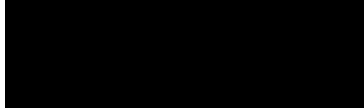


**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-107



FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the completed application on April 26, 2016, and assigned it to staff attorney [REDACTED] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated May 26, 2017, 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 asked the Board to award him a retroactive advancement to YN1/E-6 with back pay and allowances effective July 1, 2015. He stated that after taking the Service Wide Examination (SWE) in November 2014, he was placed on the advancement list. He stated that the Coast Guard erred by removing him from the November 2014 advancement list, and he asked that he be advanced retroactively, receive all back pay and allowances, be authorized the E-6 professional growth point, and be able to participate in advancement opportunities as an E-6.

The applicant argued that his then-commanding officer (CO) "was not given proper guidance on the policies" in the Enlisted Accessions, Evaluations and Advancements manual COMDTINST M1000.2A, which resulted in an "uninformed decision." The applicant argued that his advancement should have been *withheld* due to a pending disciplinary action instead of *cancelled*.

The applicant provided a timeline of events with his application. It includes the following:

- February 18, 2015: The applicant was arrested by civil authorities. At that time, he was number one on the November 2014 SWE advancement list that would begin promoting members on July 1, 2015. After the arrest, the applicant was in contact with the Division Chief regarding whether the command would pursue non judicial punishment (NJP)

against the applicant. The applicant was informed that the command was awaiting an outcome on the civil case.

- February 25, 2015: The applicant was informed by the Division Chief that a message was sent to remove the applicant from the advancement list.
- May 7, 2015: The applicant was informed by the department head that the applicant would be processed for discharge due to the arrest. The applicant stated that at this time, the civil case was still pending and no military charges had been filed against him.
- May 14, 2015: A preliminary investigation began for potential charges under the Uniform Code of Military Justice.
- June 4, 2015: The executive officer ordered the report of offense and disposition to be dismissed.
- June 8, 2015: The civil matter was dismissed.
- July 14, 2015: The applicant received a reply from the Pay and Personnel Center (PPC) regarding being reinstated on the advancement list. The applicant stated that during this time a change of command was taking place at his base.
- Late July 2015: The applicant met with his then-current CO and his incoming CO to discuss the applicant being reinstated on the advancement list. The applicant stated that it was decided that if he maintained his work ethic he would be reinstated on the advancement list.
- September 18, 2015: The applicant's new CO sent a request to PPC to reinstate the applicant on the advancement list and to retroactively advance him.
- November 4, 2015: The request to reinstate the applicant was disapproved.
- November 5, 2015: The applicant stated that he began to research the reinstatement process.

SUMMARY OF THE RECORD

In November 2014, the applicant was placed on the Advancement Eligibility List. He was ranked first for members being promoted to YN1.

On February 25, 2015, the applicant's command sent a message to PSC, PPC, which includes the following:

A. Enlisted Accessions, Evaluations, and Advancements Manual, COMDTINST M1000.2...
Removal of SNM from advancement eligibility list IAW Ref A. MBR no longer possesses command advancement recommendation.
Commanding Officers Not Recommended Special Marks were completed effective 25Feb2015.

Also on February 25, 2015, a message was sent from PSC, PPC to the applicant's command. The message stated that the applicant was "permanently removed from the November 2014 Active Duty YN1 SWE list."

The Coast Guard's Advisory Opinion mentions an April 25, 2015, disciplinary set of marks. No copy of these marks was provided in the record. The applicant's command requested on September 18, 2015, that these disciplinary marks be removed from the applicant's record.

A print out of the applicant's employee review summary provided by the Coast Guard shows that his April 30, 2015, EER has a conduct mark of "S" for satisfactory and an "R" for recommended for advancement. Enlisted members are evaluated in 25 areas on a scale of 1 to 7, with 7 being the highest. On the applicant's April 30, 2015, EER, he received seven 4s, seven 5s, and eleven 6s.

On May 7, 2015, the applicant received a negative CG-3307 administrative entry ("Page 7") in his record. The Page 7 states in full:

On morning of 18 February 2015, you were arrested at Coast Guard Base...by the...Police Department on allegations of physically assaulting two women on 17 February 2015. Charges and restraining orders were filed against you in...Municipal Court as a result of the assaults. The violent nature of the assault was corroborated by the fact that the responding police officers noted physical injuries on both victims and also recovered evidence at the scene confirming the reporting victim's account of assault. Pending the outcome of your civil court case, you may be subject to additional charges under the Uniform Code of Military Justice, as well as possible administrative actions. You have clearly failed to uphold the Coast Guard core values of Honor, Respect, and Devotion to Duty. Through your actions, you failed to set the appropriate example for junior members, and your poor judgment and reported criminal actions have brought discredit upon yourself, Base..., and the Coast Guard.

