

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2005-043**

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**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 January 3, 2004, upon receipt of the applicant's application and military records.

This final decision, dated September 22, 2005, is 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 asked the Board to correct his record to show that he was promoted from lieutenant commander (LCDR; O-4) to commander (CDR; O-5) on July 1, 2004, and to restore his previous signal number. The applicant was not promoted in 2004 because the CDR selection board that met in August 2003 did not select him. At that time, an approved voluntary retirement request was in his record. The Coast Guard canceled the planned retirement in October 2003 at the applicant's request. The CDR selection board that convened in August 2004 selected the applicant for promotion.

The applicant alleged that the CDR selection board did not select him in August 2003 only because he had requested retirement, and in accordance with policy, the Coast Guard Personnel Command (CGPC) revealed his approved retirement request to the selection board. He alleged that this policy is unjust as it causes the selection board to fail to select for promotion officers based on their pending retirement rather than on their performance and other personal qualifications.

The applicant stated that when he first requested retirement, he included in his letter language stating that he understood that if his request were approved, he would not be eligible to compete for promotion in August 2003. However, in response to his letter, someone at CGPC called and asked him to rewrite it because "the Coast Guard was required to provide all officers still on active duty with an equal opportunity for selection and could not exclude an officer merely because [he] had requested early retirement." Therefore, the applicant resubmitted his request for retirement without the sentence about not being eligible for promotion, and his request was approved.

The applicant stated that "the guidance for retirement letters now requires an acknowledgment that the approved retirement would be presented to the board." However, his letter requesting retirement was approved even though it contained no such acknowledgment. He alleged that "[b]ased on the phone conversation between myself and CGPC, I believed I was going before the [selection] board with an equal opportunity for selection."

The applicant alleged that although the Coast Guard made the regulatory change in Change 35 to the Personnel Manual, which was signed in March 2002, the change was not available in "the field." He alleged that his unit had not received Change 35 either electronically or in paper form when he submitted his revised retirement request in December 2002. He alleged that since neither Group xxxxx nor District xxxxx, which reviewed his letter, disapproved it based on the lack of the sentence acknowledging that the selection board would learn of his approved retirement, he believes that Change 35 "was not active at the time [he] requested retirement."

The applicant alleged that although the deliberations of selection boards are secret, it is clear that he was passed over for promotion because of his pending retirement because his military record is exemplary and neither he nor his supervisor could find any other logical reason for the failure of selection. The applicant alleged that even the assignment officer had placed him in an O-5 billet based on the expectation that he would be selected for CDR by the next board.

The applicant argued that the Coast Guard's policy of showing the selection board approved retirement letters destroys one's chances for promotion. He stated that he contacted all twenty of the officers with approved retirements competing for promotion during the subsequent selection board, and all twenty failed of selection. The applicant argued that "[i]f the boards are to provide every officer with an equal opportunity for advancement, then the practice of including the approved request is an error." He alleged that he was told that CGPC adopted the policy of showing approved retirement letters to selection boards "for the explicit purpose of reducing the incidence of officers with approved retirements being selected for promotion." He argued that although under the precepts, selection boards have the discretion to develop criteria for selecting officers to promote selection boards "must confine themselves to the best-

qualified selection criteria based on performance, professionalism, leadership, and education”—not on a candidate’s intention to retire.

The applicant also alleged that one of those twenty officers with an approved retirement request told him that he had submitted his retirement request not because he wanted to retire but because he anticipated failing of selection for a second time and wanted to leave the service voluntarily rather than involuntarily, due to failure of selection. This officer also told him that someone at CGPC had offered to remove the approved retirement request from his record before the selection board to enhance his opportunity for selection. The applicant argued that such “preferential treatment further demonstrates the influence a retirement letter has on the [selection] board and the unfair applicability of the process. ... If removal of the information is made for one, it should have been removed for all.”

