

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-116

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**DECISION OF THE ACTING 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**

The recommended final decision of the Board for Correction of Military Records (the Board) accurately summarizes the applicant's request and allegations, the views of the Coast Guard, the applicant's response to the same, and the applicable regulations. I concur with the findings and conclusions of the Board except as noted below:

FINDINGS AND CONCLUSIONS

1. From the documentation in the file it is apparent that the applicant was eligible for the service wide examination (SWE) in May, 2006, and was promoted before the end of October, 2006. Therefore, the relief in issue is the backdating of a promotion, with its accompanying pay and allowances, for a period between 6 months and a year.
2. The Coast Guard has not expressly admitted that the applicant would have been advanced earlier had his name been on the Supplemental Advancement List (List). While an implied argument for the same may be made, for reasons that will be apparent, this argument need not be addressed in more detail.
3. The applicant's command readily concedes "clerical error" and/or "mistake"; however, the command alone does not speak for the Coast Guard. The Board, relying heavily on the command's submissions, characterizes the delay in promotion as an "injustice" that "shocks their sense of justice".
4. The applicant has proved by a preponderance of the evidence, a perceived mistake on the part of his command, but not an "error" on the part of the Coast Guard, as such term is defined in Reale v. United States, 208 Ct. Cl. 1010, 1011 (1976).
5. BCMR Docket number 2002-040, is distinguishable based on its facts and the conduct of the Coast Guard underlying the injustice.

6. The applicant's command has characterized the delay as attributable to clerical error. However, it could, as justifiably, be characterized in terms of competing mission requirements. Both the applicant and the command describe a significant period of the time in question as being devoted to machinery and overhauls involving long and irregular hours.
7. Except when otherwise limited, it is within the discretion of a Commanding Officer to determine priorities for his or her command, and to balance the importance of operational and administrative needs, considering their respective immediacy.
8. The current promotion system based on the List is not without checks. There is a provision within USCG regulations for waiver of eligibility and deadlines for advancement. The applicant's command candidly admitted its perceived mistakes and applied for a waiver on behalf of the applicant. This request was denied.
9. The USCG regulations specifically contemplated administrative delay, placing the burden to avoid the same on the applicant and his command. The regulations are written to promote appropriate sequencing, fairness, and uniformity. Deviations from policy have the potential to create disruptions.
10. That the applicant was not able to obtain an early promotion under the facts of this petition, and instead, was only able to receive a promotion through the SWE within a year does not "shock my sense of justice" and I do not find it an "injustice".

ORDER

For the reasons above, I disapprove the recommended final decision of the Board and deny the relief recommended in the order therein and deny the relief requested by the applicant.

Date: 5/27/07

/s/ _____
Gus P. Coldebella
Acting General Counsel
U.S. Department of Homeland Security

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RECOMMENDED FINAL DECISION

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This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on May 19, 2006, upon receipt of the completed application for correction.

This recommended final decision, dated March 30, 2007, 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 advanced to second class petty officer (██████ E-5) on November 1, 2005, and to award him back pay and allowances (see Tab A, the DD 149).

The applicant alleged that as a result of an administrative mistake by his command, his name was not promptly placed on the ██████ Supplemental Advancement List and so he was not advanced off that list before it expired. The applicant alleged that on July 30, 2005, he submitted a chit to have his name put on the list, but his command forgot to do so and did not process his request until November 8, 2005. Because members were advanced off the supplemental list in the order in which their names were placed on the list, his command's three-month delay caused his name to appear very low on the list and he was not advanced before the list expired. The applicant alleged that if his command had promptly processed his request, he would have been advanced on November 1, 2005.

In support of his allegations, the applicant submitted three letters. In the first (Tab B), dated November 22, 2005, Captain T, who was the applicant's commanding officer and the captain of an ice breaker, made the following request to the Personnel Service Center (PSC):

1. I request that you revise the date [the applicant] was placed on the ██████ supplemental list from 08 NOV 05 to 08 AUG 05.

