

**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. 2014-071**



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**FINAL DECISION**

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. After receiving the applicant's completed application on March 7, 2014, the Chair docketed the case and assigned it to ■■■■■ to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 17, 2014, 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, a ■■■■■/E6 serving on active duty, asked the Board to remove from his record two Enlisted Employee Reviews (EERs)<sup>1</sup> he received for the periods ending November 30, 2011, and May 31, 2012. The applicant also asked the Board to adjust his standing on the May 2013 Service Wide Exam (SWE) ■■■■■ Advancement List to reflect the deletion of the two EERs from his record. He alleged that he was unjustly given poor evaluations and non-recommendations for advancement on the two disputed EERs in retaliation for formal complaints<sup>2</sup> that he filed against his supervisor:

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<sup>1</sup> COMDTINST M1000.2, Enlisted Accessions, Evaluations, and Advancements. Chapter 5. Enlisted Employee Review Systems (EERS). Article 5.A.1. Purpose. The Enlisted Employee Review System (EERS) was designed to serve several specific purposes:

- a. To set standards by which to evaluate the performance and behavior of all enlisted members;
- b. To inform enlisted members of the performance standards they will be measured against;
- c. To provide a means by which enlisted members can receive feedback on how well they are measuring up to the standards;
- d. To capture a valid, reliable assessment of enlisted members' performance, so the Coast Guard may advance and assign members with a high degree of confidence;
- e. To provide critical information that may affect discharges, re-enlistments, good conduct, advancement eligibility, and reductions in rate. The enlisted employee review is not only used to document an individual's past performance, but more importantly, to provide a road map for future improvement.

<sup>2</sup> Documents in the record show that the applicant had complained that his supervisor, CPO X, unjustly accused him of allowing racism to affect how he conducted his official recruiting duties.

While stationed at USCG Recruiting Office ... between June 2009 and June 2012 I received two sets of Semiannual Evaluations dated 11/30/2011 and 5/31/2012 that were given unjustly and in direct retaliation for formal complaints filed against my supervisor, [CPO X]. These evaluations should be expunged from my record and my standing on the May 2013 Service Wide Exam Advancement List should be adjusted to reflect the deletion of the evaluations.

At the time the evaluations, dated 11/30/2011, were due [CPO X] was aware that I had two pending complaints against him. One of these complaints was a formal Congressional Inquiry into why I was given unlawful orders. Although there were pending complaints Coast Guard Recruiting Command allowed [CPO X] to complete the evaluation and did not raise any questions when the evaluations dropped 61 points in one six month period. There is no documentation including; negative Page 7's, informal counseling sheets or anything else in my EI-PDR to justify such marks. In addition, the evaluation counseling session was completed well after the 30 day time line set forth in COMDTINST M1000.2 (series) Chapter 5.E.1.b. I was not given the required counseling IAW COMDTINST M1000.2 (series) Chapter 5.G.3; "If the Approving Official marks 'Not Recommended,' they must ensure the member is properly counseled on the steps necessary to earn a recommendation and prepare supporting remarks in accordance with Articles 3.A.4.b.(2), 3.A.4.e.(4), and 5.B.2. of this Manual." Additionally, I notified my Command of my intent to appeal and I was not given an audience with the rating chain until the 14<sup>th</sup> day after the evaluations were signed, at which time I was told that I would receive no assistance if I chose to continue the appeal process; once again not IAW COMDTINST M1000.2 (series) Chapter 5.I.2.b.(2) which states, "Each commanding officer must ensure counseling and clerical assistance are provided to any member desiring to exercise these appeal rights."

Furthermore, the evaluations dated 5/31/2012 should be removed due to the fact that I had little to no contact with my supervisor due to change in office location (I worked at a different location then [CPO X]), a six week TDY, PCS transfer and Orders from CGRC to limit contact between myself and [CPO X]. I again received a "Not Recommended" and again did not receive the proper counseling or documentation IAW COMDTINST M1000.2 (series) Chapter 5.G.3.

