX took advantage of the honor system and the yeomen's error in 2001 to commit the fraud, I do not believe that the Coast Guard is obligated in this case to violate its policy of not retroactively fixing members' dates of rank when fraud or cheating is discovered. The Personnel Manual contains no provisions for reviewing past advancements or promotions and revising dates of rank when enlisted members or officers are found to have committed crimes and obtained their ranks fraudulently.

4. Members are only assured advancement when their names appear at or above the cutoff on an advancement eligibility list.²⁷ Cutoffs are set in anticipation of expected vacancies,²⁸ and advancements are made to fill vacancies.²⁹ Moreover, members do not rise above the cutoff when a name is removed from the list. Rather, Commander, CGPC, at his discretion, may revise the cutoff downward on an advancement list when additional vacancies are anticipated (Tab D). In this case, the cutoff for MKCs on the 2005 list was initially set at #78, first revised to #82, later revised to #110, and then finally revised down to #121 (Tab O). Thus, at #126, regardless of MK1 XXXXXXX's fraud, the applicant was never above the cutoff on the 2005 list and had no legitimate expectation of advancement in the fall of 2006. Nor would he have been above the cutoff if MK1 XXXXXXX's military record had been accurate because even the member at #125 was not above the final cutoff. The members at #125 and above on the 2005 list, including MK1 XXXXXXX, were advanced to fill vacancies, and there was no known vacancy in the MKC ranks for the applicant, at #126. Therefore, he has not proved that his failure to be advanced on December 1, 2006, was erroneous or unjust.³⁰

5. Even though MK1 XXXXXXX committed fraud in obtaining his place at #97 on the list, I do not believe that the Coast Guard is committing an error or injustice against the applicant by refusing to backdate his date of rank as if he had advanced to MKC from the 2005 list. The facts of this case are very similar to the facts in BCMR Docket No. 94-89 (Tabs P, Q & R), in which the delegate of the Secretary denied relief, noting that placement on an eligibility list does not *per se* entitle a member to a promotion, which "results from both placement as the next member in line from the top of the eligibility list and also the appearance of a vacancy." (Tab R)

²⁶ PERSMAN, Arts. 5.C.3.b.1. and 5.C.4.a.

²⁷ PERSMAN, Art. 5.C.31.b.

²⁸ PERSMAN, Art. 5.C.3.a.2.

²⁹ PERSMAN, Art. 5.C.1.a.

³⁰ 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).

6. Like the applicant in BCMR Docket No. 94-89, this applicant's failure to advance off the 2005 list on December 1, 2006, was due in part to his position on the list as well as to another member's fraud in placing ahead of him on the list (Tab R). The applicant's placement on the 2005 list was determined by numerous factors that were included in the calculation of his final multiple.³¹ However, his position at the top of the 2005 list when it expired was due not only to those factors but also to the fact that nineteen MK1s ahead of him on the list had been removed from the list for various reasons (Tab G). In BCMR Docket No. 94-89, the delegate of the Secretary stated that that applicant was not entitled to relief because there was no known vacancy for him in the CWO ranks and because the "chain of causality" between the applicant's failure to be appointed to CWO and the cheating of the member who placed #3 on the 1984 CWO list was weak (Tab R). In so stating, she noted that the Coast Guard had anticipated only seven CWO vacancies while the 1984 list was in effect; that ten vacancies ultimately occurred; and that the applicant in that case, who had placed #14 on the list, was only at the top of the list when it expired because three of the thirteen members above him had declined the promotion. The delegate concluded that "it was more of an aberration in probability than a legitimate expectation that the applicant came so close to being promoted." (Tab R) While the applicant in this case obviously won his position at #126 on the 2005 list through long years of hard work, the fact that he was at the top of the list when it expired was similarly improbable.

7. The majority's attempt to distinguish BCMR Docket No. 94-89 from this case is not persuasive. While it was Coast Guard yeomen who initially incorrectly entered two medals in MK1 XXXXXXX's record, the supervening and therefore central conduct that generated the fraud and improper advancement was MK1 XXXXXXX's actions in misrepresenting two administrative mistakes as truth (Tab H). By Coast Guard regulation and policy, the onus was on MK1 XXXXXXX to verify the accuracy of his record,³² which he and he alone failed to do, thereby constituting fraud (Tab J). MK1 XXXXXXX's conduct is closely analogous to the member's cheating in No. 94-89 (Tab R).