The applicant argued that the new policy is also unjust because it deprives an officer of a genuine selection opportunity. He stated that under the old policy (wherein selection boards did not even consider officers with approved retirement requests), an officer who missed a selection board because of an approved retirement request and who subsequently withdrew his retirement request could be considered for promotion by the following two selection boards and would lose only one year of seniority. However, under the new policy, an officer with an approved retirement request fails of selection and so receives only one more selection opportunity if he subsequently decides to withdraw his retirement request.

The applicant stated that the Coast Guard justifies the new policy by saying that the service “needs officers selected for promotion to fill critical billets. While I would like to believe this is the case, the fact is, promotions lag well behind selection and the Coast Guard could reduce the number of officers waiting over 12 months from selection to promotion if they allowed the boards to select the best-qualified officers without influence based on retirement intention.”

### **SUMMARY OF THE APPLICANT’S MILITARY RECORD**

The applicant enlisted in the Coast Guard in 1978. He became a boatswain’s mate and advanced to first class petty officer. In May 1988, after attending Officer Candidate School, he received his commission as an ensign. He was promoted to lieutenant junior grade in November 1989; to lieutenant in November 1992; and to lieutenant commander in December 1998.

On December 1, 2002, while serving as the captain of a cutter, the applicant submitted to CGPC a request to retire on December 1, 2003.<sup>1</sup> He stated that he had “always

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<sup>1</sup> The applicant submitted a copy of this letter.

wanted to retire from a ship, and to go out as the Commanding Officer would capstone a great career." His request also stated, "I understand that if approved I am ineligible to compete in the August 2003 CDR selection board." According to both the applicant and CGPC, CGPC promptly informed the applicant that as a LCDR on active duty, the CDR selection board would consider him for promotion despite the approved retirement request. No copy of a revised retirement letter appears in the record. According to CGPC and the applicant, his request for retirement was approved on December 30, 2002.

The CDR selection board that met in August 2003 considered the applicant for promotion as an "in the zone" candidate but did not select him although his performance evaluations were consistently excellent. The precept for the selection board stated that the board members were required to "without prejudice or partiality, and having in view both the special fitness of officers and the efficiency of the Coast Guard," select the 157 best qualified officers from 191 LCDRs who were "in the zone" for promotion to CDR (having never been considered before) and 108 LCDRs who were "above the zone" (having failed once of selection and having one more chance).<sup>2</sup> The precept also directed the board members to consider Articles 5.A. and 14.A. of the Personnel Manual and the Commandant's Guidance to [Promotion Year] 2004 Officer Selection Boards in developing their criteria for selecting officers for promotion. The list of personnel records to be reviewed by the selection board included "voluntary separation orders."

In October 2003, after CGPC published the results of the August 2003 selection board, the applicant asked to have his approved December 1, 2003, retirement canceled. On October 8, 2003, CGPC canceled his retirement. Thereafter, the CDR selection board that met in August 2004 selected the applicant for promotion.

On August 27, 2004, the applicant wrote to CGPC asking for promotion as of July 1, 2004, based on the inclusion of his approved retirement in the records before the selection board in August 2003. He argued that informing the selection board of those whose retirements had been approved constituted administrative error as it caused the selection board not to select those who had proven themselves to be best qualified for promotion but who had requested retirement. On September 3, 2004, CGPC denied his request. CGPC explained the denial as follows:

Per [COMDTINST 1410.1], all voluntary separation requests are provided to [active duty] selection boards. There is no standing policy or law that prohibits promotion boards from selecting for promotion individuals with separation requests. Each board makes their own determination, and the unique criteria they set within the guidelines of law, regulations, and precepts do not constitute administrative error. Individuals in the past have

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<sup>2</sup> The precept also permitted the selection of up to 11 LCDRs who were "below the zone."

been selected for promotion [who] have pending separation requests. The exact reason for your nonselection is known only by the board membership. The only inference that can be made by your failing selection for promotion was that in the opinion of the board, you were not among those best qualified for promotion.

### **VIEWS OF THE COAST GUARD**

On April 25, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request for lack of merit. The JAG attached and adopted as part of his recommendation a memorandum on the case prepared by CGPC.