2. [The applicant] originally submitted his supplemental request chit on 30 JUL 05. Unfortunately, this command failed to properly process the request. Factoring in appropriate processing time, [his] name should have been added to the [REDACTED] supplemental list approximately 08 AUG 05. Due to this command's failure to properly process [the applicant's] supplemental request chit, he was not placed on the [REDACTED] supplemental list until 08 NOV 05.
3. If you do not revise the date he was placed on the [REDACTED] supplemental list it is highly likely he will not advance off the supplemental list. That is a high price for a member to pay for a clerical error made by his command.
4. In keeping with fundamental fairness, I request that you correct this mistake. ...

The second letter (Tab C) is the PSC's letter denying Captain T's request:

1. I am writing in response to your memorandum of 22 Nov 2005. I appreciate your concern for the impact of the delay on [the applicant], but we do not grant the type of exception you seek. To backdate his placement on the supplemental list, we would have to move [him] ahead of 38 other sailors and that would not be fair to those members when we have to assume they and their units did everything right.
2. I do not doubt that other members on the list could also claim their message would have been earlier had everything worked perfectly for them. Unit processing time and unit errors impact many DTGs [date-time-group stamp] and it would be unfair to waive the rules for some and not for others. Since the DTG is the only tool we have for sequencing the members on the list, we have to hold a hard line to be fair to everyone.

The third letter (Tab D), dated March 12, 2006, is signed by CWO S, the Main Propulsion Assistant aboard the ice breaker, who stated the following:

I request favorable consideration of [the applicant's] application to change his date of advancement and compensation for lost pay and benefits.

[The applicant] submitted a request to be placed on the [REDACTED] Supplemental Advancement List on 30 JUL 05. His request was not processed in due time and subsequently, severely delayed his advancement. [He] should have been added to the supplemental list by 08 AUG 05.

I take full responsibility for the delay in processing [the applicant's] request to be placed on the [REDACTED] supplemental list. His request was submitted during a time of elevated work responsibilities for all personnel onboard the vessel. Additionally, his efforts to pursue following up on the request were hindered by the transition period of all of his direct superiors. The request was in my possession and I personally failed to ensure the request chit was handled properly.

VIEWS OF THE COAST GUARD

On September 27, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request (Tab E). In doing so, he adopted the findings and analysis provided in a memorandum on the case (Tab F) by the Coast Guard Personnel Command (CGPC).

CGPC stated that the applicant submitted his request chit for placement on the [REDACTED] Supplemental Advancement List on July 30, 2005, but his command did not send the required message to the PSC until November 8, 2005. CGPC noted that ALCOAST 359/05 (Tab G), the bul-

letin announcing the supplemental list and procedures for getting on the list, was issued on July 7, 2005, and stated the following:

The member's standing on the supplemental advancement list is based solely on the date-time-group (DTG) of the notification MSG [message]. Commands may send a MSG as soon as the MBR [member] has met all advancement eligibility requirements and should contact PSC (ADV) if acknowledgement MSG is not received within 5 working days. PSC (ADV) will use only DTG reflecting the actual time of release of the MSG. Backdating the DTG is not permitted.

CGPC also noted that under Article 5.C.4.a. of the Personnel Manual (Tab H), it is a member's responsibility to ensure his own eligibility to take the servicewide examination for advancement and that, under Article 5.C.4.g., only PSC has the authority to waive eligibility and deadlines for advancement and that "failure by member, supervisor, or supporting command to fulfill their responsibilities is not justification for a waiver and may result in a member not qualifying" CGPC stated that these regulations apply to supplemental advancements lists because such lists are created in lieu of participation in servicewide examinations.

