

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2007-208**

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**FINAL DECISION**

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on September 13, 2007, upon receipt of the applicant's completed application, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 24, 2008, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST**

The applicant, a senior chief xxxxxxxx (XXCS/E-8) in the Coast Guard Reserve, asked the Board to correct her record by advancing her to master chief xxxxxxxx (XXCM/E-9) as of June 1, 1995, or at the latest, December 1, 2002, and to order the Coast Guard to pay her back pay and allowances owed as a result of that advancement, with interest. The applicant acknowledged that she knew of these errors in 1995 and 2002 but argued that it is in the interest of justice for the Board to waive the statute of limitations because she has been investigating the matter for the past eight years by contacting appropriate offices and has yet to receive a satisfactory answer explaining the Coast Guard's failure to advance her.

The applicant alleged that, following the October 1994 Reserve servicewide examination (RSWE), her name was in second place on the list for advancement to XXCM. The cutoff for guaranteed advancement was zero, indicating that no advancements were expected to occur off the list. Nevertheless, one XXCM retired in March 1995, and the XXCS who was first on the list was advanced to fill the XXCM billet on the Reserve Personnel Allowance List (RPAL). However, when another XXCM retired in May 1995, the applicant was not advanced to XXCM; nor was anyone else. When she contacted her District Personnel Division on July 19, 1995, to ask about advancement, she was advised that there was no empty XXCM billet on the RPAL, and subsequent inquiries about the status of the billet of the second XXCM to retire in 1995 have gone unanswered. However, she noted, candidates for master chief boatswain's mate (BMCM), master chief damage controlman (DCCM), and master chief electronics technician (ETCM) were advanced to master chief in 1995 even though their names were below the "cutoffs" for guaran-

teed advancement on their ratings' advancement lists. She noted that the DCCS and the ETCS were advanced to master chief even though the cutoffs on their advancement lists were zero. She asked where their new billets came from, and why was she not advanced when she was second on the Reserve XXCM advancement list and two Reserve YNCMs retired in 1995.

The applicant stated that she was not advanced off the 1994 advancement list before it expired, and she continued to compete for advancement from 1995 through 2000 by taking the RSWE. She made no allegations about her lack of advancement pursuant to those RSWEs except to note that very few members were advanced to XXCM but that some were advanced from below the cutoff.

Following the October 2001 RSWE, the applicant stated, her name was in third place on the XXCM advancement list and the cutoff was placed so that only the first person on the list was guaranteed advancement. On February 1, 2002, the first person on the list (XXCM 8 (see the chart on page 3 below)) was advanced to XXCM, and on April 1, 2002, the second person on the advancement list was advanced (XXCM 9). Therefore, since the applicant had been third on the advancement list and had risen to the top because of the advancement of XXCM 9, on July 23, 2002, she called the Reserve Force Master Chief at the Human Resources Services and Information Center (HRSIC) to ask about whether she would be advanced prior to the expiration of the advancement list or should seek a waiver so that she could take the RSWE again in October 2002.<sup>1</sup> He told her that the XXCM advancement on April 1, 2002, had been an administrative error and that even adjusting for that error there was still one too many YNCMs than there should have been given the number of XXCM billets. The Reserve Force Master Chief stated that a mistake had also been made with a PACM (public affairs) advancement but that the erroneous advancements were not going to be withdrawn despite the mistakes.

The applicant also alleged that another "adjustment should have occurred," but apparently did not, when XXCM 3 attained 30 years of service on June 13, 2002. Because she was not advanced, the applicant prepared a request for waiver to be able to take the RSWE again in October 2002 and forwarded it through her chain of command. In addition, her command sent the Reserve Personnel Management (RPM) Division at the Coast Guard Personnel Command (CGPC) an email asking whether there was a projected XXCM vacancy and whether the applicant would be advanced. A chief warrant officer (CWO S) at RPM advised her command that there was "no RPAL vacancy for XXCM. The attrition point that will create an RPAL vacancy for [the applicant] is for HRSIC to receive a XXCM retirement request." In response, the command asked how close XXCM 5 was to attaining 30 years of service. The applicant submitted copies of these emails and alleged that CWO S never responded to her command's question about when XXCM 5 would attain 30 years of service.

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<sup>1</sup> Under Article 7.C.12.b. of the Reserve Policy Manual (RPM), candidates for advancement to master chief petty officer (E-9) "must have at least two years of pay status eligibility remaining as computed from 1 January of the year following the October Service Wide Exam, to be eligible for advancement. Individuals scheduled for discharge, due to reach their 30 year pay base date (PBD) anniversary, or reaching maximum age for mandatory retirement during the two year period following the 1 January date are ineligible to participate." Members who are prohibited from competing for advancement under these rules may request a waiver to participate in the RSWE.