CGPC stated that the applicant submitted a request on December 1, 2002, to retire voluntarily on December 1, 2003. Because of the sentence in his letter stating that he would be ineligible to compete for promotion in August 2003, the Chief of Officer Separations contacted the applicant and told him that, "separation request notwithstanding, he would be considered for selection" to CDR in August 2003. On December 30, 2002, CGPC stated, the applicant's request for retirement on December 1, 2003, was approved and the approved requirement request was included among the personnel records shown to the selection board in accordance with COMDTINST 1410.1.

CGPC stated that in accordance with COMDTINST 1410.1, dated May 23, 2000, voluntary separation orders, such as an approved retirement request, are available to selection boards, whereas mandatory separation orders are not. Therefore, CGPC included the applicant's approved request for voluntary retirement among the records available to the selection board. CGPC further stated that because the deliberations and proceedings of a selection board are confidential and the boards establish their own criteria for selection, only the selection board members "know the exact reason for the Applicant's non-selection."

The JAG argued that the applicant "was treated in accordance with standard policy. ... Voluntary resignation requests are part of the numerous documents that are provided to the promotion board. As the Coast guard committed no error and worked no injustice, [the applicant's] request should be denied."

### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On May 19, 2005, the applicant responded to the views of the Coast Guard. He strongly objected to the JAG's recommendation and stated that the issue "is not that they (the Coast Guard) did anything wrong or illegal, but rather that the policy is flawed." The applicant argued that the "number of authorized promotions is established based on authorized strength, so many otherwise well deserving individuals will

fail to select for promotion due to the [statutory] authorized strength restriction. It is my position that placing the approved retirement requests in the folder for consideration plays to the character of the selection board by making it easier for them to select officers not to promote based on their desire to retire.” He alleged that the “inclusion of the approved retirement requests predisposes the boards to fail to select an officer for promotion.”

The applicant further argued that the policy creates injustice when officers later withdraw their requests for retirement or retire but are recalled to active duty. They have essentially missed one of their two chances for selection for promotion because the selection board has failed to select them due to the approved retirement requests in their records.

The applicant argued that all officers on active duty, whether they are retiring soon or not, should have an equal opportunity for promotion and that revealing approved retirement requests to the selection boards prevents this. He argued that allowing retiring officers to be selected for promotion by hiding this information from the selection boards “will not unduly injure the officer corps, as many officers are currently waiting well over a year from the time of selection to the time of promotion.”

#### **APPLICABLE LAW**

Under 14 U.S.C. § 251, the Secretary may convene selection boards of senior officers to select officers to recommend for promotion.<sup>3</sup> Selection board members must swear to perform their duties “without prejudice or partiality, and having in view both the special fitness of officers and the efficiency of the Coast Guard.” *Id.* at § 254. The Secretary determines the number of officers to be promoted by adding the number of vacancies existing at that grade in the officer corps to the number of new vacancies estimated to arise in that grade during the following year and subtracting the number of officers who have already been selected but not yet promoted to that grade. § 255.

Before convening a selection board, the Secretary establishes a “promotion zone” of officers who have not yet been considered for promotion. §§ 256, 257. The number of candidates “in the zone” is based upon the needs of the service, the estimated number of future vacancies, and “the extent to which current terms of service in that grade conform to a desirable career promotion pattern.” § 256. “Except when his name is on a list of selectees, each officer who becomes eligible for consideration for promotion to the next higher grade remains eligible so long as he (1) continues on active duty; and (2) is not promoted to that grade.” § 257(d).

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<sup>3</sup> The Secretary has delegated his duties under 14 U.S.C. §§ 251 *et seq.* to the Commandant.

The Secretary must supply the selection board with the names and records of all eligible officers and the number of officers to be selected. § 258. Any officer recommended for promotion must be deemed "best qualified" for promotion by at least two-thirds of the members of a board of six or more members. § 259. Except to issue a report listing the selectees, "the proceedings of a selection board shall not be disclosed to any person not a member of the board." § 261(d). After the President approves the selectees, they are "promoted by appointment in the next higher grade to fill vacancies in the authorized active duty strength of the grade as determined under section 42 of this title after officers on any previous list of selectees for that grade have been promoted." § 271.