CGPC stated that the "dynamics of the enlisted advancement process require appropriate sequencing mechanisms for advancement list placement both for the Service Wide Examination and Supplemental Advancement lists." The policy applied in ALCOAST 359/05 (Tab G) of using only DTGs to sequence members on the supplemental advancement list is intended to ensure that names are sequenced on the list by a standard procedure. CGPC stated the applicant's command's request for a waiver of that policy was "appropriately denied ... since the strict adherence to the date-time-group criteria is essential to the overall fairness of the process." CGPC further argued the following:

If the Coast Guard were to deviate from policy in this case, the 38 personnel who would be displaced on list would be unfairly disadvantaged. Additionally, it is very likely that any of those displaced personnel could claim that their message submission was delayed by their command by matters of days, weeks or even months as in the case of this Applicant. Therefore, any digression from policy would create significant disruptions within the advancement system and undermine fairness. The supplemental advancement lists are published on the CG Personnel Command Website and [ALCOAST 359/05] provides a mechanism for units and members to ensure that their Supplemental Advancement List placement was properly executed.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 3, 2006, the Chair sent a copy of the Coast Guard's advisory opinion to the applicant and invited him to respond within 30 days. The applicant requested and was granted several extensions and responded on January 18, 2007 (Tab I).

The applicant stated that on July 30, 2005, he gave his request chit to his supervisor, [REDACTED] M, who signed and dated it and promptly forwarded it to the division chief, [REDACTED] M, who signed and dated it July 30, 2005. One week later, the applicant alleged, he checked to see where he was on the supplemental advancement list but did not see his name. He immediately asked his supervisor, [REDACTED] M, why his name was not on the list and [REDACTED] M said he would look into it. Three or four days later, the applicant again asked [REDACTED] M about the status of his request, and [REDACTED] M said he was looking into it and had not heard back from the command. "After numerous

inquiries over the next two weeks,” the applicant stated, “I received word from [REDACTED] M that my paperwork was with the command, and I should see my name on the advancement list shortly.”

The applicant stated that during the next several weeks, the ice breaker was in dry dock and his department was very busy working long and irregular hours to complete extensive maintenance. When the maintenance was complete, he took 30 days of leave and returned to duty on October 24, 2005. The applicant stated that “[u]pon returning from leave I was fully expecting to see my name on the advancement list,” but it was not there. Upon inquiry, his supervisor discovered that the applicant’s request had remained on the desk of the Main Propulsion Assistant, CWO S, for three months. Thereafter, it was quickly forwarded up the chain of command until signed by the Executive Officer of the cutter on October 31, 2005. However, it then experienced further undue delay and was not received by the ship’s office until November 8, 2005.

The applicant stated that following this debacle, the Engineering Officer held a meeting with the Command Master Chief, [REDACTED] M, [REDACTED] M, CWO S, and others. During the meeting, the applicant “was told several times that it was completely my fault for not being more aggressive in following up with my advancement.” He was told that he should have jumped the chain of command and sought a Request and Complaint Mast with the Executive Officer. However, he had always been told before that issues should be handled at the lowest possible level, and he “honestly believed in my command to handle my paperwork properly, and did not expect to have to keep track of their progress.” When he later discovered that no one had informed Captain T of what had occurred, he requested a meeting with Captain T, who was stunned and tried to help him get his DTG on the supplemental advancement list backdated to no avail.

The applicant alleged that from September 2005 to August 2006, about 226 MK3s were advanced to [REDACTED] off the supplemental advancement list. He stated that he is not asking to jump ahead of anyone on the list but merely to be advanced with them. He stated that the undue delay in his placement on the list has not only delayed his advancement but cost him “valuable points for time in grade for future service wide examinations.” He noted that he has been awarded an Achievement Medal for his work aboard the ice breaker.

In support of his allegations, the applicant submitted a statement (Tab J) signed by his supervisor, [REDACTED] M, who stated that the applicant had properly used the chain of command pursuant to his request chit and had asked [REDACTED] M on several occasions about the status of his chit. [REDACTED] M stated that on each occasion, he verified with his own supervisor, [REDACTED] M, that the chit was being processed but later learned that CWO S had never forwarded it.

APPLICABLE REGULATIONS

Under Article 5.C.3.b. of the Personnel Manual (Tab H), enlisted members in paygrade E-4 normally advance to E-5 when there is a vacancy in their rating in paygrade E-5 and they are at the top of an SWE advancement list. The list is compiled after the members take a servicewide examination (SWE). Their placement on the list depends upon how many points they have out of a total of 200 possible points. They can earn up to 80 points on the SWE; up to 50 for their performance marks on their most recent evaluation; up to 30 for sea duty; up to 20 for time in service; up to 10 for time in paygrade; and up to 10 for medals and awards received.

