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

Application for Correction of the Coast Guard Record of:

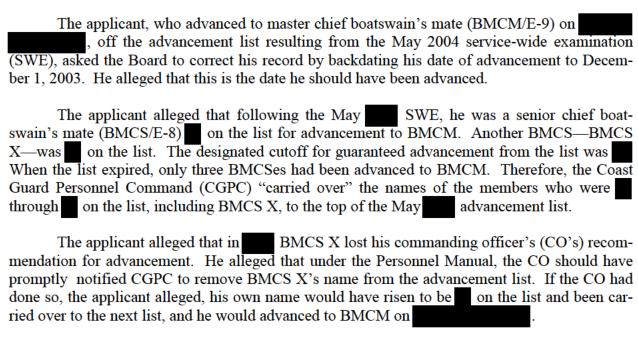
BCMR Docket No. 2008-099

## **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 April 11, 2008, upon receipt of the applicant's completed application, and assigned it to staff member pare the decision for the Board as required by 33 C.F.R. § 52.61(c).

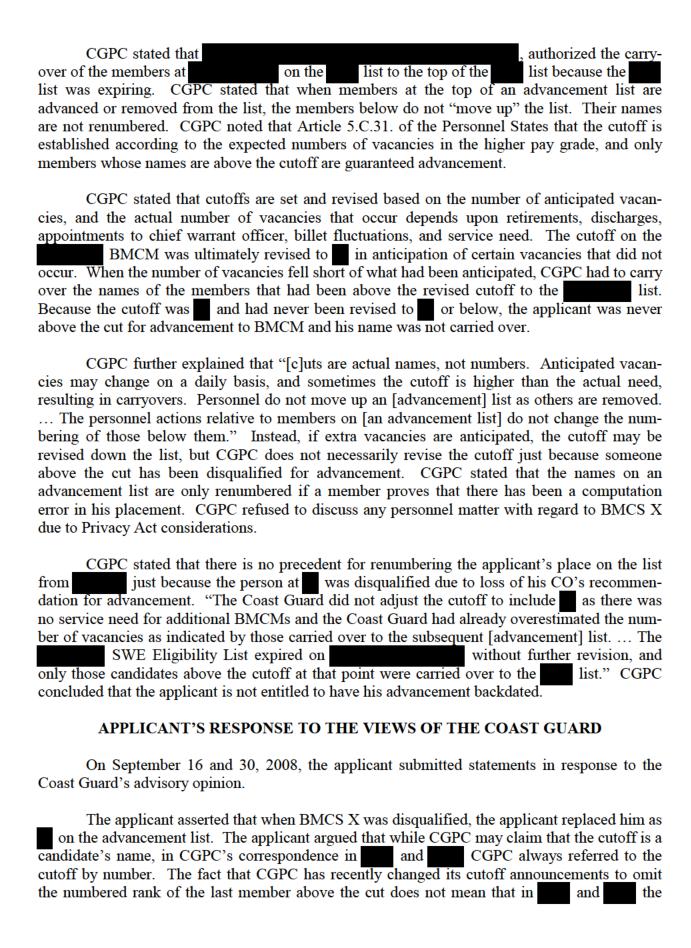
This final decision, dated January 22, 2009, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

### APPLICANT'S REQUEST AND ALLEGATIONS



The applicant alleged that because BMCS X's command improperly delayed notifying CGPC of BMCS X's loss of his CO's recommendation for advancement, CGPC erroneously "carried over" BMCS X's name instead of the applicant's name. The applicant alleged that the

CO of xxxxxxxxxxxxx did not notify CGPC of BMCS X's loss of recommendation for advancement until . Therefore, he argued, his own advancement date should be backdated to .
The applicant stated that enlisted members competing for advancement through the SWE process "expect a fair opportunity to advance" and that to ensure fairness, all commands must obey the performance evaluation and advancement rules in the Personnel Manual. The applicant argued that he was improperly denied advancement on delay of BMCS X's CO at xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
In support of his allegations, the applicant submitted a copy of the SWE advancement list, which bears his name as and BMCS X's name as He noted that Article 5.C.5.d.4. of the Personnel Manual states that if a member whose name is on an advancement list to pay grade E-9 receives any court-martial or civil conviction, non-judicial punishment, unsatisfactory conduct mark, or low performance marks, the member's CO must notify CGPC to remove the member's name from the advancement list.
The applicant also submitted a copy of a letter he sent to CGPC dated in which he requested advancement to BMCM with back pay. He argued that when BMCS X lost his CO's recommendation for advancement, his name was removed from the list, and the applicant's name became, which was above the cutoff for guaranteed advancement to BMCM. The applicant's CO forwarded this letter to CGPC with a very strong endorsement in favor of the applicant's advancement. The CO stated that the applicant had already been "hand-selected to fill two different E-9 billets on the District xxxxxxxxxx staff." The applicant also submitted CGPC's response to his request, dated that his request had been carefully reviewed and disapproved. CGPC stated that it
appears from your memo there is a misinterpretation of the way revised cuts are calculated. If one member is removed from the [advancement list], the members below the cut do not move up on the list. In this particular case, the [SWE] List revised cuts were announced in when the BMCM cut was revised to [T]here were 5 BMCM carry-overs from the [list] to the [list]. These carryovers were announced in your request for a retroactive advancement is not justified.
VIEWS OF THE COAST GUARD
On September 2, 2008, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided by CGPC in an enclosed memorandum on the case.
CGPC stated that the applicant placed SWE. Under SWE. Under guaranteed advancement to BMCM was revised to which was BMCS X, in on the BMCM advancement list following the issued on the BMCM advancement list following the issued on the cutoff was revised again to the cutoff was revised again to which was BMCS X, in