Under 14 U.S.C. § 285, any lieutenant commander who fails to be selected for promotion a second time shall be retired if he has at least twenty years of service or, if not, retained on active duty and retired on the last day of the month in which he completes twenty years of active service.

Under Article 14.A.3.a. of the Personnel Manual, each selection board must develop its own standards and promotion criteria to select the best-qualified candidates. Article 14.A.1.b. states that the "criteria published here are furnished to boards solely to guide and do not limit the scope of authority vested in them." Article 14.A.3.b. of the Personnel Manual provides the following "basic criteria" a selection board should use, in addition to the more specific criteria they adopt: performance evaluations, professionalism, leadership, and education. Article 14.A.6.b. states that in comparing candidates for promotion, selection boards compare officers' "past performance, their capacity to undertake successfully tasks of progressively greater difficulty involving broader responsibilities, their capability and inclination to study for further professional growth, and their potential to perform creditably those duties to which these officers might be assigned in the next higher grade."

COMDTINST 1410.1, concerning "Coast Guard Active Duty Officer Promotion Boards," was signed on May 23, 2000, and includes language almost identical to that in the Personnel Manual. It also lists the personnel records to be reviewed by board members, including "voluntary separation orders."

Article 5.A.8.a.1. of the Personnel Manual provides that "[e]xcept in extraordinary circumstances such as wartime recall or urgent Service need, retired officers recalled to active duty normally are not eligible for promotion to the next higher grade, an exclusion the recall order will note." Article 5.A.8.a.3. states that a retired officer "who at retirement had once or twice failed selection for promotion to the next higher grade is not eligible for promotion if recalled to active duty."

Article 12.C.9. of the Personnel Manual was revised in March 2002 pursuant to Change 35. Article 12.C.9.a.1. now provides that prior to requesting a voluntary retire-

ment from CGPC, which may grant or deny such requests based on the needs of the Service, an officer must meet the following requirements:

- a. Must complete two years time in grade by the date of retirement. (A scheduled promotion will not be effected if an officer has an approved voluntary retirement on file at the time their name would otherwise appear on the respective Officer Promotion Authorization Listing (OPAL) unless the officer requests to have the letter pulled.).
- b. Will complete at least one year at his or her duty station INCONUS, ...
- c. Submit a request between one year and six months before the desired retirement date using the format in paragraph 9 below. ...

Article 12.C.9.a.9, which was also added to the Personnel Manual by Change 35, provides that the letter by which an officer requests voluntary retirement should include the following sentences:

1. I request retirement on the first day of [month/year], or as soon thereafter as possible.
2. I understand if this request is approved, I will be ineligible for promotion if already selected for the next higher grade. I further understand that a copy of my voluntary retirement orders will be included in my permanent record and will be visible to any future selection board. ...
4. I understand if I request to cancel this retirement, Commander (CGPC-opm) will consider cancellation solely on the needs of the Service.

Article 12.C.9.c. of the Personnel Manual states that the “decision to submit a retirement letter is a serious one because the projected separation triggers transfer and promotion actions that, if reversed, could cause hardship to other officers. Therefore, Commander (CGPC-opm) may approve a request to cancel or delay a scheduled retirement based on Service needs or a member’s hardship situation similar or equal to those listed in Article 12.D.3. The Service does not consider a change in civilian employment plans a hardship.”

## 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 10 U.S.C. § 1552. The application was timely.

2. The applicant argued that his date of rank should be backdated by one year to July 1, 2004, which, he alleged, would have been his date of rank had the CDR selection board that met in August 2003 not seen the voluntary retirement orders that were in his record at the time. The applicant alleged that CGPC revealed his and other officers’ approved retirement requests to the selection board pursuant to an unjust pol-



icy. The applicant argued that under this policy, selection boards rarely or never select officers with voluntary retirement orders because they improperly and unjustly use the approved retirements as a reason not to find the officer among the best qualified for promotion.