Under Article 5.C.3.d. (Tab H), however, “[p]ersonnel may be advanced to E-5 through E-9 without participation in SWE competition by special authority of the Commandant.” ALCOAST 359/05 (Tab G), issued on July 7, 2005, states the following:

1. This ALCOAST announces early advancement authorization off the May 2005 SWE Advancement Eligibility List and waivers of the NOV 2005 SWE. All concerned are advised to carefully review this message since it contains several new requirements for placement on a supplemental advancement list. ...

3. The BM1, GM2, IT2, [REDACTED] and MST2 Supplemental Advancement Lists will remain in effect until advancements are authorized from the NOV 2005 SWE Advancement Eligibility List. Personnel may continue to be placed on these supplemental lists using the procedures outlined in this ALCOAST until 31 DEC 2005. Since placement on a supplemental list does not guarantee advancement, all eligible personnel desiring to advance to BM1, GM2, IT2, [REDACTED] and MST2 should take the NOV 2005 SWE. Once advancements have been authorized from the NOV 2005 SWE Advancement Eligibility List, the supplemental lists for these ratings will be terminated. ... [Specification of enlisted professional qualifications and correspondence courses required for advancement, etc., omitted.]

9. Effective immediately through ... 31 DEC 2005 for BM1, GM2, [REDACTED] and MST2, a commanding officer or OINC may submit requests recommending eligible mbrs for placement on the supplemental advancement list when the mbr meets all applicable requirements identified in Art. 5.C.4.b.1. of [the Personnel Manual]. The mbrs standing on the supplemental advancement list is based solely on the date-time-group (DTG) of the notification msg. Commands may send a msg as soon as the mbr has met all advancement eligibility requirements and should contact PSC(adv) if acknowledgement msg is not received within 5 working days. PSC(adv) will use only DTG reflecting the actual time of release of the msg. Backdating the DTG is not permitted. Upon receipt of a notification msg, PSC(adv) will place the mbrs name in the next position on the supplemental advancement list for that rating providing all prerequisites have been met. ...

Article 5.C.4.a. of the Personnel Manual (Tab H) states 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.”

Article 5.C.4.e. (Tab H) states that “Coast Guard commanding officers are responsible for execution of the advancement program. Failure to properly discharge this responsibility reflects adversely on command performance. Commanding officers are responsible for the timely evaluation of assigned personnel, submitting recommendations, and coordinating with examining boards as necessary to ensure that every eligible and recommended candidate for advancement has an opportunity to compete.”

Article 5.C.4.g. (Tab H) states that the “PSC(adv) is the single point of contact for all request for waivers of advancement requirements and deadlines. The SWE cycle process requires all responsible parties to do their part to ensure success. Failure by a member, supervisor or supporting command to fulfill their responsibilities is not justification for a waiver and may result in the member not qualifying to test. Waivers should be requested only if unusual circumstances, last minute operational schedule changes, etc., result in the member being ineligible through no fault of the member. Prior to submitting a waiver, the command must ensure that the member,

unit and/or PERSRU did everything that can be reasonably expected to ensure eligibility prior to the deadline for eligibility.”

FINDINGS AND CONCLUSIONS (Analysis)

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 concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. Captain T, the applicant's commanding officer, has admitted (Tab B) that the applicant originally submitted his request for placement on the supplemental advancement list on July 30, 2005. The applicant and his supervisor, [REDACTED] M, stated that after submitting his chit, he checked the list, saw that his name did not appear on it, and inquired into the status of his request several times in August 2005 (Tabs I & J). His supervisor responded to his inquiries by saying that the “paperwork was with the command, and I should see my name on the advancement list shortly.” (Tab I) Thereafter, the applicant admits, he did not check on the processing of his request until October 26, 2005, because he was busy with work and went on leave for 30 days. The Captain T and CWO S have admitted that from late July or early August until late October 2005, the applicant's request remained unprocessed on CWO S's desk (Tabs B & D). Therefore, it appears that because of CWO S's error, the command's message requesting placement of the applicant's name on the 2005 [REDACTED] Supplemental Advancement List was delayed by approximately three months. Captain T has stated that he believes the DTG of the command's message should have been August 8 rather than November 8, 2005. As a result of this delay, the applicant's name appeared very low on the list, and he did not advance before the list expired. The Coast Guard has admitted that the applicant would have been advanced had his command sent the message on August 8, 2005 (Tab F).

