

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 2001-001

FINAL DECISION

██████████ Deputy Chairman:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on September 11, 2000, upon the Board's receipt of the applicant's complete application for correction of his military record.

This final decision, dated July 26, 2001, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a chief warrant officer - 2 (CWO2), asked the Board to correct his record to show that prior to his promotion to CWO2, he had been advanced to ██████████ (██████████ pay grade E-8), effective February 1, 1999, with back pay and allowances. The applicant claimed that his name was erroneously removed from the 1998 E-8 advancement eligibility list in August 1998.¹

SUMMARY OF RECORD AND SUBMISSIONS

The applicant took the May 1997 servicewide examination (SWE) for advancement to E-8. He placed number ██████████ on the 1997 advancement list and was not one of those above the cut-off (guaranteed advancement) when the advancement list was published initially.² In May 1998, the applicant took the SWE again for advancement to E-8.

In June 1998 after taking the May 1998 SWE, the applicant requested that his name be removed from the 1997 advancement eligibility list. He stated that he expected to be advanced from the 1997 list on August 1, 1998 and once advanced he would be transferred to an overseas assignment. He indicated that he was not interested in moving again, having recently moved his family from ██████████, to ██████████, a year earlier. His name was removed from the May 1997 advancement list on June 16, 1998, in accordance with his request.

¹ The applicant was advanced to CWO2 on October 1, 1999.

² Those members who placed at or above the cutoff are guaranteed advancement and do not have to take a subsequent SWE to remain eligible for advancement. Those, like the applicant, who placed below the cutoff are not guaranteed advancement and are required to take a subsequent SWE to remain eligible for advancement.

As stated above, prior to asking that his name be removed from the 1997 advancement list, the applicant took the May 1998 SWE for advancement to E-8. In August 1998, the results of the May 1998 SWE were announced and the applicant placed number one on the 1998 advancement list. The applicant stated that two days after the May 1998 advancement list was published, the Human Resource Service and information center (HRSIC) directed that his name be removed from the 1998 list. HRSIC stated that the applicant's name had been erroneously placed on the list because one year had not elapsed from the anniversary of his removal from the 1997 advancement list and the May 1998 SWE. HRSIC cited Article 5.C.25.f. of the Personnel Manual as the basis for its decision to remove the applicant's name from the 1998 advancement list.

The applicant stated that 5.C.25.f. of the Personnel Manual does not apply to the May 1998 SWE advancement list because he had taken that examination prior to his election to have his name removed from the 1997 advancement list. He stated that Article 5.C.25.f. provides for the following, in pertinent part: "These members shall be required to wait one year from the anniversary date of that election before being eligible to participate in future examinations." He stated that he was counseled that he would be ineligible to participate in the 1999 SWE because he was removing his name from the 1997 advancement list. The applicant argued that the pertinent provision of the Personnel Manual prevents competing in future examinations not previous examinations. He stated his interpretation is consistent with the counseling he received from his unit. The applicant further stated the following:

I was also assured that having already participated in the 1998 [SWE] that this statement would have no impact on my eligibility for the 1998 advancement cycle. I had invested a considerable amount of time studying for the 1998 [SWE] and felt confident that I would place high on the 1998 eligibility list, so I voluntarily removed my name from the 1997 eligibility list.

On September 4, 1998, the applicant wrote to the Commander, Coast Guard Personnel Command (CGPC) requesting to have his name reinstated to the 1998 advancement eligibility list. The applicant stated that he did not receive a reply from CGPC. The applicant's CO wrote the following in support of the applicant's request to CGPC:

[The applicant] is absolutely correct when he states that the Personnel Manual only prohibits participation "in future examinations." Moreover, retroactively denying a member what he earned in good faith as a result of a decision he made "after the fact" is specifically excluded as a possibility according to guidance contained in Article 5.C.25.f. [The applicant's] subsequent removal from the May eligibility . . . list was not based on policy contained in the Personnel Manual and can, for that reason, be viewed as unfair and incorrect.

Views of the Coast Guard

On February 28, 2001, the Chief Counsel provided an advisory opinion to the Board. He recommended that the Board deny relief to the applicant.