The applicant alleged that her request for a waiver of the rules so that she could take the RSWE in October 2002 was denied. She submitted an email from her Executive Officer stating that “[a]lthough ALCOAST 266/02 temporarily suspended (until 30Sep03) the waiver procedures for SELRES personnel who attained 30 yrs of service, COMDT (CGPC-rpm) is holding a hard line that members with over 28 yrs remain ineligible for RSWE competition. [T]hey’re not approving requests or appeals. In discussing this issue, it is quite clear that [RPM] assessed whether to amend eligibility requirements, but ultimately made the decision not to. If you have any outstanding favors owed, now may be the time to call them in. [I]t doesn’t look like I can take it any further.” Therefore, she and her husband, who is a retired captain, contacted various high-ranking officers about RPM’s refusal to grant any waivers, but their efforts were to no avail.

The applicant argued that XXCM 5’s attainment of 30 years of service on November 29, 2002, should have created a XXCM vacancy and resulted in another advancement—her own. The advancement list resulting from the October 2001 RSWE did not expire until December 16, 2002, and so she should have been advanced on December 1, 2002, after XXCM 5’s 30<sup>th</sup> anniversary date on November 29, 2002. However, her repeated inquiries about her advancement produced no satisfactory answers. In support of her allegations, she submitted a chart with the following Reserve XXCM data:

xxxxxxx	Pay Base Date (30 <sup>th</sup> Anniversary Year)*	Date of Rank as XXCM
XXCM 1	June 29, 1960 (1990)	April 1, 1978
XXCM 2	February 27, 1967 (1997)	April 1, 1989
XXCM 3	June 13, 1972 (2002)	January 1, 1990
XXCM 4	June 25, 1971 (2001)	January 1, 1991
XXCM 5	November 29, 1972 (2002)	January 1, 1991
XXCM 6 **	October 26, 1979 (2009)	August 1, 2001
XXCM 7 **	May 31, 1973 (2003)	October 1, 2001
XXCM 8 **	May 28, 1975 (2005)	February 1, 2002
XXCM 9 **	November 27, 1974 (2004)	April 1, 2002
XXCM 10	March 15, 1976 (2006)	October 1, 2003

\* The 30<sup>th</sup> anniversary years were added to this chart for clarity.

\*\* Double asterisks were added to mark those who on December 1, 2002, were XXCMs with less than 30 years of service.

The applicant alleged that CWO S, who was working at RPM in 2002, intentionally prevented her from being advanced because of his personal bias against her. In support of this allegation, the applicant submitted a statement signed by a retired senior chief petty officer, SPCO B, on March 3, 2006. He wrote that in a September 2002 telephone conversation with CWO S about a request he had made for a waiver to participate in the RSWE, he mentioned the applicant’s name. CWO S “was very angry and said, ‘[the applicant] will never be able to take the Master Chief Servicewide ever again or never be promoted to master chief!’” CWO S also told him that the applicant “went over his head with an Admiral to pressure him to change his mind.”

In support of her allegations, the applicant submitted a statement from her commanding officer, who wrote that “it is clear that there is a possibility of at least one and potentially two administrative oversights that may have led to an injustice concerning the well-deserved advancement of [the applicant] to XXCM.” He further stated that the applicant has been “dili-

gent in her repeated attempts to seek answers to legitimate questions on whether or not the Reserve advancement system was applied properly and equitably. Her attempts to solicit detailed information and answers via her regular chain of command, Reserve Program managers, Headquarters, and via the network of Coast Guard Chief Petty Officers have not resulted in complete answers.” The applicant also submitted copies of the following documents *inter alia*:

- The Reserve advancement list dated November 30, 1994, shows that the applicant placed second on the list for advancement to XXCM, but the cutoff for guaranteed advancement to XXCM was zero—i.e., no advancements to XXCM were expected to occur.
- The May 1995 issue of the publication *Coast Guard Reservist* announced the retirement of a XXCM as of March 1995.
- A list of advancement announcements indicates that the XXCS who placed first on the Reserve advancement list dated November 30, 1994, was advanced to XXCM on May 1, 1995.
- The August 1995 issue of the publication *Coast Guard Reservist* announced the retirement of a second XXCM as of May 1995.
- ALDIST 155/95, issued on August 21, 1995, shows that no XXCS was advanced to XXCM after the second YNCM’s retirement, but that candidates for BMCM, DCCM, and ETCM were advanced. In addition, the applicant submitted the advancement lists for these ratings, which show that the master chief candidates whose advancements were announced in ALDIST 155/95 had placed below the cutoff for guaranteed advancement when the advancement list was published.
- The Reserve advancement list dated December 27, 2001, shows that the applicant placed third on the list for advancement to XXCM, but the cutoff for guaranteed advancement to XXCM was one—i.e., only one XXCS was guaranteed advancement to XXCM in 2002.
- ALCGPERSCOMs 010/02 and 026/02 announced the advancement of the first and second candidates on the Reserve XXCM advancement list—XXCM 8 and XXCM 9—on February 1 and April 1, 2002, respectively.
- ALCGPERSCOM 039/02 announced that although a rule had been waived to allow members to remain in the Selected Reserve beyond their 30<sup>th</sup> anniversary, the rule under Article 7.C.12.b. of the Reserve Policy Manual would still be enforced so that members who would have more than 28 years of service as of January 1, 2003, would not be eligible to compete for advancement by taking the RSWE in October 2002.
- ALCGPERSCOM 118/02 announced advancements authorized for December 1, 2002. No one was advanced to XXCM.