3. The applicant has proved by a preponderance of the evidence that he was not advanced off the 2005 [REDACTED] Supplemental Advancement List as a result of an administrative error by the Coast Guard. Specifically, CWO S, who was at least three steps up in the applicant's chain of command, received the applicant's chit in late July or early August 2005 and did not forward it until the last week of October 2005.

4. The Coast Guard argued (Tab F) that, despite his command's undue delay, the applicant's request should not be granted because, in the absence of SWE scoring, the DTG is the only administrable means of ranking members on a supplemental advancement list and because, under Article 5.C.4.a. of the Personnel Manual (Tab H), members are responsible for ensuring their own eligibility for advancement even though the administrative efficiency of their commands may strongly affect their eligibility. The Coast Guard noted that many other MK3s' chits may also have been delayed days, weeks, or months by their own chains of command.

5. The fact that the DTG may be the most easily administrable means of ranking members on a supplemental advancement list, however, does not mean that clear injustices should not be corrected by this Board when a member applies for relief. Nor does the fact that

Article 5.C.4.g. of the Personnel Manual (Tab H) grants the PSC the authority to waive advancement eligibility criteria undermine this Board's authority to correct errors and remove injustices under 10 U.S.C. § 1552. In BCMR Docket No. 2002-040 (Tab K), the delegate of the Secretary held that "[t]he Coast Guard has committed an injustice against one of its members when the Coast Guard's action, or lack thereof, shocks one's sense of justice. *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976). The BCMR has the authority to decide on a case-by-case basis if the Coast Guard has committed an error or injustice." Under the circumstances of this case, the Board is persuaded that the command's undue, three-month delay in processing the applicant's chit was unreasonable and greatly unfair to the applicant. The applicant asked his supervisor about the status of his chit several times in August 2005 (Tabs I & J). Although he did not jump the chain of command, as his superiors later suggested he should have done, the Board believes that in repeatedly asking his supervisor about the status of his request chit in August 2005, the applicant exercised due diligence as an E-4 in following up on his chit. His supervisor apparently assured him that the chit was being processed and might well have been annoyed had the applicant persisted in questioning him. The applicant admitted that he did not pursue the matter in September or early October, when he was on extended leave, but according to CWO S (Tab D), the applicant's ability to continue following up on his request during those weeks would have been "hindered by the transition period of all of his direct superiors."

6. Captain T, the applicant's commanding officer, suggested that, but for CWO S's delay, the command might have sent the message to the PSC as early as August 8, instead of November 8, 2005. However, the Coast Guard has admitted only that, but for the long delay, the applicant would have been advanced off the 2005 [REDACTED] Supplemental Advancement List.

7. Accordingly, relief should be granted because, under the particular circumstances of this case, the applicant's failure to be advanced from the 2005 [REDACTED] Supplemental Advancement List shocks the Board's sense of justice. *See Reale*, at 1011 (Tab L). The Board finds that the most appropriate relief would be to correct the applicant's record to show that he was advanced to [REDACTED] on the same day that the last person to be advanced off the 2005 [REDACTED] Supplemental Advancement List before it expired was advanced to [REDACTED]

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of [REDACTED] XXXXXXXXXXXXXXXXXXXXXXXX, USCG, for correction of his military record is granted as follows:

His record shall be corrected to show that he was advanced to [REDACTED] E-5 on the same date that the last person to be advanced off the 2005 [REDACTED] Supplemental Advancement List was advanced to [REDACTED]. The Coast Guard shall pay him all back pay and allowances he may be due as a result of this correction.