3. “Injustice” as used in 10 U.S.C. § 1552(a) 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); Decision of the Deputy General Counsel, BCMR Docket No. 2001-043. “The BCMR has the authority to decide on a case-by-case basis if the Coast Guard has committed an error or injustice.” Decision of the Deputy General Counsel, BCMR Docket No. 2002-040.

4. Under 14 U.S.C. § 258, selection boards are entitled to see the records of the candidates for promotion. Nothing in the applicable statutes (14 U.S.C. §§ 251 *et seq.*) prohibits the Coast Guard from revealing voluntary retirement orders to selection boards. The Commandant’s instruction for promotion boards, COMDTINST 1410.1, which was signed on May 23, 2000, lists “voluntary separation orders” among those performance and personnel records to be shown to selection boards.

5. Under 14 U.S.C. § 254, Congress requires selection board members to select officers for promotion “without prejudice or partiality, and having in view both the special fitness of officers and the efficiency of the Coast Guard.” Under 14 U.S.C. § 256, a “promotion zone” of candidates for promotion is based upon the needs of the service, the estimated number of future vacancies, and “the extent to which current terms of service in that grade conform to a desirable career promotion pattern.” These statutes clearly contemplate the efficient functioning and development of the officer corps and the filling of extant and expected vacancies to be fundamental criteria in the selection process. Although the applicant argued that hiding voluntary retirement orders from selection boards and thereby increasing the number of otherwise best-qualified, retiring officers among the selectees would increase efficiency by expediting promotions, it is not for this Board to decide what is most efficient for the Coast Guard. Even assuming that, as the applicant alleged but did not prove, selection boards habitually fail to select officers with voluntary retirement orders and that the Coast Guard intentionally invites this result by revealing such orders to the selection boards, the Board finds nothing in these alleged actions and attitudes that is contrary to the statutes.<sup>4</sup>

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<sup>4</sup> Although the Coast Guard’s logic of hiding mandatory retirement orders (such as age-related retirement orders) from selection boards while revealing voluntary retirement orders is not stated in the record or COMDTINST 1410.1, the difference is likely mandated by the Coast Guard’s determination of what promotes the efficient functioning and development of the officer corps and therefore outside the Board’s purview. The applicant has neither argued nor proven that the difference in treatment of officers with voluntary and involuntary retirement orders “shocks the sense of justice.” *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976).

6. Article 14.A.3.b. of the Personnel Manual provides that the “basic criteria” to be used by a selection board are performance evaluations, professionalism, leadership, and education. The applicant argued that the selection boards’ alleged adoption of another criterion—not having retirement orders—is improper as it does not fall within these four categories. He also argued that selecting the “best-qualified” candidates by definition prohibits the consideration of non-performance-related information such as an officer’s pending retirement. However, in Article 14.A.3.a., the Commandant authorizes each selection board to develop its own standards and promotion criteria by which to determine whom to recommend for promotion. Nothing in Article 14.A.2.a. requires that a selection board’s adopted criteria fall within the four basic criteria provided in Article 14.A.3.b. Moreover, Article 14.A.1.b. expressly states that the “criteria published here are furnished to boards solely to guide and do not limit the scope of authority vested in them.” In addition, the Board notes that Article 14.A.6.b. states that selection boards should compare officers’ “past performance, their capacity to undertake successfully tasks of progressively greater difficulty involving broader responsibilities, their capability and inclination to study for further professional growth, and their potential to perform creditably those duties to which these officers might be assigned in the next higher grade.” A selection board member could reasonably conclude that a retiring officer has little if any “capacity to undertake successfully tasks of progressively greater difficulty involving broader responsibilities” in the Coast Guard, “capability and inclination to study for further professional growth” in the Coast Guard, or “potential to perform creditably those duties to which these officers might be assigned in the next higher grade,” since the officer has voluntary retirement orders that will presumably prohibit him from doing any of those things.