The applicant stated that after RPM refused to advance her when XXCM 5 attained 30 years of service, she studied the advancements to master chief petty officer (MCPO) in all the

ratings and determined that there had been manipulation or borrowing of billets between the ratings; that in some ratings advancements had been effected months early in anticipation of an MCPO's attainment of 30 years of service; and that the number of master chiefs and advancements per rating did not correspond to the authorized numbers for each rating. In support of these allegations, the applicant submitted a copy of an email she sent to the Reserve Force Master Chief at HRSIC on August 1, 2003, presenting charts concerning master chief advancements and her allegations about her own non-advancement. She pointed out that, although he had told her in 2002 that there was an "overage of E-9s," two BMCSes had been promoted to BMCM in 2002 and that although only one PSCM had attained 30 years of service in 2002 and thus dropped off the RPAL, four PSCSes had been promoted to PSCM in 2002. She also pointed out that one MKCM had attained 30 years of service and dropped off the RPAL in 2002 but no one was promoted to MKCM to replace him.<sup>2</sup> She further asked why a TCCS had been promoted to TCCM on January 1, 2003, if there was really an overage of E-9s at the end of 2002. In addition, the applicant noted that XXCM 7 must have dropped off the RPAL on May 31, 2003, because she would have attained 30 years of service on that date, but no one advanced to XXCM on June 1, 2004. She argued that since some members were apparently promoted to master chief several months before the vacancy occurred, she should have been advanced on December 1, 2002, in anticipation of XXCM 7's 30<sup>th</sup> anniversary.

On August 4, 2003, the Reserve Force Master Chief responded to the applicant's email. He noted that even though XXCM 7 had dropped off the RPAL on May 31, 2003, there were still three YNCMs with less than 30 years of service on the RPAL (YNCMs 6, 8, and 9 on the chart on page 3) even though only two XXCM billets were authorized. Therefore, they still had one too many YNCMs than authorized. He stated that he could not see how the applicant could have advanced to XXCM in December 2002 given the overage even though XXCM 5 attained 30 years of service on November 29, 2002. He stated that he did not know what happened in 1994 but would try to find someone who did. He further stated that he did not understand why she had provided information about E-9 advancements in other ratings.

On September 29, 2003, the applicant emailed the Reserve Force Master Chief again. She complained that she had not received a response to questions she submitted on August 10, 2003, about her non-advancement in 1994. She also asked why another XXCS was being advanced to XXCM on October 1, 2003 (XXCM 10), if there were already too many YNCMs on the RPAL. The Reserve Force Master Chief replied that he did respond to her previous emails but did not have any information about what happened in 1994. He pointed out that the issue "should have been brought up last century and not 10 years after." He stated that E-9 advancements made in other ratings "have nothing to do with XXCM advancements. There are a MAXIMUM of TWO BILLETS for XXCM." He recommended that she address her questions to CWO S, "the keeper of the advancement numbers," and forwarded her email to CWO S. On September 30, 2003, CWO S replied to the Reserve Force Master Chief stating that the XXCM advancement occurring on October 1, 2003, "was from the new department 'USJFCOM/ CINCLANTFLT' created this month." The Reserve Force Master Chief forwarded the email to the applicant and stated that because of the creation of the new XXCM billet there "are now three

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<sup>2</sup> The applicant later corrected this information to note that two MKCSes had been promoted to MKCM in early 2002.

authorized XXCM billets and we have three people filling those billets,” citing YNCMs 8, 9, and 10, from the chart on page 3 above.

The applicant also stated that since 2004 she has raised her questions about E-9 advancement and the unfairness of not allowing members with more than 28 years of service to compete for advancement even though they are now allowed to remain in the Selected Reserve past their 30<sup>th</sup> anniversary with various officers, including Admiral Collins and Admiral Allen. However, she has not received a satisfactory answer. She alleged that the policy prohibiting competition for advancement after 28 years of service is contrary to the Coast Guard’s policy and goals of creating equal opportunity and developing and retaining a quality work force.

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

On March 4, 2008, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case.

The JAG stated that the applicant was not above the cutoff on the advancement lists in effect in either 1995 or 2002, and there were apparently no further vacancies to be filled when she rose to the top of those lists. He noted that under Article 5.C.3.a.2. of the Personnel Manual, the cutoff point on an advancement list is set in advance based upon expected Service needs, and only members whose names appear above the cutoff are assured of advancement.