Viewing the enclosed Evaluation Summary and EI-PDR one will see an extreme drop for two marking periods (same supervisor [CPO X]) that is unsubstantiated. Both sets of evaluations were given in direct retaliation for filing complaints. I have waited until now to appeal as I was, and still am, fearful of reprisal. Additionally, I was recently made aware that [CPO X] has been relieved of his duties as Recruiter in Charge for the exact reasons my initial complaints were made. I ask the board to expunge the evaluations dated 11/30/2011 and 5/31/2012 from my permanent record and adjust my standing on the May 2013 Service Wide Exam Advancement List to reflect the deletion of these evaluations.

The applicant also alleged that he has waited to appeal the two evaluations because he was, and still is, fearful of reprisal. He pointed out that when looking at his record, the Board will notice an "extreme drop" during the two marking periods in which he received the two disputed EERs.

### **SUMMARY OF THE RECORD**

The applicant enlisted on active duty in the Coast Guard on September 26, 1999. During his career, the applicant has received various positive administrative remarks and awards:

- A Page 7 dated July 24, 2001, commends the applicant for his dedication and outstanding work ethic during an engine casualty on a cutter.
- A Page 7 dated November 6, 2001, states that the applicant received a mark of 7 (the highest possible mark) for "Stamina" on his EER dated September 30, 2001.

- A Page 7 dated December 17, 2001, commends the applicant for his hard work and dedication in making critical repairs to the starboard reduction gear on the cutter.
- A Page 7 dated April 21, 2002, states that the applicant received a mark of 7 for “Adaptability” on his EER dated March 31, 2002.
- A Page 7 dated July 2, 2002, states that the applicant was counseled about being “[u]nreliable due to failure to pay debts” because he had “issued a check, #1105, for non sufficient funds to the galley in the amount of 98.85 for [his] chow bill for the month of May. Member was counseled concerning his financial responsibilities.”
- A Page 7 dated January 10, 2003, states that he was selected as his station’s “Sailor of the Quarter” for the period October 1 to December 31, 2002.
- A Page 7 states that the applicant received an Enlisted Person of the Quarter award in 2004.
- The applicant also received a Coast Guard Meritorious Team Commendation, which was awarded the staff of his recruiting office “[f]or exceptionally meritorious service from October 2008 through September 2009.”

On his EERs as a recruiter in 2008, 2009, and 2010, the applicant received primarily excellent marks of 6 with some 5s and some 7s in the various performance dimensions and he was recommended for advancement to chief petty officer.

On October 27, 2011, the applicant’s commanding officer (CO) acknowledged receiving a Report of Harassment claiming that the applicant had been “harassed based on reprisal because you verbally opposed what you perceive as discriminatory Coast Guard recruiting practices.” The CO initiated an investigation. The applicant acknowledged this notification.

On November 17, 2011, the command reported that an attempt had been made to mediate a resolution between the applicant and CPO X. After a three-hour meeting, CPO X stated that he would like to continue working with the applicant, but the applicant asked for CPO X to be removed and stated that, if not, he wanted to be transferred to a billet in his [REDACTED] rating instead of returning to the recruiting office because of “the change in the work environment since he filed his complaint.” The command reported that a lieutenant and master chief petty officer who attended the mediation session “do not believe an act of discrimination occurred.” Therefore, the command would work to transfer the applicant to an [REDACTED] billet.

On his EER dated November 30, 2011, the applicant received mostly low marks of 3 with some 2s, 4s, and 5s and a mark of not recommended for advancement. On his EER dated May 31, 2012, he received all middle marks of 4 and another recommendation against advancement. A summary of all the applicant’s EERs shows that on his other, non-disputed EERs, he regularly received excellent marks and was recommended for advancement except on the two disputed EERs.

## VIEWS OF THE COAST GUARD

On July 14, 2014, the Judge Advocate General (JAG) submitted an advisory opinion recommending that the Board grant relief in this case. Although Commanding Officer, Coast Guard Personnel Service Center (PSC) had previously recommended that the Board deny relief in this case, the JAG stated that PSC had since concurred in the recommendation to grant relief. In a memorandum on the case, which the JAG enclosed with the advisory opinion, PSC stated the following:

I recommend that no relief be granted. The [a]pplicant received a non-recommendation on his 30 November 2011 and 31 May 2012 Enlisted Employee Reviews. Applicant asserts that he appealed this evaluation but has stated that he was told he would be given no support if he continued on with the appeal. The applicant provides no proof or documentation of this other than his statement. In accordance with policy, the Approving Official's decision on the advancement recommendation is final and many not be appealed.