On June 8, 2015, the civil charges against the applicant were dismissed without prejudice, the reason marked as "Proof." The contact order against the two women was lifted.

On June 22, 2015, a list of members who were to be advanced effective July 1, 2015, was released. Included on this list was the YN2 listed as number two on the November 2014 YN1 advancement list, next in line behind the applicant.

On July 14, 2015, the applicant sent an email to PPC regarding the advancement list. He asked if a member is taken off an advancement list due to a pending investigation, when the investigation is over and no charges were filed is there a procedure for the command to have the member reinstated on the advancement list. PPC replied with the following:

The fact that there were no charges does not necessarily mean that the CO does not or did not intend to remove the recommendation. If the CO lost confidence in the member during the investigation and removed the recommendation, then it stands and there is no reinstating the member to the list. If however, the CO determines that s/he acted hastily and submitted the "not recommended" prior to getting all the facts and now realizes that there were no grounds to remove the recommendation, the CO may submit a memorandum, to PPC(ADV) and request that the EER be "corrected" since the "not recommended" was unwarranted and submitted in error.

On September 18, 2015, the applicant's new CO sent a memorandum to PPC regarding the applicant's reinstatement on the November 2014 advancement list. The memorandum included the following:

I request [the applicant] be placed back on the Advancement Eligibility List for YN1 off the 2014 November Service Wide Exam. A message was sent to CG Pay and Personnel Center Advancement Branch...requesting removal of [the applicant] off the Advancement List. This request was in connection to a civil matter that has since been dismissed without prejudice and at no fault of the member. As such, I request that the Enlisted Employee Review entry on April 25, 2015 of Not Recommended be removed and that his Enlisted Employee Review for April 30, 2015 reflect a Satisfactory Conduct mark vice

Unsatisfactory and change from Not-Recommended for Advancement to Recommended for Advancement. [The applicant] has pursued and acquired the necessary YN knowledge and customer service skills needed in YN leadership to advance to YN1 and is recommended for advancement as soon as permitted.

Emails were exchanged between September 18, 2015, and October 13, 2015, between the applicant's base and PPC requesting that he be retroactively advanced. The email chain forwards this email asking for it to be processed. The request email states:

I'd like to request EPM's approval for a retroactive advancement for [the applicant] to 01 July 2015. MBR marked on 30 Apr 2015 as Unsat and Not Recommended due to fraudulent charges and subsequently removed from the advancement list. The charges were dismissed without prejudiced [sic] and at no fault of the member. The Unsat and Not recommended have been changed to Recommended and Sat conduct by the command. The member is now reinstated to the Nov 2014 SWE Eligibility list. We would like to request the retroactive advancement to 01 July 2015 when [the applicant] would have been advanced as #1 on the Nov SWE list as reparation.

A memorandum was sent from PSC to the applicant's command in response to a memorandum dated September 18, 2015. PSC stated that the request for retroactive advancement was "unfortunately disapproved." The memorandum included the following:

Following [the applicant's] civil arrest...he was given an Enlisted Employee Evaluation (EER), noting that the command had withdrawn their recommendation for advancement. In accordance with [COMDTINST M1000.2], members are required to maintain their advancement recommendation throughout an active SWE eligibility list. Since [the applicant's] name was removed from the SWE eligibility list, he must qualify again through a subsequent SWE competition for advancement.

[The applicant] has been identified as a High Year Tenure (HYT) candidate, currently having over 17 years of active duty service as an E5. Our office has received the HYT waiver request which will be reviewed and processed by the HYT waiver panel accordingly.

On October 28, 2015, emails were exchanged between members of the applicant's command. The first email indicates that a chief warrant officer (CWO) serving as a personnel specialist had inquired if the command was going to request to have the applicant's May 7, 2015, Page 7 removed. The CWO stated that "it was determined that the command will not request to have it removed." The next email contained notes from an in-person discussion with the CWO regarding the events that occurred the night of February 17, 2015. PERS4 added to the notes in parentheses to supplement the notes. The summary includes the following:

-It was a boyfriend/girlfriend spat. An outsider got involved. (The outsider was another girl that his girlfriend was with.)