cutoff was not associated with the number, rather than the person. The applicant further argued that because CGPC clearly intended to advance the top eight candidates from the list, he should have been advanced when BMCS X was disqualified. He also argued that a "lack of precedence should not prevent this disservice from being corrected." The applicant also asked the Board to consider his CO's endorsement of his request, in which the CO noted that CGPC had transferred the applicant to two E-9 billets during the lifecycle of the list, while he was still an E-8, which clearly shows that he was ready to fill and E-9 billet.

The applicant alleged that BMCS X had offered to provide information about his disqualification for advancement in the bulk that bulk the bulk that BMCS X had offered to provide information about his disqualification for advancement in the bulk that the

#### APPLICABLE REGULATIONS

Article 5.C.1.a. of the Personnel Manual in effect in states that "[t]he objective of the enlisted advancement system is to ensure the required degree of proficiency at the various grade levels within each specialty and promote those best qualified to fill vacancies which occur."

Article 5.C.4.b.1.l. states that a member is not eligible to compete for advancement by taking the SWE unless the member is recommended for advancement by his or her CO. Article 5.C.4.e.4. states that "[t]he commanding officer's recommendation for advancement is the most important eligibility requirement in the Coast Guard advancement system."

Article 5.C.25.d. states that "[i]f at any time prior to effecting an advancement, a commanding officer wishes to withdraw his or her recommendation because an individual has failed to remain eligible and it appears that eligibility will not be attained prior to expiration of the current eligibility list, the commanding officer shall advise the Human Resources Service and Information Center [HRSIC] by message with Commander, (CGPC-epm), as an information addressee, to remove the individual's name from the eligibility list." Article 5.C.5.d.4. states that "[a]fter the individual has been recommended for advancement, but has not been advanced, commanding officers will submit a message to HRSIC (adv), with Commander, (CGPC-epm-1) as information addressee, to remove from the current advancement eligibility list any person who has received any of the following: CM [court-martial] or civil conviction, NJP, an unsatisfactory conduct mark, or a factor mark less than those provided for in Art. 10.B.9."

Article 5.C.31.f. states that an "individual's name may be removed by Commander, CGPC as a result of disciplinary action, or for other good and sufficient reasons, whereby the individual is no longer considered qualified for the advancement for which previously recommended. Commanding officers shall withhold any advancement under such circumstances and advise Commander, CGPC of their intentions relative to removal from the list. A commanding officer may also direct that the individual not be removed from an eligibility list but that advancement is being withheld for a definite period. [See] Article 5.C.25. Individuals who have their names removed from an eligibility list must be recommended and qualify again through a subsequent SWE competition."

Under Article 5.C.3.b., following the SWE in May each year, the candidates for advancement to a particular rate, such as BMCM, are ranked according to a calculation that assigns

points for each candidate's SWE score, performance marks, time in service, time in present pay grade, medals and awards, and sea duty. Article 5.C.31.a. states that HRSIC prepares the advancement eligibility lists for approval by Commander, CGPC.

Article 5.C.3.a.2. states that a "cutoff point is established for each rating and rate based upon vacancies anticipated at the time the eligibility list is compiled. Personnel who are below the cutoff point should plan on participating in subsequent SWEs in order to maintain eligibility." Article 5.C.31.b. states that "[c]utoff points on eligibility lists will be established by Commander, CGPC, according to the number of advancements anticipated during the effective period of the respective lists. The cutoff point on each list is shown by a mark adjacent to the rank-order number of the last name above the cutoff, e.g., 21. Only those personnel [whose] names appear above the cutoff are assured of advancement."

Article 5.C.31.c. states that the "effective period of the advancement eligibility list will be published with the list. Normally, each list will remain in effect until superseded by a new eligibility list resulting from a later SWE competition. When the new list is published all candidates above the cutoff on the superseded list will be carried over to the top of each new list."