Conversely, in the course of researching the claims made by the Applicant, it was discovered the supervisor in question was investigated by CGRC on three separate occasions, the third resulting in the supervisor being relieved of his duties. It is reasonable to suspect an injustice has occurred, however, it would be more appropriate for [the JAG] to make this determination.

PSC explained that while researching the applicant's allegations, it was discovered that in January 2014, the applicant's supervisor was investigated for a claim of "prohibited harassment and a negative office climate" and that two additional, prior investigations involving the applicant's supervisor had occurred. As a result of the investigations against the applicant's supervisor, a recommendation was made to have the supervisor relieved of his duties as the Recruiter in Charge of the applicant's recruiting office as soon as possible. Effective January 14, 2014, the applicant's supervisor was formally relieved of his duties by Commanding Officer of Coast Guard Recruiting Command. In support of this claim, PSC included a memorandum dated January 14, 2014, "Final Action on Administrative Investigation into Claim of Prohibited Harassment and Negative Office Climate at Recruiting Office ...," which summarizes several offensive incidents attributed to the applicant's supervisor (see attached) and states that although "the investigation did uncover substantial workplace climate issues,"

the totality of the practices at RO [Recruiting Office] ... and the way they were or were not communicated by [CPO X], led recruiters to believe unequal treatment was occurring.

With the exception of one, all current and former members of RO ... interviewed expressed displeasure, fear of intimidation or reprisal, and/or confusion about policies and practices at the office. The consensus is that teamwork is absent, recruiters do not speak up for fear of reprisal, and the office will never function properly under [CPO X]' leadership.

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It is my opinion that [CPO X] did not engage in prohibited harassment<sup>3</sup> with recruiters at RO ..., but the totality of [CPO X]' statements, practices and actions led his staff to reasonably believe that some of his actions were based on protected categories of race, ethnicity or gender.

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<sup>3</sup> Coast Guard Civil Rights Manual, COMDTINST M5350.4C, "Prohibited Harassment is defined as including, but not limited to, unwelcome conduct, whether verbal, nonverbal, or physical conduct that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, offensive, or hostile environment on the basis of an individual's protected status, which includes: race, color, religion, sex, national origin, age, disability, genetic information, sexual orientation, marital status, parental status, political affiliation, or

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Given that this is the third inquiry on [CPO X] undertaken by CGRC in less than two years, all providing evidence of leadership and workplace climate deficiencies, it is my opinion that [CPO X] is unable to lead RO ... in a manner that supports the workplace satisfaction, efficiency, and effectiveness CGRC and the Coast Guard expect.

The JAG made the final determination that “[w]hile there was no Coast Guard error, there is sufficient evidence of an injustice to support the granting of the applicant’s relief.” The Commanding Officer, Coast Guard PSC concurred with the JAG’s final determination.

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

On July 23, 2014, the Chair of the BCMR sent the applicant a copy of the Coast Guard’s views and invited him to respond within thirty days. The applicant responded on July 24, 2014, and stated that he agreed with the recommendation for relief.

### **APPLICABLE LAW AND POLICY**

Chapter 2.1.a. of the Coast Guard Civil Rights Manual, COMDTINST M5350.4C, states that “[e]very Coast Guard member deserves to be treated with dignity and respect and work in an environment free of discrimination or harassment.”

Article 5.G.3 of COMDTINST M1000.2, the Enlisted Accessions, Evaluations, and Advancements Manual, states that “[i]f the Approving Official marks ‘Not Recommended,’ they must ensure the member is properly counseled on the steps necessary to earn a recommendation and prepare supporting remarks in accordance with Articles 3.A.4.b.(2)., 3.A.4.e.(4)., and 5.B.2. of this Manual.

Article 5.G.4 of COMDTINST M1000.2 states that “[t]he Approving Official’s decision on the advancement recommendation is final and may not be appealed. However, if the Approving Official learns new information and decides to change the recommendation, they should follow the procedures in Article 5.J.2. of this Manual.”

Article 5.J.2 of COMDTINST M1000.2 states that for changing EER marks, “Approving Officials are authorized to change any mark they assigned to members still attached to the unit if the Approving Official receives additional information that applies to the particular employee review period.”