The JAG stated that the applicant unduly delayed her complaint with respect to her non-advancement in 1995 without excuse. He argued that this part of her claim should be barred by the doctrine of laches because “[d]ocuments that might have been relevant to an investigation of the applicant’s claim are no longer available for review.” He stated that when an applicant’s “unexcused delay has caused substantial prejudice to the government,” the application should be barred because during the delay evidence regarding the applicant’s claims “becomes lost, stale, or inaccessible” and the costs of investigating or correcting the matter increase. In support of his argument regarding the doctrine of laches, the JAG submitted an email from a civilian staff member of the Reserve Policy and Plans Division of CGPC, who wrote the following:

The year in question [1995] also followed a period of significant drawdown, where the CG Reserve went from 12, 000 billets to 8,000 billets. There are many variables that play in when or if a member who is eligible to advance gets advanced, and as you said, it is driven off vacant billets. It does depend on when other members of the same rate in the next higher pay grade retire, thereby POTENTIALLY opening a billet. However, there is the continual process in the field to allocate billets where they are needed and in what rates; i.e., the programming of billets. This is done by the SARR process today. Given the time lapse since 1995, it is nearly impossible at this point to determine what transpired back then, and if there was even a position to which to advance the member.

Regarding the merits of the applicant’s 1995 claim, the JAG stated that her argument that she was entitled to advancement because a XXCM retired when she was at the top of the advancement list in 1995 assumes that the XXCM who retired vacated a XXCM billet, which is not necessarily the case. The JAG alleged that Article 12.C.1.a. of the Reserve Administration and Training Manual (RATMAN) in effect in 1995 stated that “the overall objective [of the advancement system] is to advance the best qualified personnel to fill available vacancies. ...

Advancements are based on vacancies generated within a pyramidal structure in each rating. Vacancies in each rate are based on current shortages. In ratings that are overpopulated, there is no existing shortage; as a result, advancement opportunities are limited.”

Therefore, the JAG concluded, the XXCS who was originally in first place on the 1995 XXCM advancement list was presumably advanced because of a vacancy even though none had apparently been expected since the cutoff was set at zero. The JAG stated that presumably “the needs of the service required the Coast Guard to dip below the cutoff point to fulfill a specific need; i.e. fill a specific vacancy. Specific vacancy draws upon a significant distinction between “designated billets” and “non-designated billets.” [Citation omitted.] It is most likely that the billet occupied by [the first XXCM to retire in 1995] upon his retirement was a designated XX billet,” which triggered the advancement of the first XXCS on the advancement list to XXCM. The JAG further stated that because the applicant was not advanced when a second XXCM retired in 1995, it is likely that that XXCM was filling a non-designated billet. The JAG noted that the applicant admitted that she was told by someone in her District Personnel Office in July 1995—after the second XXCM retired—that there was no vacant XXCM billet, and the information given to her by that personnel officer is presumably correct. The JAG argued that the applicant has failed to submit “evidence to rebut the presumption that in 1995, the Coast Guard administered the Reserve advancement program correctly, lawfully, and in good faith,” citing *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); and *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

Regarding the merits of the applicant’s allegation that she was wrongly denied advancement in 2002, the JAG stated the applicant has failed to prove that the RPM Division or other Coast Guard personnel “failed to carry out their duties correctly, lawfully, and in good faith.” He noted that the applicant’s “claim for advancement in 2002 received review in and outside of her chain of command, which included Flag Level inquiry.” The JAG stated that the Coast Guard’s advancement regulations are written “to ensure a fair and equal advancement opportunity based on authorized ‘strength in numbers’ in each grade to provide for the needs of the Service. The applicable statutes and regulations do not bestow upon individual members a right to be involved in the decision making process when it comes to an ‘annual strength in numbers’ determination, nor do the applicable statutes and regulations require the Coast Guard to deliver an individualized explanation or after action report, breakdown, or summary to each member when they have failed to make the cut, or failed to advance.” The JAG concluded that the applicant was not entitled to advancement in 2002 because she did not place above the cutoff. In addition, he pointed out that although the Reserve Force Master Chief “never addressed the specific inquiry on the status of XXCM [5’s] billet, he did answer the underlying premise to her question consistently” by noting that there were three YNCMs on the RPAL but only two authorized XXCM billets. The JAG noted that under 14 U.S.C. § 702(b), the authorized number of billets for each rating is reset “at least annually” in accordance with Service needs, but if the number of authorized billets in a particular grade is reduced, members are not usually separated or reduced in grade.

The JAG also adopted the facts and analysis of the case provided in a memorandum prepared by CGPC. CGPC stated that “the delay in application has disproportionately hampered the Coast Guard’s ability to ascertain additional information in support of the case.” CGPC further stated that

advancement numbers are produced by comparing bodies to billets. The number of positions for a particular rate comes from the "Billet" list, which is used for advancements. The number of personnel attached to those billets comes from the Selected Reserve (SELRES) list, which is not used for advancements. The "SELRES" list is used as a report of strength only. Changes in positions on the billet list can significantly impact advancements, but are not visible to most members. Another factor in advancement calculations is that some personnel are in billets listed as "general petty officer." These are mostly Command Master Chief positions. Personnel in those positions are not considered to be filling a job in their rate/rank, which allows for an additional advancement. Once these personnel return to a normal billet within their rate/rank, there will be some over-billeting which can delay advancements until either billet changes or other losses occur. There are no assumptions or predictions used in the monthly advancement numbers. Everything is based on a snapshot of the reserves as of the last day of the month and the actual inventory of billets and members.