8. The majority also argues that in No. 94-89, the applicant had never been appointed to CWO and therefore his retroactive appointment would have prevented or "bumped" the appointment of someone else, and that here the grant of relief would not prevent the advancement of anyone on the current MKC eligibility list. This distinction, however, goes more to the question of what kind of relief is appropriate than whether relief itself is appropriate. Backdating the applicant's advancement by ten months, as he requested (Tab C), may not bump someone else from advancement, but it would underscore the unaddressed harm of the other individuals described below. In this regard, the majority's recommended decision would merely substitute one form of disparity for another. Ultimately, the majority's decision cannot explain away the essential similarities between No. 94-89 and this case: a member committed a fraud, which allowed him placement on an advancement eligibility list at a position higher than the

³¹ PERSMAN, Art. 5.C.3.b. (showing that the candidates for advancement to a particular rate, such as MKC, are ranked on the advancement eligibility list according to a calculation of a multiple that assigns points for each candidate's SWE score (up to 80 points), performance marks (up to 50 points), time in service (1 point per year for up to 20 years), time in present pay grade (2 points per year for up to 5 years), medals and awards (varying from 1 point per Good Conduct Medal and 2 points per Achievement Medal up to 10 points for a Medal of Honor), and sea duty (1 point per month and a maximum of 2 points per year for up to 30 points), as shown on the PDE).

³² PERSMAN, Arts. 5.C.3.b.1. and 5.C.4.a.

applicant, who fell below the cutoff, and when the fraud was discovered by the Coast Guard, the member was punished and reduced in rate. Those facts were not enough to entitle the applicant in No. 94-89 to the relief he requested (Tab R), and, in the interests of consistency and fairness, those facts should not be enough here.

9. Granting the relief requested by the applicant would raise more equitable concerns than it would resolve. If authorized, backdating the applicant's date of promotion would clearly affect several members' dates of rank. For example, because MK1 XXXXXXXX was improperly advanced to MKC on November 1, 2006, (a) another MK1 who would have advanced to MKC on that date presumably was not advanced until December 1, 2006; (b) the applicant was not advanced to MKC until October 1, 2007, off the 2006 list; and (c) another MK1 on the 2006 list would have advanced off that list on October 2, 1007, in lieu of the applicant. Whenever such fraud occurs, numerous members who placed below the wrong-doer on the current and subsequent lists may be harmed by being promoted later than they would have been but for the fraud or, as in Docket No. 94-89, by never being promoted at all (Tab R). That the applicant was promoted the last of all of these individuals on the 2005 list and therefore, by this single measure, arguably suffered the most harm does not negate that every individual whose advancement MK1 XXXXXXXX affected by his wrongdoing suffered a harm because of his fraud. I believe such matters should be settled by policy applicable to all. The Coast Guard's advisory opinion states that the Coast Guard "do[es] not go back in history and revised the advancement eligibility lists because members are later reduced in grade for misconduct." (Tab J)

10. The delay of the applicant's advancement by ten months is indeed a substantial harm (Tab A), but, as pointed out above, it is not the only harm that resulted from MK1 XXXXXXXX's fraud, and I am not convinced that the applicant is entitled to relief simply on the basis that his harm may have been the most substantial. Unlike the majority, I do not place any significance on the prosecutor's decision to ask the applicant to testify at MK1 XXXXXXXX's sentencing (Tab B), since a prosecutor's concerns about proving a criminal case, as well as his or her resources to do so, are very different than the equitable and policy concerns at issue before the Board. I do not dispute the majority's view that the applicant here has suffered a harm; the paramount question, however, is whether the applicant has shown, in light of the evidence in the record, Coast Guard policy and practice, and the overarching considerations of equity, that he is entitled to the relief he seeks. I do not believe he has.

11. The majority appears to believe that Coast Guard members are entitled to a 100% fool-proof record-keeping system and a 100% fraud-proof advancement system. I do not agree. Imperfection is a hallmark of human existence and no human endeavor, however thoughtfully planned and carefully executed, will be immune from error. The Board ought not demand perfection from the Coast Guard where none is possible, but rather a reasonable, good faith effort at carrying out the entrusted duties. The record here clearly does not show perfection, but I believe it shows that the Coast Guard acted reasonably and in good faith under the applicable policy.

12. It is very unfortunate that MK1 XXXXXXXX committed his fraud, thereby injuring numerous fellow members of the Coast Guard, including the applicant. I am sympathetic to the applicant's obvious grievance at his situation and for the harm he has suffered. But I believe that the decision in BCMR Docket No. 94-89, the lack of a Coast Guard policy providing for the correction of members' advancement dates under the circumstances at issue here, and a prudential

consideration of the equities of a policy that applies to all, compel a denial of the applicant's request for relief. For the foregoing reasons, I believe his application should be denied.

Date

Lillian Cheng