

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-143



FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on April 26, 2017, 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 January 12, 2018, 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, an active duty Senior Chief [REDACTED] (E-8), asked the Board to correct his record by awarding him retroactive advancement to Master Chief [REDACTED] (E-9). He stated that he was not recommended for advancement on his November 30, 2015, Enlisted Employee Review (EER) because of a then-ongoing investigation that concluded on August 22, 2016. At the end of the investigation, "no negative administrative action" was taken against him. He stated that he had transfer orders cancelled, he was "shunned by the Sector Community," and he was relieved of his responsibilities due to the investigation. Had the investigation concluded in a timelier manner, the applicant claimed, he would have been able to advance to an E-9 in 2016.

In support of his application, he provided several documents, which are described below in the Summary of the Record. He also provided a memorandum from the Commanding Officer (CO) of Enlisted Personnel at the applicant's command, Commander M. Commander M stated that a preliminary investigation was initiated on September 10, 2015, due to an alleged misappropriation of galley funds. The investigation concluded on December 1, 2015, and recommended that the applicant receive Non-Judicial Punishment (NJP). During this period, Commander M noted, the applicant's EER was due "and given the gravity of this matter, the Sector Commander, did not feel, at the time, that [the applicant] should have been recommended for advancement." The applicant was then "afforded another opportunity to explain the transactions that were being questioned" and he was able to clarify each of the five questioned transactions. On June 16, 2016,

the investigator submitted an addendum to the original investigation, concluded that there were no funds missing, and did not recommend that any administrative actions be taken.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on January 17, 2001. There are no negative entries in his military record.

The applicant provided a copy of a cancelled Standard Travel Order, which states that orders issued on February 11, 2015, had been canceled.

On September 10, 2015, instructions were given to investigate the “circumstances surrounding allegations of misappropriation of funds” from the galley since June 2014. The investigator was instructed to “investigate the nature and amount of any misappropriation of galley funds, cause of the possible misconduct, and any fault or responsibility for the incident.” The investigation was to be completed by September 24, 2015, or the investigator would be required to provide a reason for the delay.

The EER at issue here is dated November 30, 2015. The applicant originally received a mark of “not recommended” for advancement; however, the Coast Guard’s database shows that this mark was subsequently changed to “recommended” for advancement. He received a “satisfactory” conduct mark. Enlisted members are evaluated in 25 areas on a scale of 1 to 7, with 7 being the highest. The applicant received mostly 6s, with two 7s and two 5s.

On December 1, 2015, the Preliminary Investigating Officer (PIO) submitted a Preliminary Investigative of Misappropriation of Galley Funds to Captain C. The PIO made several findings of fact, including that five discrepancies existed with the galley funds. The PIO stated that he believed the applicant violated Uniform Code of Military Justice (UCMJ) Articles 121, larceny and wrongful appropriation; 107, false official statement; and 92, failure to obey general order or regulation. He recommended that the applicant receive NJP and that the applicant’s Food Service Officer qualifications be removed.

On June 16, 2016, the PIO provided an addendum to the Preliminary Investigation. The PIO stated that the applicant had been “afforded another opportunity to explain the discrepancies” found in the initial investigation. All five discrepancies had been fully explained, and the PIO found that no funds were missing. Based on these new findings, the PIO rescinded his original recommendation of NJP and Food Service Officer qualification removal.

On June 17, 2016, the applicant’s command sent a request to the Personnel Service Center (PSC) to change the mark of “not recommended” to “recommended” for advancement on the November 30, 2015, EER.

On August 22, 2016, the investigation concluded. A memorandum titled Final Action on the Investigation of Misappropriation of Galley Funds states that no discrepancies were found after the applicant explained all five instances at issue. Ultimately, it was recommended that no negative administrative action be taken against the applicant, as “he was able to demonstrate that all funds

were accounted for.” It was also noted that PSC was able to change the mark of “not recommended” on the applicant’s November 30, 2015, EER.

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.3.a. states that the SWE process is meant to ensure fair and impartial advancement opportunities, but it does not guarantee any one member that he will be advanced. Article 3.A.3.b. states that members who wish to compete for advancement to paygrade E-9 may participate in the May SWE. Members must complete all eligibility requirements by the Servicewide Eligibility Date, which is February 1 of the exam year.