-It wasn't considered domestic violence because they didn't live together. (To my understanding under CG Work-Life it wasn't considered DV since they didn't live together, however I think was considered an alleged DV case by the City/County because they had a relationship)

-It became a "he said "she said" issue.

-Mbr left the scene and his girlfriend called the police. (or her friend called) (Member was subsequently arrested the next morning at Base...after the alleged incident)

-Court system let it play out. Court system is slow.

-It was dismissed without prejudice. (on 9Jun15)

- Command gave member an EER with Unsat and Not Recommended due to the arrest. (The Command removed it's recommendation via memo 25Feb15, then a Not Recommended, and Unsat was on the 31Apr14 EER)
- Command wasn't sure how long civil case was going to last and waited for police to sort it out. (as well as the DA's Office to determine possible charges and court date)
- Since member was arrested they pulled the recommendation thinking they can give it back, if needed, once the case was decided on. (On a later date the CO determined/recommendation for reinstatement was based on outcome of case and members performance)
- They issued member a CG-3307 on 7 May 2015 which the member refused to sign. (The command initiated an investigation once the DA dismissed it. The results of the command investigation was dismissed because a PG7 of 7May15 had already been done)
- The unit had a change of command and key personnel transferred during the summer. (The CO, XO, CMC and Pers Dept Head transferred at the same time)
- 18 Sep 2015 they submitted the request through PPC Customer Care.
- 1 Oct 2015 PPC forwarded the package to EPM...
- Command does not see charges being brought back. Member has not further contact with two females.
- It is standard for the court system to issue a "no contact order" for any case involving any type of assault or domestic violence until case is adjudicated. (This is what we typically see in legal system here)

On October 30, 2015, the applicant submitted a request to PSC for wavier of the high year tenure professional growth point until he completed 20 years in service. He stated that he will reach 20 years of service on August 18, 2018. He requested the waiver so that he may acquire a 20-year retirement. He asked that, if approved, he have the opportunity to compete in all advancements for which he qualifies. The applicant's command submitted the request with an endorsement, recommending approval of the waiver. The applicant's captain in the endorsement stated that while the applicant "has numerous negative [Page 7s], his performance while at Base...has been above standard and he has taken appropriate actions to correct his conduct." The applicant received a response from PSC approving his waiver request. He was told that he will be retained on active duty until he is eligible for retirement.

Emails were exchanged between the applicant and his then-current CO between March 21, 2016, and March 23, 2016, to discuss the CO's statement to the Board. The first email from the applicant states that he and a YNC generated a statement for the CO. The CO's response states that he commended the applicant for doing research and follow-up on the situation. The email further states "I...am confused by paragraph number 1... It says that I should have withheld your advancement. I'm pretty sure that's what I did." The applicant responded and asked if the addition of "vice removed" would help clarify. The CO responded with the following:

I think that I now understand what you are after. I "cancelled" the Advancement instead of "withholding" it. Seems clear from the references provided – that withholding would have been the more correct action. It is a shame that I didn't have that guidance back then. But I reserve the right to get smarter. It seems that if I can convince the BCMR that I would have taken a different action, they may conclude a different outcome.

On April 18, 2016, the applicant's CO during the period in question prepared a statement to the Board. It states:

I am requesting a correction to the manner in which, as the former Commanding Officer of CG Base... I took punitive, administrative action against [the applicant]. A preliminary investigation was initiated on May 13, 2015 for [the applicant's] civil arrest on February 17, 2015 following the report of an altercation within the city limits... On 25 February 2015, [the applicant] was removed from the YNI Eligibility Advancement List pending potential disciplinary action.

With the benefit of hindsight, I now recognize that, in accordance with [COMDTINST M1000.2], when I supported the Cancellation of YN2's advancement, I should have more correctly, Withheld the Advancement. On 4 June [2015] disposition of the investigation was dismissed, lacking civil prosecution closure. It was my intent that, following my July 17, 2015 PCS departure, the new Base...Commanding Officer could decide, based on the merits of [the applicant's] performance, whether to restore the Recommendation for Advancement. The [new Captain, applicant], and his LPO and I discussed this in my office, prior to my departure. In all other respects, eligibility for advancement was maintained by [the applicant.]