CGPC concluded that the record does not support the applicant's contention that she was treated unfairly or unjustly denied advancement.

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

On March 6, 2008, the Chair sent the applicant a copy of the views of the Coast Guard and invited her response. The applicant was granted an extension of the time to respond and her response was received on May 16, 2008.

In response to the JAG's argument regarding the doctrine of laches and her 1995 claim, the applicant stated that her advancement in 1995 "was swept aside or not effected due to errors in administration of the Reserve advancement system." She argued that in 1995, the Reserve administrators were preoccupied with the changes involved in integrating the Reserve into the active duty forces, which caused "chaos within the Active Duty and Reserve programs."<sup>3</sup> The applicant stated that in 1995 her inquiry was handled by a junior petty officer at HRSIC and "should have been referred to a higher level." She argued that someone should have advised her to apply to the BCMR at that time, but they failed to do so. She had "no exposure" to the BCMR process prior to her performance of extended active duty in 2002. She also argued that she has been diligent and persistent in pursuing her advancement and in inquiring about the denial of her advancement since 2002 and that she has shown "a uniform pattern of injustice against [her] that is repeated over and over in more recent times." She stated that she renewed her inquiries about her 1995 non-advancement in 2003, when the Coast Guard "could have provided an answer" about what had happened in 1995, but CWO S refused to return her calls. In addition, she pointed out that SPCO B signed the affidavit for her in 2006. The applicant further argued that if the Coast Guard cannot adequately answer her questions, its record-keeping "appears to be inadequate." She also alleged that the Coast Guard "is unable to furnish documentation to support its opinion."

The applicant objected to the JAG's discussion of what "most likely" happened in 1995 as mere supposition without a factual basis. She stated that the significant known facts are that advancements are sometimes made below the cutoff points and that two YNCMs retired in 1995 but she was not advanced even though she was at the top of the advancement list when the sec-

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<sup>3</sup> The applicant submitted documents concerning problems encountered in integrating the Reserve into the active duty forces.



ond XXCM retired. She further argued that because, under Article 7.C.21.b. of the RATMAN in effect in 1995, the cutoff is set based upon the number of advancements to be made in the coming year and yet some members were advanced below the cutoff, advancements must have been made without respect to the number of vacant billets. She argued in essence that because some members below the cut on their respective advancement lists were advanced, she was also entitled to advancement in 1995 even though she was below the cutoff.

In response to the JAG's argument that the applicant was never assured advancement because she placed below the cutoff, the applicant pointed out that sometimes members are advanced even though their names are below the cutoff. However, she alleged, the statement from SPCO B proves that CWO S was biased against her and would have prevented her advancement if there was a vacancy. The JAG's failure to respond to SPCO B's affidavit, she argued, reinforces the fact that CWO S "was capable of adverse action" to deny her advancement to XXCM. She noted that in 2002 and 2003, CWO S repeatedly refused to return her telephone messages about her non-advancement.

In response to the JAG's argument that the Board should presume that the advancement system was managed correctly, lawfully, and in good faith in 1995 and 2002 based upon the presumption of regularity, she pointed out that the Coast Guard has already admitted that errors were committed in the advancement system, such as the erroneous advancement of a XXCS and PACS to master chief rank in 2002. In addition, she alleged that in deciding not to withdraw the two erroneous advancements, CGPC violated Article 5.C.38.e. of the Personnel Manual, which states that when enlisted members are advanced as a result of an administrative error, they "shall be reduced to the correct rate as of the date the erroneous advancement is noted."

The applicant stated that the Coast Guard has never provided a responsive answer to her inquiries about why she was not advanced when XXCM 5 passed her 30<sup>th</sup> anniversary on November 19, 2002. She pointed out that the JAG admitted in the advisory opinion that the Reserve Force Master Chief "never addressed the specific inquiry on the status of XXCM [5's] billet, [but] he did answer the underlying premise to her question consistently." The applicant stated that she did not ask the Reserve Force Master Chief about "an underlying premise," so his emails were unresponsive to her clearly stated question about why she did not get XXCM 5's billet when she completed 30 years of service on November 29, 2002. The applicant pointed out that the Reserve Force Master Chief acknowledged that members drop off the RPAL on their 30<sup>th</sup> anniversaries because he stated that when he himself "went over thirty," someone was advanced. The applicant concluded that she was entitled to advance in 2002 because she has proved that

- members below the cutoff on an advancement list are sometimes advanced even if there is no corresponding vacancy on the RPAL;
- members who pass their 30<sup>th</sup> anniversaries drop off the RPAL list and thus may create a vacant billet at their grade level on the RPAL list;
- members are sometimes advanced when someone else drops off the RPAL list by passing their 30<sup>th</sup> anniversary;
- members are sometimes advanced months in advance in anticipation of a vacancy;
- XXCM 5 passed her 30<sup>th</sup> anniversary on November 29, 2002;

- no one has explained to her exactly why she did not advance when XXCM 5 passed her 30<sup>th</sup> anniversary except to allege that there was an overage of YNCMs and thus no vacancy on the RPAL; and
- CWO S was biased against her and in a position to prevent her advancement.