The Chief Counsel stated that the applicant failed to prove that the Coast Guard misapplied the regulations to the facts of his case. He stated that service members who voluntarily elect to be removed from the SWE eligibility list are "required to wait one year from the anniversary date of the election before being eligible to participate in future examinations." He stated that Article 5.C.25.f. of the Personnel Manual has been consistently interpreted and applied to disqualify service members, who voluntarily request the removal of their names from an advancement list, not only from competing for advancement but also from advancing for one year.

The Chief Counsel stated that the applicant requested the removal of his name from the eligibility list to avoid a PCS transfer that would have resulted from his advancement to E-8. The Chief Counsel stated that the applicant was within his rights to reject his scheduled advancement to the next higher pay grade. However, he was not within his right to take a subsequent SWE when he was scheduled to advance from the current advancement list.

The Chief Counsel stated that advancement lists are interrelated and not separate entities. Article 5.C.31.c. of the Personnel Manual states that "[n]ormally 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 advance candidates above the cutoff on the superseded list will be carried over to the top of each new list."³ (According to a memorandum from CGPC, the 1997 eligibility list was effective from January 1, 1998 through December 31, 1998.) The Chief Counsel stated that since the applicant had not been advanced to E-8 off the May 1997 advancement list prior to the publication of that list, his name would have automatically been carried over to the top of the May 1998 advancement list. Therefore, according to the Chief Counsel, when the applicant requested the removal of his name from the May 1997 advancement list, he implicitly authorized the removal of his name from the May 1998 advancement list. The Chief Counsel further stated as follows:

[The applicant's] sole logical basis for having taken the action he did was to circumvent the regulatory scheme underlying the Coast Guard's enlistment advancement system. Applicant was probably informed well before May 1998 that he would be subject to a PCS transfer if he accepted the advancement to E-8 scheduled for August 1998. However, it was only after taking the May 1998 SWE that he asked to have his name removed from the May 1997 eligibility list. It is axiomatic that his action was

³ According to information obtained from the Office of the Commander, Coast Guard Personnel Command, the applicant was not above the cutoff when the advancement eligibility list was originally published in May 1997. Nor was he above the cutoff when the E-8 advancement eligibility list was republished with the November 1997 E-4 through E-6 advancement list. However, in July 1998, the cutoffs for the 1997 advancement list were revised and the applicant would have been included in those guaranteed advancement from the 1997 list, if his name had not been removed for that list.

designed specifically to avoid the undesirable consequences of the policy's intended results.

A declaration from the Assistant Chief, Advancements and Separations Branch, Enlisted Personnel Management Division, was attached to the advisory opinion. This individual stated the following:

If a member voluntarily elects to be removed from an eligibility list, he or she will be ineligible to compete for advancement for one year. CGPC . . . has consistently interpreted Article 5.C.25.f. of the Coast Guard Personnel Manual to implement a one-year penalty to members who reject expected advancement to the next pay grade. Therefore, any member who chooses not to be promoted is precluded from competing or advancing for one year. This has been the unbroken policy of the Coast Guard since 5.C.25.f. was put into practice.

Applicant's Reply to the Views of the Coast Guard

On March 1, 2001, a copy of the advisory opinion was sent to the applicant with an invitation for him to respond. He did not submit a response.

FINDINGS AND CONCLUSIONS

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

1. The BCMR has jurisdiction of this case pursuant to section 1552 of title 10, United States Code. The application was timely.

2. Article 5.C.25.f. of the Personnel Manual states that "[p]ersonnel who decline promotion or voluntarily elect to be removed from an eligibility list . . . shall be required to wait one year from the anniversary date of that election before being eligible to participate in future examinations." After taking the May 1998 SWE, the applicant elected to have his name removed from the 1997 advancement list in June 1998. Two months later (August 1998), his name was also removed from the 1998 advancement list because a year had not elapsed since his June 1998 election to have his name removed from the 1997 advancement list. The applicant stated that Article 5.C.25.f. of the Personnel Manual does not apply to the May 1998 SWE because he participated in that SWE in May 1998, prior to his June 1998 election to have his name removed from the 1997 list. That argument is not persuasive. For the reasons discussed below, the Board finds that the Coast Guard did not commit an error or injustice in this case.