VIEWS OF THE COAST GUARD

On October 6, 2016, the Judge Advocate General (JAG) for the Coast Guard submitted an advisory opinion and recommended that the Board deny relief in this case. The JAG stated that the February 25, 2015, message from PSC to the applicant's command stated that he had been "permanently removed" from the advancement list. According to the Enlisted Accessions, Evaluations, and Advancements manual, Article 3.A.25.f., a member's name may be removed from an eligibility list "as a result of disciplinary action, or for other good and sufficient reasons." The JAG argued that the evidence shows that the applicant's removal was for "good and sufficient reasons," pursuant to his arrest for assault.

The manual also states that members must maintain advancement eligibility through the date of advancement. Members who "fail to maintain the commanding officer's advancement recommendation cannot be reinstated on existing eligibility list for advancement."¹ The JAG argued that it "is not in dispute" that the applicant failed to maintain eligibility prior to the advancement date.

The JAG stated that while the CO's letter to the Board "indicates a desire to have withheld the advancement...he does not label his action an error." Instead, the CO confirmed that he took punitive action against the applicant and claimed that he "should have more correctly" withheld the applicant's advancement. However, the JAG noted, the fact the applicant's command was not willing to remove the Page 7 from his record shows that there was no error in removing the applicant from the eligibility list. The JAG argued that while the CO's letter "expresses a desire to have taken another action with the benefit of hindsight, his initial action did not constitute an error."

The JAG also argued that just because the applicant's command changed his April 30, 2015, EER to show "Recommended for Advancement" and "Satisfactory" for conduct, that action does not restore the applicant's placement on the advancement list. Removal from an eligibility list is a permanent action. Furthermore, the JAG stated, pursuant to Article 3.A.24.f. of the manual, the decision to add or remove members from the eligibility list lies with PSC.²

¹ COMDTINST M1000.2A, Article 3.A.13.

² COMDTINST M1000.2A, Article 3.A.25.

The JAG argued that the manual does provide a method to change marks on an EER,³ but stated that it does not provide a method to restore a member to an eligibility list once permanently removed.

The JAG noted that the advancement of individuals is a complicated process, so the permanency of removal from eligibility lists is for good reason. The Coast Guard must be able to advance people in a timely manner, taking many factors into consideration. Therefore, the JAG argued, PSC's decision not to allow the applicant to be reinstated onto the advancement list was within their discretion and did not constitute an error.

Lastly, the JAG argued that there is no injustice. PSC inquired into whether an arrest actually happened and asked if the command was willing to remove the Page 7 from the applicant's record. The arrest did happen and the command did not request the removal of the Page 7. The JAG therefore argued that this is not a case wherein evidence was presented to clearly absolve the applicant of any violations of Coast Guard core values. Therefore, the JAG recommended that the Board deny relief. In doing so, the JAG also adopted the findings and analysis in a memorandum prepared by PSC.

PSC stated that according to Article 3.A.4.b.(3) of the manual, the CO's advancement recommendation is the most important eligibility requirement in the Coast Guard advancement system, and under Article 3.A.19., the CO has the choice of withholding an advancement, in which case the CO may later ask PSC to effect the advancement, or withdrawing an advancement recommendation, in which case the removal from the current advancement list is permanent. PSC noted that Article 3.A.22.c. states that a CO may not advance a member retroactively, and advancements are considered retroactive after 30 days have elapsed since the requested date of advancement.

As for changing the applicant's marks on his evaluation, PSC stated according to Article 4.E., a CO may change any mark they assigned to a member still attached to that unit. This includes changing the recommendation for advancement, per Article 4.E.2.b.

In light of these regulations and records, PSC argued that relief should not be granted in this case because the applicant has not shown that his removal from the November 2014 advancement list was an injustice or error. PSC stated that the policy in the Enlisted Accessions, Evaluations and Advancements manual stresses the importance of a CO's recommendation for advancement and that this recommendation must be maintained continuously from the eligibility date through the date of advancement. After the applicant was arrested, his CO chose to *withdraw* the recommendation, as opposed to *withholding* it. PSC argued that the fact that his CO chose to withdraw the recommendation, when he had the choice to withhold, provides evidence of the CO's intention. Furthermore, the applicant's CO stated that he intended to let the determination of whether to restore the applicant's recommendation to the incoming CO. PSC argued that this is further evidence that the applicant's CO intended to withdraw the recommendation instead of withholding it because the incoming CO could not change the prior CO's evaluation marks.

³ COMDTINST M1000.2A, Article 4.E.2.b.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 12, 2016, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited a response within 30 days. No response was received.