The applicant further argued that in light of the many errors committed within the advancement system, the Board should surmise that her advancement was denied in 2002 as the result of an administrative error.

The applicant also stated that she has never received a satisfactory response to her inquiries about why the Coast Guard did not waive the rule prohibiting members with more than 28 years of service from competing for advancement when it decided to allow members with more than 30 years of service to remain in an active status the SELRES. She submitted evidence showing that she has raised the issue with various officials since 2002. The failure to waive the rule prohibiting continued competition for advancement, she argued, denies “equal opportunity for advancement to all enlisted personnel.”

### **APPLICABLE REGULATIONS**

Article 1.D.8. of the Reserve Policy Manual (RPM) in effect in 2002 (COMDTINST M1001.28) states the following:

Enlisted and chief warrant officers may be assigned to SELRES TRA/PAY CATs in their first 30 years of service. Normally, on the thirtieth anniversary of their pay base date, enlisted and chief warrant officers will be transferred to TRA/PAY CAT H.

Article 7.C.1. of the RPM states the following:

b. The goal of the Reserve enlisted advancement system provides for the orderly advancement of enlisted personnel. It requires minimum standards of eligibility to ensure a degree of proficiency at each grade level. The overall objective is to advance the best qualified personnel to fill available vacancies.

c. Advancements are based on vacancies generated within a nationwide pyramidal structure in each rating. Vacancies in each rate are based on current shortages. In ratings that are overpopulated, advancement opportunities are not available.

Article 7.D.2. RPM states that “[r]eservists may compete for advancement in the Reserve Service Wide Exam except in the following circumstance: a. Candidates who do not have two years of pay status eligibility remaining, as computed from 01 January following the Service Wide Exam, may not compete for advancement to paygrade E-7 and above.” Article 7.C.12.b. states that candidates for advancement to grades E-7, E-8, and E-9

must have at least two years of pay status eligibility remaining as computed from 1 January of the year following the October Service Wide Exam, to be eligible for advancement. Individuals scheduled for discharge, due to reach their 30 year pay base date (PBD) anniversary, or reaching maximum age for mandatory retirement during the two year period following the 1 January date are ineligible to participate.

## FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submission, and applicable law:

1. The Board has jurisdiction over this matter pursuant to 10 U.S.C. § 1552.
2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.
3. An application to the Board must be filed within three years after the applicant discovers the alleged error in her record.<sup>4</sup> The applicant in this case alleged that the Coast Guard erred twice by failing to advance her to XXCM first in 1995 and then in 2002. Her first claim, regarding her non-advancement in 1995, is not timely because she was not serving on active duty during 1996, 1997, and 1998. The three-year statute of limitations is tolled during periods of active duty but not during a reservist's inactive duty in the SELRES.<sup>5</sup> The applicant's second claim, which concerns her non-advancement in December 2002, is timely because she served on active duty from July 6, 2002, through September 30, 2004, and her application was received by the Board on September 11, 2007, within three years of her release from active duty.<sup>6</sup>
4. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of the applicant's claim with regard to her non-advancement in 1995 if the Board finds that it is in the interest of justice to do so. In *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that to determine whether the interest of justice supports a waiver of the statute of limitations, the Board "should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review." The court further instructed that "the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review."<sup>7</sup>
5. The applicant argued that it is in the interest of justice for the Board to waive the statute of limitations because she has been investigating the matter for the past eight years by contacting appropriate offices and has yet to receive a satisfactory answer explaining the Coast Guard's failure to advance her. She also argued that in 1995, Reserve administrators were pre-occupied with the Reserve's integration and that when she called her District Personnel Office to inquire about advancement, her inquiry was handled by a junior petty officer when it should have been passed to and addressed at a higher level. In addition, the applicant stated that she had "no exposure" to the BCMR until 2002.

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<sup>4</sup> 10 U.S.C. § 1552(b).

<sup>5</sup> See *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940 "tolls the BCMR's limitations period during a servicemember's period of active duty").

<sup>6</sup> *Id.*

<sup>7</sup> *Allen v. Card*, 799 F. Supp. 158, 164-65 (D.D.C. 1992). See also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

6. The Board finds that the applicant's explanation of her delay in seeking advancement to XXCM in 1995 is not compelling. She knew she had not been advanced to XXCM in 1995 and she could and should have sought correction of her record within three years. Instead, she apparently telephoned her District Personnel Office in 1995, accepted the answer given to her by a junior petty officer that there was no open XXCM billet, and did not pursue the matter further for several years. The Board also notes that while the applicant claims that she had "no exposure" to the BCMR, she did not claim to have been unaware of the Board's existence. As a XXCS dealing with military personnel records, the applicant should have known of the Board's existence and should have timely pursued her claim while the officers charged with making Reserve advancements in 1995 and the documentation of billets, etc., were readily accessible.