7. The applicant argued that the policy is unjust because officers who, like him, change their minds and do not retire and officers who are recalled to active duty after retiring may have a failure of selection in their records due entirely to their prior voluntary retirement request and, therefore, less chance of promotion since two failures of selection result in mandatory retirement under 14 U.S.C. § 285. Pursuant to Article 12.C.9.c. of the Personnel Manual and based upon the needs of the Service, CGPC allows some officers to change their minds and cancels their scheduled retirements despite the negative impact such cancellations may have on more junior officers awaiting promotion. The Board finds that the fact that such officers may have a failure of selection in their records because a prior selection board saw their voluntary retirement orders does not constitute “treatment by the military authorities that shocks the sense of justice.” *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976). In addition, the Board notes that pursuant to Article 5.A.8.a.1. of the Personnel Manual, “[e]xcept in extraordinary circumstances such as wartime recall or urgent Service need, retired officers recalled to active duty normally are not eligible for promotion to the next higher grade, an exclusion the recall order will note.” The fact that a failure of selection caused by retirement orders makes a recalled officer ineligible for promotion under Article 5.A.8.a.3. does not persuade the Board that the

Coast Guard's policy of showing approved voluntary retirement orders to selection boards is unjust.

8. The applicant alleged that Change 35 to the Personnel Manual should not have applied to him in August 2003 because it was "not active" when he submitted his request for retirement in December 2002. As evidence, he cited the (alleged) fact that his revised retirement request was processed and approved without the language required in Article 12.C.9.a.9. about "understand[ing] that a copy of my voluntary retirement orders will be included in my permanent record and will be visible to any future selection board." The applicant has not provided a copy of his revised retirement request and no copy appears in his record.<sup>5</sup> However, the Personnel Manual indicates that Change 35 was added to the Personnel Manual in March 2002, and the Commandant's instruction for promotion boards (COMDTINST 1410.1), which was signed on May 23, 2000, includes "voluntary separation orders" among the records available to selection boards. Assuming that, as the applicant alleged, certain personnel officers overlooked a lack of required language in his revised retirement request, their failures do not prove that the Coast Guard's policy was in not effect when the applicant submitted his retirement request in December 2002.

9. The applicant argued that he had no notice of the Coast Guard's policy of showing voluntary retirement orders to selection boards. Article 12.C.9.a.9. requires officers to acknowledge that they understand the policy in their retirement requests. However, assuming *arguendo* that the applicant's revised retirement request lacked the language required in Article 12.C.9.a.9. and that the applicant was unaware of the policy, the Board finds that the application of the policy to him in August 2003 was neither error nor "treatment by the military authorities that shocks the sense of justice." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976). As an officer of the Coast Guard, the applicant was charged with knowing the provisions of the Personnel Manual and of COMDTINST 1410.1. Furthermore, when advised by CGPC in December 2002 that his first retirement request did not comply with the rules, the applicant may be deemed to have been put on notice that there were new rules in effect.

10. The applicant alleged that one officer who failed of selection in 2004 told him that, before the selection board met, someone at CGPC offered to remove his voluntary retirement orders from his record before it was considered by a selection board. The applicant has not proved this allegation, and absent evidence to the contrary, the Board presumes that Coast Guard officials have carried out their duties "correctly, lawfully, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979); 33 C.F.R. § 52.24(b). Moreover, under Article 12.C.9.c. of the Personnel Manual, CGPC may properly cancel an officer's voluntary

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<sup>5</sup> The BCMR staff asked the applicant for a copy of this letter by telephone message on September 13, 2005, and in a telephone call on September 15, 2005. Although the applicant stated that he had a copy of the letter and would promptly fax it to the BCMR, he did not do so and did not contact the BCMR.

retirement and remove retirement orders from his record upon his request, just as CGPC did for the applicant in October 2003. Therefore, if someone at CGPC did offer to remove retirement orders from a candidate's record in 2004, the offer was presumably made in accordance with this regulation.

11. The applicant has not proved by a preponderance of the evidence that either his failure to be selected for promotion in August 2003 or his failure to be promoted to CDR on July 1, 2004, was erroneous or unjust.

12. Accordingly, the applicant's request should be denied.

**ORDER**

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