3. Article 5.C.25.f. of the Personnel Manual is clear that the Coast Guard intended for those individuals who request removal of their names from an eligibility list wait one year from the date of that election before becoming eligible to participate in future SWEs. The SWE process is the only avenue to advancement, except for direct advancement by the commandant. Therefore, the words "wait one year to participate in future SWEs" clearly says to the Board that the Coast Guard's intent with this

regulation is to prohibit advancement for one year. Otherwise, there would be no purpose in requiring a one-year waiting period between an election to have one's name removed from an advancement list and participating in future SWEs.

4. If the applicant's interpretation were accepted, it would mean that the one-year prohibition on future SWEs after an election is made to have one's name removed from the advancement list would have no effect. A member could time an election to have his name removed from a current list after taking a subsequent SWE, thereby circumventing the one-year waiting period. This is particularly true since an advancement list is normally effective from January through December of a given year and the SWE is usually given in May of the preceding year. The applicant's argument that the 1998 SWE does not qualify as a "future SWE" because it occurred before his request to have his name removed from the 1997 advancement list is his own interpretation of the regulation. A future SWE could be any SWE that occurs after the one in question. In this regard, the Coast Guard has asserted that its intent and interpretation of the regulation has been to prevent participation and/or advancement in an SWE for one year after a service member makes an election to have his name removed from the eligibility list. It has asserted that the applicant's interpretation of the regulation would damage the integrity of the advancement system. In addition, the applicant has not shown that he has been treated any differently than any other member who has elected to have his name removed from an advancement list.

5. Moreover, as the Chief Counsel stated, advancement lists are interrelated because those individuals who are above the cutoff, and not advanced by the expiration of the current list, have their names carried to the top of the new advancement list. The applicant placed above the cutoff on the 1997 advancement list when it was revised in July 1998. However, the applicant was aware that he would be advanced from the 1997 list at the time he made his request to have his name removed from the 1997 advancement list. The Board is persuaded in this finding based on the applicant's statement that he had learned that his projected advancement date was August 1, 1998 and that he would be transferred overseas once advanced. He did not want the overseas assignment. Therefore, he opted to have his name removed from the advancement list, hoping that he would be eligible to advance from the May 1998 SWE.

6. The applicant made the decision to have his name removed from the May 1997 advancement list after he took the May 1998 SWE. When he made the decision to have his name removed from the advancement list he was aware of the pertinent regulation, because he talks of the counseling he received with regard to it. From the applicant's and his CO's statements questions existed in their minds about the meaning of the regulation. Instead of guessing with respect to its meaning, they should have consulted with CGPC on its meaning. They did not contact CGPC but relied on their interpretation, which is different from that of the Coast Guard. To accept the applicant's interpretation would defeat the purpose of the regulation. He took a gamble by asking to have his name removed from the 1997 advancement list, hoping that his and the CO's interpretation was correct. Based on his military experience, he should have known to clarify the matter with CGPC, if questions existed whether he would be eligible to advance if he participated in the May 1998 SWE after the June 1998 decision to have his name removed from the May 1997 advancement list.

7. The applicant's one-year waiting period began on or about June 16, 1998 and ended on or about June 15, 1999. By removing his name from the 1997 advancement list, which did not expire until December 31, 1998, the applicant effectively removed himself from all advancement lists for one year. To rule otherwise, would permit servicemembers to manipulate the situation by shortening, or in some cases eliminating, the waiting period between an election to have their names removed from an advancement list and eligibility to participate in a future SWE to less than the one year waiting period required by 5.C.25.f. of the Personnel Manual.

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

9. In view of the facts that have become known because of this case, the Board recommends that the Coast Guard consider rewriting the regulation to make it clearer that the one-year waiting period after an election to have one's name removed from an advancement list applies to both advancement and participation in future SWEs.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

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