APPLICABLE REGULATIONS

All applicable regulations discussed are from the Enlisted Accessions, Evaluations, and Advancements manual, COMDTINST M1000.2. Chapter 3 of the manual covers policy regarding enlisted advancements. Article 3.A.4.b.(3) states that the CO's "recommendation for advancement is the most important eligibility requirement in the Coast Guard advancement system." This article notes that the CO's recommendation is only valid for each specific advancement eligibility period, and must be renewed for each year. The CO's "recommendation for advancement must be maintained from the recommendation date up to the advancement date...Personnel who have been invalidated must be recommended and qualify again through a new SWE competition."

Article 3.A.5. discusses basic eligibility requirements. Section (n) states that a member must be recommended for advancement by the CO.

Article 3.A.13. states the following:

Members must maintain advancement eligibility from the date of recommendation through the date of advancement. Members who fail to maintain the commanding officer's advancement recommendation cannot be reinstated on existing eligibility list for advancements. Members will be removed from an advancement list or supplemental advancement list if any of the following occur: ...

3.A.13.b. – Members whose commanding officer has withdrawn their advancement recommendation are not eligible to advance. Commanding officers will contact Commanding Officer (CG PPC (ADV)) copying Commander (CG PSC-EPM-1) or (CG PSC-RPM) as information addressee, to remove from the current advancement eligibility list any member meeting this criteria.

Article 3.A.19.b. is titled "Withholding Advancements," and paragraph (1)(a) states that a CO will withhold advancement for enlisted members who have a disciplinary action pending. The CO must notify PPC and include the reason for the action and a statement that the member understands why the advancement was withheld. The advancement may be effected at a later date but not past the expiration of the current eligibility list. To effect an advancement that was withheld, the CO advises PPC and PSC with a recommendation that the member is deserving of advancement.

According to Article 3.A.19.c., titled "Cancellation of Advancement," a CO may advise PPC prior to effecting an advancement if the CO has withdrawn his advancement recommendation because the member has failed to remain eligible. The CO will advise PPC to remove the member's name from the eligibility list, will state the reasons for the action, and include a statement that the member understands why his name is being removed.

Article 3.A.22.c. states that a CO cannot advance a member retroactively, and an advancement is considered retroactive after 30 days have elapsed since the requested date of advancement. This section states that no exceptions to this policy are permitted.

Article 3.A.25.f. states that Commander, PSC may remove a member's name from an eligibility list "as a result of disciplinary action, or for other good and sufficient reasons, whereby the member is no longer considered qualified for the advancement." This section also states that a CO may "direct that the member not be removed...but that advancement is being withheld for a definite period." Members who are removed must qualify for advancement again through a subsequent SWE competition.

Chapter 4 of the manual pertains to enlisted qualifications. Article 4.E.2.b.(2) states that if an approving official wishes to make changes to an evaluation more than seven days past the submission date, and the member is still assigned to the unit, the approving official must write, sign, and send a memorandum to the Commanding Officer (CG PPC) to request a change to the marks.

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 concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The applicant asked the Board to award him a retroactive advancement to YN1/E-6 with back pay and allowances effective July 1, 2015. The applicant alleged that his removal from the 2014 advancement list, as opposed to withholding his advancement, was erroneous and unjust. 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.⁴ 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."⁵

3. According to Article 3.A.4.b.(3) of COMDTINST M1000.2, a CO's "recommendation for advancement must be maintained from the recommendation date up to the advancement date...Personnel who have been invalidated must be recommended and qualify again through a new SWE competition." Article 3.A.13. states that "[m]embers who fail to maintain the commanding officer's advancement recommendation cannot be reinstated on existing eligibility list for advancements," and lists one of the reasons for removal as a CO

⁴ 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)).

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

withdrawing his recommendation for advancement. The applicant's CO provided a letter to the Board stating that he "should have more correctly" withheld the applicant's advancement as opposed to cancelling it. However, the message to PSC, PPC on February 25, 2015, asks for "Removal of SNM from advancement eligibility list," and states that the applicant "no longer possesses a command advancement recommendation." In light of this language, the Board finds that, at the time the message was sent to PSC, the CO had in fact withdrawn his advancement recommendation, which permanently removed the applicant's name from the advancement list pursuant to Article 3.A.19.c. The loss of the advancement recommendation removed the applicant from the list because Article 3.A.4.b.(3) of COMDTINST M1000.2 states that a CO's "recommendation for advancement must be maintained from the recommendation date up to the advancement date. Personnel failing to maintain the CO's recommendation for this period shall be invalidated from the Servicewide Exam(s) in which they participated. Personnel who have been invalidated must be recommended and qualify again through a new SWE competition." The Board therefore finds that the applicant has not proven by a preponderance of the evidence that PSC committed error or injustice by permanently removing the applicant from the November 2014 advancement list and refusing to reinstate him on the list.