Article 3.A.3.e. states that a cutoff point is established for each rating based upon vacancies during each period of eligibility. Only members whose names appear at or above this cutoff point are guaranteed advancement if they remain eligible through their advancement date. The manual notes that members who are below the cutoff point are encouraged to participate in future SWEs to maintain eligibility.

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 COs 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.”

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.22.b. 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.

VIEWS OF THE COAST GUARD

On September 21, 2017, the Judge Advocate General of the Coast Guard recommended that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum submitted by the PSC.

PSC stated that according to the Enlisted Accessions, Evaluations, and Advancements Manual, Article 3.A.4.b.(3), the CO’s recommendation for advancement “is the most important eligibility requirement in the Coast Guard advancement system.” According to Article 3.A.5., a member must complete all eligibility requirements, including being recommended for advancement by his CO, by the Service Wide Exam (SWE) eligibility date. The eligibility date for advancement to E-9 is February 1 of the exam year. The applicant originally received a “not recommended” mark on his November 30, 2015, EER which rendered him ineligible for the May 2016 SWE. PSC argued that although the applicant’s advancement recommendation was later

changed, that is not a basis to retroactively advance him to an E-9. PSC stated that the applicant did not sit for the May 2016 SWE and was not on the advancement eligibility list for that exam due to his ineligibility. The cutoff for that May 2016 exam was zero; therefore, even if the applicant had competed in that exam, he might not have advanced. Lastly, PSC noted that the applicant did not compete in the May 2017 SWE, despite the fact that he has maintained his advancement recommendation since the correction to his November 30, 2015, EER.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 20, 2017, 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.

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 alleged that the mark of "not recommended" on his November 30, 2015, EER was erroneous and unjust and asked the Board to award him a retroactive advancement to E-9 as if he had been advanced off the 2016 SWE 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.¹ 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."²

3. According to Article 3.A.4.b.(3) of COMDTINST M1000.2, a CO's "recommendation for advancement is the most important eligibility requirement in the Coast Guard advancement system." And the CO's "recommendation for advancement must be maintained from the recommendation date up to the advancement date." The applicant originally received a "not recommended" for advancement mark on his November 30, 2015. His command did not request that this mark be changed until June 17, 2016. The eligibility date for the May 2016 SWE was February 1, 2016. The applicant was therefore ineligible to take the SWE to compete for advancement throughout the applicable period because he did not have his CO's recommendation for advancement as a result of the ongoing investigation into discrepancies found in the unit's accounts.

4. Although a CO's recommendation for advancement is the most important eligibility requirement, advancement to Master Chief is a competitive process determined in large part by the

¹ 33 C.F.R. § 52.24(b).

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

results of the SWE, as well as other factors, such as awards and time in service.³ Because the applicant did not take the May 2016 SWE, he was ineligible to advance off the advancement list resulting from that SWE, and the Coast Guard's refusal to advance him cannot be considered erroneous.

5. Nor does the Board consider the applicant's lack of advancement to E-9 to be unjust under these circumstances. He argued that it was unjust because the SWE eligibility period passed before the investigation was completed, and the investigation ultimately found that there were no funds missing and that no action should be taken against him. The record shows, however, that significant discrepancies were discovered in the galley's books or accounts—which the applicant was responsible for maintaining—and he was apparently unable to fully explain and resolve the discrepancies for a while. The fact that the applicant was ineligible to take the May 2016 SWE to compete for advancement to Master Chief because of these problems does not shock the Board's sense of justice.⁴ And as the Coast Guard noted, the cutoff point for advancement on the May 2016 SWE [REDACTED] advancement list was zero, meaning that no vacancies in the [REDACTED] ranks were expected, and so even those who took the SWE were not guaranteed advancement.

6. Accordingly, the Board finds that the applicant has not proven by a preponderance of the evidence that his lack of advancement to E-9 is erroneous or unjust. The applicant's request for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

³ Article 3.A.3 f. of the Enlisted Accessions, Evaluations, and Advancements manual, COMDTINST M1000.2, states that a member's placement on an advancement list is calculated by combining the member's SWE score (40%); sea/surf duty time (15%); time in service (10%); time in current pay grade and rating (5%); and awards (5%). Article 3.A.5. lists several basic eligibility and advancement requirements, and Article 3.A.6.d. adds more eligibility requirements for competing for advancement to E-9.

⁴ 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." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976).

ORDER

The application of [REDACTED], USCG, for correction of his military record is denied.

January 12, 2018

