

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-050



FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on December 10, 2018, and assigned the case to the staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision dated August 26, 2022, 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 Master Chief Petty Officer (MCPO/E-9), asked the Board to correct his record by backdating his date of rank as an E-9 from November 1, 2019, to December 1, 2018.

The applicant alleged that he was denied advancement from E-8 to E-9 in 2018 because the Coast Guard Personnel Service Command (PSC) failed to adhere to Coast Guard advancement and separation policies and procedures in the Military Separations Manual with respect to another E-8 member. He alleged that, if PSC had followed the policies and procedures, that other E-8 would have been separated under High Year Tenure (HYT) policy¹ in 2018, and the applicant would have advanced to E-9 instead on December 1, 2018.

The applicant explained that in 2017 the other E-8 was in first place (just above the applicant, who was in second place) on the E-9 advancement list for their rating resulting from the May 2017 Service Wide Examination (SWE). That advancement list was to go into effect on

¹ Military Separations Manual, COMDTINST M1000.4, Article 3.A. states, “High year tenure (HYT) is a workforce management tool that establishes limits on the active military service time an active-duty enlisted member can complete based on their pay grade. HYT is designed to increase personnel flow, compel members to advance in their rating, and allow more consistent training and advancement opportunities for the enlisted workforce.”

January 1, 2018. However, the E-8 in first place had reached his Professional Growth Point (PGP)² in 2017 and failed to advance to E-9 before December 31, 2017, as required by HYT policy.³ According to the applicant, that E-8 also failed to submit an HYT waiver request by the December 31st deadline. Therefore, the applicant argued, under HYT policy, the E-8 in first place should have been immediately removed from the advancement list that went into effect on January 1, 2018, and processed for separation by September 1, 2018. In this regard, Article 3.D.1.a. of the Military Separations Manual states the following about a member's eligibility to advance under HYT policy:

- (1) Members whose active military service time exceeds their PGP are allowed to advance if that advancement occurs on or before 31 December of the year they reach their PGP.
- (2) HYT candidates, (i.e., those members whose active military service time is greater or equal to their PGP on 31 December) are not eligible to advance after 31 December, unless authorized by a waiver covered in Article 3.H of this Manual. These advancements shall be withheld by Commander (CG PSC-EPM) until HYT PGP waiver results are announced. Commander (CG PSC-EPM) shall advance the next eligible member as appropriate. HYT candidates who do not receive a HYT PGP waiver with the advancement option shall lose their advancement. If a waiver is approved with the ability to advance, the advancement date will not be retroactive.

But instead, the applicant complained, the E-8 in first place on the advancement list was granted an HYT waiver after the published deadline to advance, retained in first place on the advancement list, retained on active duty, and authorized advancement as of December 1, 2018.⁴ The applicant argued that this other E-8 should have been required to request a waiver before December 31, 2017, as that was the deadline for advancement to E-9, but he did not. The applicant claimed that the other E-8 benefited from favoritism and nepotism in receiving the HYT waiver and advancement. The applicant argued that as the person in second place on the E-9 advancement list, he was erroneously and unjustly deprived of advancement to E-9 on December 1, 2018, by PSC's deviation from policy.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on October 3, 2000, at age 18, and entered a technical rating, where he continued to advance until he advanced to E-8 in September 2014.

In May 2017, the Coast Guard conducted the annual SWE for advancement. On June 23, 2017, PSC issued a Memorandum on Eligibility List for Advancement to Pay Grade E-5 through E-9 in the May 2017 Service Wide Examinations (SWE) with the advancement lists for each rate

² PGP is defined as “[t]he maximum amount of active military service a member can have for their current pay grade. *Id.* at Article 3.B.2. The PGP of an E-8 is 26 years of active service, meaning that an E-8 who attained his or her 26th anniversary on active duty during 2017 and remains an E-8 on December 31, 2017, is normally retired no later than September 1, 2018, unless a waiver of the HYT policy is granted. *Id.* at Articles 3.C., 3.D., and 3.G.