Article 5.I.1. of COMDTINST M1000.2 states that “[t]he employee review is designed to be as objective as possible. However, when one human being evaluates another, there will be some subjectivity. Even when the member perceives no difference in performance from one period to the next, small variations in marks can occur.” The article also states that “[t]he appeals process is designed to review marks the evaluatee believes were based on: (1) incorrect information; (2) prejudice; (3) discrimination; or (4) disproportionately low marks for the

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any other basis protected by law. Among the types of unwelcome conduct prohibited by this policy are epithets, slurs, stereotyping, intimidating acts, and the circulation or posting of written or graphic materials that show hostility toward individuals because of their protected status.”

particular circumstances.” The article also notes that a recommendation for advancement portion on the employee review may not be appealed.

Article 5.I.2.a. of COMDTINST M1000.2 provides the various responsibilities a member holds when appealing an evaluation.

- (1) Request an Audience. Before writing an appeal, the member should request an audience with the rating chain to verbally express any concerns that could lead to a written appeal.
- (2) Written Appeal. If this meeting does not lead to an agreement between the Approving Official and the member, the member can appeal in writing and submit the appeal to the Appeal Authority indicated in Figure 5.C.1., via the commanding officer. If the member has been reassigned, they must submit the appeal to the Appeal Authority for the former command, via the commanding officer of that command.
- (3) The Appeal Letter. The appeal letter must contain the specific competencies in dispute and supporting information indicating why the marks should be reviewed. Supporting information must include specific examples of demonstrated performance that indicate how the member met or exceeded the written standards. The member attaches a copy of the signed employee review counseling sheet as enclosure (1) and other enclosures pertinent to the assigned marks.
- (4) Submission Deadline. The member must submit the appeal within 15 calendar days (30 calendar days for reservists) after the date they signed the acknowledgment section of the counseling sheet for the disputed employee review.
- (5) Appealing After the Deadline. If appealing more than 15 calendar days (30 calendar days for reservists) after the date the member signed the employee review acknowledgment section, the member must explain the circumstances that did not allow or prevented him or her from submitting the appeal within the prescribed time limit.

Under Article 3.A.3.b. of COMDTINST M1000.2, a member’s placement on an advancement list is determined by a point system, and members receive points for their EER marks, as well as for their score on the Service Wide Examination, their time in grade, their medals, etc.

### 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.
2. The applicant requested an oral hearing before the Board. Pursuant to 33 C.F.R. § 52.31, “[t]he Chair shall decide in appropriate cases whether to grant a hearing or to recommend disposition on the merits without a hearing,” and § 52.51 states that “[i]n each case in which the Chair determines that a hearing is warranted, the applicant will be entitled to be heard orally in person, by counsel, or in person with counsel.”<sup>4</sup> The Chair, acting pursuant to 33 C.F.R. § 52.51,

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<sup>4</sup> See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at \*21 (Dec. 7, 1977) (holding that “whether to grant such a hearing is a decision entirely within the discretion of the Board”); *Flute v. United States*, 210 Ct. Cl.

denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.<sup>5</sup>

3. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice. The applicant is challenging EERs dated November 30, 2011, and May 31, 2012, and he filed his application on March 7, 2013. Therefore, his application is timely.

4. The applicant did not exercise his right to appeal the disputed EERs within fifteen days pursuant to COMDTINST M1000.2, Article 5.I.2. The applicant alleged that he attempted to appeal the first disputed EER and notified his command of his intent to appeal. The applicant stated that he requested an audience to pursue an appeal in accordance with Article 5.I.2.a., but was not afforded an opportunity to have an audience with the rating chain until the 14<sup>th</sup> day after the evaluations were signed, at which time he was notified that if he chose to continue with the appeal process, he would receive no assistance from the command, which he was entitled to. The applicant's claims in this regard are supported by the report of the investigation in January 2014, which found that fear of intimidation and reprisal was a common feeling held by those in the recruiting office. The applicant alleged that it was this fear of reprisal that kept him from continuing further with the appeal of his EERs. Also, not allowing the applicant to have an audience with the rating chain until the 14<sup>th</sup> day, leaving only one day left to appeal, and refusing to provide him with assistance hindered the applicant's ability to timely submit his appeal. Therefore, and because this potential remedy is no longer available to the applicant, the Board finds that he has exhausted his administrative remedy within the Coast Guard.<sup>6</sup>