7. The Board's cursory review of the merits indicates that the applicant's 1995 claim cannot now prevail. As the Coast Guard argued, because of the applicant's delay, information—whether in office records or officers' memories—that would have shed light on whether the applicant was entitled to advancement and why she was not advanced in 1995 is no longer available. Therefore, the claim would be barred under the doctrine of laches. In addition, although the applicant has submitted published retirement announcements for two YNCMs from 1995, when she had placed second on the advancement list, she has not shown that those retirements left a designated XXCM billet empty for her or reduced the number of YNCMs with less than 30 years of service below the authorized number on the RPAL. Given the lack of a good excuse for the applicant's delay with respect to her 1995 claim and the insufficiency of the evidence supporting that claim, the Board finds that it is not in the interest of justice to waive the statute of limitations for the 1995 claim, which should therefore be denied.

8. As shown in Finding 3, however, the applicant's request with respect to her non-advancement to XXCM as of December 1, 2002, is considered timely because the Board's statute of limitations was tolled while she remained on active duty through September 30, 2004. According to the record, the RPAL allotment for YNCMs in December 2002 was two. Therefore, to prove that she was entitled to advancement on December 1, 2002, the applicant must show that there was only one Reserve XXCM with less than 30 years of service on that date. She alleged that the RPAL was exceeded in some ratings, but even assuming improper advancements were made in other ratings, such improprieties would not render the applicant's non-advancement to XXCM either erroneous or unjust.<sup>8</sup> (Such logic would make every reservist on an advancement list potentially entitled to advancement, not just the applicant.) Nevertheless, if there was only one Reserve XXCM with less than 30 years of service on December 1, 2002—following XXCM 5's 30<sup>th</sup> anniversary on November 29, 2002—the applicant was presumably entitled to advancement because she was at the top of the XXCM advancement list. The chart submitted by the applicant (see page 3 above), however, indicates that there were four Reserve YNCMs with less than 30 years of service on December 1, 2002: YNCMs 6, 7, 8, and 9. Therefore, the preponderance of the evidence supports the Coast Guard's position that there was an "overage" of YNCMs in December 2002, and no vacancy on the RPAL to permit the applicant's advancement, which was the explanation repeatedly given to her at the time.

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<sup>8</sup> *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (finding that for purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is "treatment by military authorities that shocks the sense of justice, but is not technically illegal").

9. The CGPC memorandum submitted as part of the advisory opinion indicates that not every master chief with less than 30 years of service counts toward the RPAL allotment for his or her rating. YNCMs assigned to “general petty officer” billets—such as Command Master Chief billets—rather than to designated xxxxxxxx billets do not count toward the RPAL allotment. According to CGPC, when a XXCM who has been assigned to a general petty officer billet leaves that billet, the XXCM suddenly counts against the RPAL allotment and so there may be an “overage”—i.e., too many YNCMs on the RPAL—if the RPAL allotment was already filled. Therefore, theoretically, if three of the four Reserve YNCMs who had less than 30 years of service on December 1, 2002, were assigned to general petty officer billets rather than to xxxxxxxx billets, the applicant might have been entitled to advancement. However, the applicant made no arguments about the designation of the YNCMs’ billets in her application or in her response to the Coast Guard’s advisory opinion, and she has not proved that only one of the four YNCMs with less than 30 years of service on December 1, 2002, was assigned to a designated xxxxxxxx billet.

10. The applicant argued that she should have been advanced to XXCM on December 1, 2002, in anticipation of XXCM 7’s 30<sup>th</sup> anniversary on May 31, 2003, because, she alleged, members in other ratings were advanced months before a vacancy arose. However, the fact that no XXCS was advanced as a result of XXCM 7’s 30<sup>th</sup> anniversary indicates that her anniversary did not create a XXCM vacancy on the RPAL. (Perhaps she was assigned to a general petty officer billet, or perhaps her 30<sup>th</sup> anniversary simply eliminated some of the surplus of YNCMs on the RPAL.) Moreover, even if, as the applicant alleged, some members were advanced to master chief without regard to the needs of the Service or the RPAL, such errors would not justify the applicant’s own advancement.

11. The applicant submitted an affidavit from SCPO B dated March 3, 2006, stating that CWO S—who was the Enlisted Status Manager within the Reserve Personnel Management Division at CGPC in 2002—was mad at the applicant for complaining to flag rank officers and others about his office’s decision not to waive the rule under Article 7.C.12.b. of the Reserve Policy Manual so as to allow her and many others with more than 28 years of service as of January 1, 2003, to compete for advancement by taking the RSWE in October 2002. However, there is no evidence that CWO S ever suffered any negative repercussions because of the applicant’s complaints, and a single affidavit alleging an expression of hostility by CWO S against the applicant during a telephone conversation does not overcome the presumption of regularity<sup>9</sup> and persuade the Board that CWO S would have or could have prevented the applicant’s advancement had there actually been an RPAL vacancy for a XXCM on December 1, 2002. Furthermore, since the applicant has not proved that there was such a vacancy, the point is moot.