Article 5.C.31.d. states that CGPC may amend an advancement eligibility list "when necessary to insert candidates whose regular or substitute examination were received too late for computer scoring."

Article 10.B.5.a.1. states that members in pay grade E-8 receive regular, annual performance evaluations, with recommendations for or against advancement, on November 30<sup>th</sup> each year. Under Article 10.B.5.b., special performance evaluations must be prepared on certain occasions, such as when a member receives NJP, a documented "alcohol incident," or performance probation or when a member is convicted by court-martial or civil court.

#### 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. Although the application was not filed within three years of the applicant's failure to be advanced on it is considered timely under *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994).
- 3. 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.

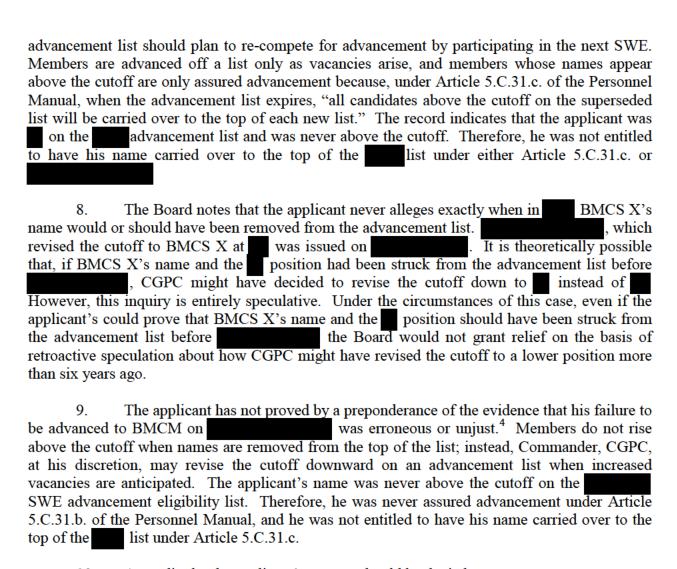
<sup>&</sup>lt;sup>1</sup> *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

- 4. The applicant alleged that the Coast Guard erroneously failed to advance him to BMCM on and asked the Board to order the Coast Guard to backdate his advancement to that date. The Board begins its analysis in every case by presuming that the disputed information—in this case, the applicant date of advancement—is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>2</sup> Absent evidence to the contrary, the Board presumes that Coast Guard officials have carried out their duties "correctly, lawfully, and in good faith."
- 5. The applicant argued that he should have been advanced because he was on the advancement list, the cutoff for advancement was and the person ranked on the advancement list—BMCS X—became disqualified for advancement. He argued that when BMCS X was disqualified, his name should have been removed from the list, and the list should have been renumbered so that the applicant's name would rise to and be above the cutoff. The applicant failed to submit any evidence to show that BMCS X was disqualified for advancement in However, even assuming the applicant could prove that BMCS X became disqualified for advancement in the applicant's claim fails for the reasons stated below.
- 6. In the Board's experience and as stated by CGPC, advancement eligibility lists are never renumbered when members' names are removed from the top of the list due to either advancement or disqualification. For instance, when CGPC authorizes the advancement of members ranked #1, #2, and #3 on an advancement list, the members ranked #4, #5, and #6 do not then become #1, #2, and #3, respectively. Members retain their numbered positions on an advancement list unless CGPC discovers scoring errors or must insert missed personnel in an advancement list in accordance with Article 5.C.31.d. of the Personnel Manual. When a member's name is removed from an advancement list for any reason, both the name and the assigned number are simply struck out. For example, on , when CGPC issued to announce the "carryover" of members above the cutoffs from the advancement lists to the top of the advancement lists, CGPC listed for carryover BMCM advancement list personnel numbered on the BMCM advancement list. If the list had been renumbered upon the removal from the list of due to their advancement, then would have announced the carryover of members numbered instead of those numbered Therefore, assuming arguendo that BMCS X's name should have been struck from the BMCM advancement list sometime in position would have been struck out along with his name, and the applicant would have remained on the list.
- 7. Under the cutoff on the BMCM advancement list was lowered to [BMCS X's name]." There is no evidence in the record indicating that the cutoff was ever lowered to the applicant's position at or below. Under Article 5.C.31.b. of the Personnel Manual, only members whose names are above the cutoff are assured of advancement. Article 5.C.3.a.2. states that members whose names do not appear above the cutoff on an

\_

<sup>&</sup>lt;sup>2</sup> 33 C.F.R. § 52.24(b).

<sup>&</sup>lt;sup>3</sup> Arens v. United States, 969 F.2d 1034, 1037 (Fed. Cir. 1992); Sanders v. United States, 594 F.2d 804, 813 (Ct. Cl. 1979).



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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

<sup>&</sup>lt;sup>4</sup> For the purposes of the BCMRs, ""[i]njustice', when not also 'error', is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976).

# **ORDER**

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