4. The record indicates that the CO later reconsidered his decision to withdraw his advancement recommendation after the State did not prosecute the applicant and he committed no further misconduct. In an email from March 22, 2016, the CO stated, "It says that I should have withheld your advancement. I'm pretty sure that's what I did." In the same email chain, he also stated, "Seems clear from the references provided – that withholding would have been the more correct action." Additionally, in the CO's letter to the Board, he stated, "when I supported the Cancellation of YN2's advancement, I should have more correctly, Withheld the advancement... It was my intent that...the new Base...Commanding Officer could decide, based on the merits of [the applicant's] performance, whether to restore the Recommendation for Advancement." However, the CO's own message to PSC shows that he had documented his withdrawal of his recommendation for advancement on special marks dated February 25, 2015, and Article 3.A.13. states that "[m]embers who fail to maintain the commanding officer's advancement recommendation cannot be reinstated on existing eligibility list for advancements."

5. According to the applicant's own timeline, in late July 2015, after the State had declined to prosecute him in June, he met with his incoming and outgoing COs about the reinstatement of his advancement, and the outgoing CO stated that he would leave the decision of whether the applicant should be recommended for advancement up to the incoming CO based on the applicant's future performance. The outgoing CO confirmed this in his letter to the Board when he stated that it had been his intent to let the incoming CO decide whether to recommend the applicant for advancement based on the applicant's future performance. Therefore, in July 2015, even knowing that the State had already dismissed the charges against the applicant, the outgoing CO did not think that the applicant should be immediately or retroactively advanced. Nor did the CO agree that the Page 7 documenting the incident should be removed from the applicant's record. Therefore, the CO's recent statement that he should have withheld the applicant's advancement so that he could have requested reinstatement of the applicant's

advancement eligibility constitutes “retrospective reconsideration”⁶ that is not based on any new information about the alleged assault and the applicant’s arrest.⁷

6. Finally, the Board notes that pursuant to Article 3.A.19.b.(3) of COMDTINST M1000.2, even if the CO had withheld the applicant’s advancement, instead of cancelling it, the CO could only *request* the applicant’s advancement at a later date, as the final decision rested with PSC. And when the CO did request the applicant’s advancement, PSC denied the CO’s request based not only on the fact that the CO had removed the applicant’s name from the advancement list but also on the Page 7 documenting the applicant’s arrest, which the command declined to remove. Moreover, PSC has separate authority to cancel an advancement “for good and sufficient reasons” under Article 3.A.25.f. Therefore, the final authority for determining whether the applicant should be advanced rests with PSC, and PSC has already declined to advance him.

7. Accordingly, the Board finds that the applicant has not proven by a preponderance of the evidence that his removal from the November 2014 advancement eligibility list was erroneous or unjust or that he should be retroactively advanced and awarded back pay and allowances. The applicant’s request for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁶ See *Tanaka v. United States*, 210 Ct. Cl. 712 (1976) (upholding an Air Force BCMR decision to deny relief because letters from the plaintiff’s raters had not shown any misstatements of fact but “only opinions they no longer entertained”); *Paskert v. United States*, 20 Cl. Ct. 65 (1990) (upholding an Army BCMR decision to deny relief because the letter of the plaintiff’s senior rater stating that the plaintiff should have been selected for promotion and retained in the Army but not denying the underlying facts “is a case of retrospective thinking motivated by the knowledge of the applicant’s nonselection for promotion”); BCMR 2015-136 (noting that “retrospective reconsideration” without new information is not grounds for removing an evaluation); BCMR Docket No. 84-96, Decision of the Deputy General Counsel (finding that a CO’s statement that he would raise the applicant’s marks retroactively if he could, but that did not identify any misstatements of fact, constituted “retrospective reconsideration that should be afforded little weight”); BCMR Docket No. 67-96 (finding that relief should be denied because the recent statements of the applicant’s supervisors constituted “retrospective reconsideration”); BCMR Docket No. 24-94 (finding that “retrospective reconsideration” did not warrant relief when the reporting officer wrote, “had I known then what I now know I would have marked him differently”).

⁷ The Board notes that because the applicant was not advanced in July 2015, he later became subject to discharge under the High Year Tenure program, but PSC has agreed to retain him until he is eligible for retirement.

ORDER

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

May 26, 2017