12. The applicant repeatedly pointed out that CGPC sometimes advances members whose names appear below the original cutoff point on an advancement list. Clearly, being below the cutoff is not an absolute bar to advancement although only those whose names appear above the cutoff are guaranteed advancement. CGPC sets cutoffs when the advancement lists are

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<sup>9</sup> 33 C.F.R. § 52.24(b); see *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979) (holding that absent evidence to the contrary, Government officials are presumed to have carried out their duties “correctly, lawfully, and in good faith”).

issued based on foreseeable losses and Service needs in the next year. The fact that CGPC sometimes advances members below the cutoff only proves that CGPC cannot perfectly predict future losses and Service needs that create RPAL vacancies or new billets; it does not support the applicant's contention that there was ever a XXCM vacancy on the RPAL that she was erroneously denied when she was at the top of the XXCM advancement list. As stated in Article 7.C.1.c. of the Reserve Policy Manual, "[v]acancies in each rate are based on current shortages. In ratings that are overpopulated, advancement opportunities are not available." The fact that CGPC sometimes advances members below the cutoff shows that vacancies and new billets are sometimes created unexpectedly in the year after an advancement list is issued, as when XXCM 10 (from the chart on page 3) was advanced on October 1, 2003, following the creation of a new XXCM billet; it does not prove that officers within CGPC or any other Coast Guard office improperly manipulated the master chief billets in a way that prevented the applicant's advancement.

13. The applicant complained that in 2002, CGPC erred in advancing one PACS and the XXCS who was ahead of the applicant on the advancement list and did not demote those members in accordance with Article 5.C.38.e. of the Personnel Manual when the errors were discovered. Assuming her allegation is true, CGPC's error does not prove that the applicant was also entitled to the benefit of such an error. Nor has she shown that, but for these errors, she would have advanced to XXCM. As the applicant was a xxxxxxxx, rather than a public affairs specialist, she was not on the PACM advancement list and the erroneous advancement of the PACS to PACM is unlikely to have affected the applicant's own opportunity to advance. And if CGPC had not erroneously advanced the XXCS who was above the applicant on the XXCM advancement list on April 1, 2002 (XXCM 9 in the chart on page 3), the applicant would never have risen to the top of that advancement list because that XXCS would have remained above her on the list.

14. The applicant argued that it was unfair for the Coast Guard to waive one rule by allowing reservists to remain in the SELRES beyond 30 years of service without also waiving the rule that prohibits members with more than 28 years of service from competing for advancement. She argued that this combination of rules violates equal opportunity policy and undermines the Coast Guard's goal of retaining and developing qualified members. She submitted evidence showing that the latter rule has been enforced in all ratings although it means that reservists, who previously might serve only their 29<sup>th</sup> and 30<sup>th</sup> years without hope of advancement, may now choose to serve beyond their 30<sup>th</sup> year without hope of advancement.

15. Article 7.C.12.b. of the Reserve Policy Manual in effect in 2002 provides that reservists "due to reach their 30 year pay base date (PBD) anniversary ... during the two year period following the 1 January date [following the October RSWE] are ineligible to participate" in the RSWE for advancement to pay grades E-7, E-8, and E-9. As stated in Article 7.C.1.c., "[a]dvancements are based on vacancies generated within a nationwide pyramidal structure in each rating. ... In ratings that are overpopulated, advancement opportunities are not available." The rule under Article 7.C.12.b. effectively increases the opportunities for reservists with less than 28 years of service to advance to a higher pay grade by preventing reservists with more than 28 years of service who are already in a high pay grade from competing for an even higher pay grade. To facilitate the advancement of younger and newer members, the Armed Forces have adopted a variety of rules to keep open space at the top of the pyramidal structure of each enlisted rating and the officers' ranks to allow the most qualified new members to advance, which is part

of the “overall objective” of the advancement system as stated in Article 7.C.1.b. The Board is not persuaded that the Coast Guard erred or committed an injustice when it refused to waive the rule under Article 7.C.12.b. at the same time that it decided to allow reservists with more than 30 years of service to continue serving if they so desire.

16. The applicant made numerous allegations with respect to the actions, attitudes, and error rates of various Coast Guard offices and officers. Those allegations not specifically addressed above are considered to be not dispositive of the case.

17. Accordingly, the applicant’s request should be denied because her claim regarding her non-advancement in 1995 is untimely, and she has not proved by a preponderance of the evidence that she failed to advance to XXCM in either 1995 or 2002 because of an error or injustice committed by the Coast Guard.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

**ORDER**

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of her military record is denied.