5. The applicant alleged that the inclusion of the two disputed EERs in his military record is erroneous and unjust. He argued that because the two disputed EERs were unjustly included as part of his record, his name appeared erroneously low on the 2013 Service Wide Exam Advancement List. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record 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>7</sup> Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."<sup>8</sup>

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34, 40 (1976) ("The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process."); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

<sup>5</sup> *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

<sup>6</sup> 33 C.F.R. § 52.13(a) ("No application shall be considered by the Board until the applicant has exhausted all effective administrative remedies afforded under existing law or regulations, and such legal remedies as the Board may determine are practical, appropriate, and available to the applicant.")

<sup>7</sup> 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

<sup>8</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).

6. Under 10 U.S.C. § 1552, the Board is authorized to “correct an error or remove an injustice” in any Coast Guard military record. “Error” means a mistake of a significant fact or law and includes a violation by the Coast Guard of its own regulations.<sup>9</sup> For the purposes of the BCMRs, “injustice” is sometimes defined as “treatment by the military authorities that shocks the sense of justice but is not technically illegal.”<sup>10</sup> The Board has authority to determine whether an injustice exists on a “case-by-case basis.”<sup>11</sup> Indeed, “when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate,”<sup>12</sup> and “[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious.”<sup>13</sup>

7. The preponderance of the evidence in the record shows that the disputed EERs were adversely affected by factors that should not be in the rating process.<sup>14</sup> They are therefore unreliable assessments of the applicant’s performance and are unjust. The record shows that the command climate of the recruiting office was repeatedly investigated, which eventually led to the supervisor being relieved of his duties. Therefore, the Board finds that the applicant has submitted sufficient evidence to overcome the presumption of regularity and to prove by a preponderance of the evidence that the two disputed EERs are unjust and should be removed from his record.

8. The low marks on those EERs presumably lowered the applicant’s position on the [REDACTED] advancement list resulting from the 2013 SWE, pursuant to Article 3.A.3.b. of COMDT-INST M1000.2. Therefore, his position on that list should be adjusted following the removal of the EERs. If when this correction is made, it is determined that the applicant would already have been advanced but for the inclusion of the disputed EERs in his record, his date of rank should be backdated to what it would have been, and he should receive back pay and allowances. Moreover, the Board notes that while this decision was pending, another [REDACTED] advancement list has been issued as a result of the 2014 SWE. The Board finds that the applicant’s placement on this list should be adjusted, if necessary, as well.

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

**(ORDER AND SIGNATURES ON NEXT PAGE)**

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<sup>9</sup> See *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (“‘Error’ means legal or factual error.”); *Ft. Stewart Schools v. Federal Labor Relations Authority*, 495 U.S. 641, 654 (1990) (“It is a familiar rule of administrative law that an agency must abide by its own regulations.”).

<sup>10</sup> *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); *but see* 41 Op. Att’y Gen. 94 (1952), 1952 WL 2907 (finding that “[t]he words ‘error’ and ‘injustice’ as used in this section do not have a limited or technical meaning and, to be made the basis for remedial action, the ‘error’ or ‘injustice’ need not have been caused by the service involved.”).

<sup>11</sup> Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

<sup>12</sup> *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)).

<sup>13</sup> *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).

<sup>14</sup> *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), *cited in Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).



**ORDER**

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

1. The Coast Guard shall remove the two EERs dated November 30, 2011, and May 31, 2012, as well as any associated Page 7s or other related documentation, from his record.
2. After removing the two EERs, the Coast Guard shall recalculate and correct his position on the [REDACTED] Advancement List resulting from the May 2013 SWE. If he would already have been advanced to [REDACTED] off of that list had the two EERs never been in his record, the Coast Guard shall promptly advance him to [REDACTED] backdate his date of rank to what it would have been had the two EERs never been in his record, and pay him corresponding back pay and allowances.
3. If he competed for advancement by taking the May 2014 SWE and is not advanced off the [REDACTED] advancement list resulting from the May 2013 SWE, the Coast Guard shall recalculate and correct his position on the [REDACTED] advancement list resulting from the May 2014 SWE.

October 17, 2014