³ *Id.* at Article 3.B.3.b., which states, “Regardless of the exact date a member passes their PGP during a calendar year, 31 December will be the cut-off that determines whether or not a member is a HYT candidate. The member shall become a candidate on 31 December.”

⁴ Military Separations Manual, COMDTINST M1000.4, Article 3.B.4. states, “A waiver from this policy granted by Commander (CG PSC-EPM) allowing the member to continue on active duty past the required separation or retirement date listed in Article 3.H. of this Manual.

and rating. The applicant placed second on the E-9 advancement list for his rating as a result of the May 2017 SWE. The memorandum stated that for advancement to grades E-7 through E-9, the eligibility list would be effective from January 1, 2018, through December 16, 2018. It also stated that the cutoffs for advancement would be published at a later date, would be based on forecast losses and position reductions during the period of eligibility, and were designed primarily for Assignment Officer planning purposes. Finally, this memorandum stated that 2018 High Year Tenure (HYT) candidates who took the May 2017 SWE would lose eligibility to advance unless granted a waiver that allows the member to continue to compete for advancement.

On September 8, 2017, the Coast Guard published ALCGENL 136-17 Bulletin “May 2017 Service Wide Exam Cutoffs.” This bulletin published the cutoffs for advancement and revealed that only one E-9 advancement opportunity was forecast for the applicant’s rating during 2018, and so the cut for advancement to E-9 was above the applicant’s name at the first name on the list.

On October 5, 2017, the Coast Guard published the ALCGENL 155-17 Bulletin “2018 High Year Tenure (HYT) Professional Growth Point (PGP) Waiver Process for the Active Duty Enlisted Workforce.” This bulletin revealed that for the 2018 advancement window, service members between grades E-6 and E-8 who were identified as HYT candidates and desired to serve beyond their PGP should submit a waiver request no later than January 12, 2018. This bulletin further provided that an HYT waiver panel would be conducted from January 22 to 26, 2018, and candidates would be individually notified of waiver panel results via an emailed memorandum through their respective commands.

On December 1, 2017, the Coast Guard published ALCGENL 177-17 “2018 High Year Tenure (HYT) Professional Growth Point (PGP) Update to the E-6 to E-8 Waiver Process.” This bulletin updated the waiver panel dates from January 22-26, 2018, to January 17-19, 2018. It stated that candidates would continue to be individually notified of waiver panel results via an emailed memorandum through their respective commands. All other dates and deadlines pertaining to the applicant’s rating remained unchanged.

Between November 22, 2017, and August 10, 2018, the Coast Guard published four ALCGENL bulletins (172-17, 014-18, 033-18, and 122-18) titled “May 2017 Service Wide Exam Revised Cutoffs.” Although there were changes to the cutoffs for other ratings in these bulletins, all four bulletins revealed that there would be only one advancement opportunity for the applicant’s rating during the 2018 advancement window.

Although not documented in the record before the Board, according to both the applicant and the Coast Guard, the member who placed first on the E-9 advancement list in the applicant’s rating submitted a waiver request in January 2018, was granted an HYT waiver, and so was not separated on September 1, 2018. Instead, he continued serving on active duty and advanced to E-9 on December 1, 2018. The applicant took the May 2018 SWE to be eligible for advancement to E-9 in 2019.

On September 5, 2018, the applicant submitted a two-page memorandum “High Year Tenure Policy and Eligibility for Advancement” to the Coast Guard Office of Military Personnel. The purpose of this memorandum was to address the fact that HYT candidates who enter their

PGP year are allowed to compete for advancement during their PGP year by taking the SWE even though any advancements from the resulting advancement lists could not occur until the following year, after they have already become an HYT candidate by not being advanced during their PGP year. The memorandum focuses on the contradictions in policies between the Military Separations Manual, COMDTINST M1000.4, and the Enlistment, Evaluations, and Advancements Manual, COMDTINST M1000.2B. According to the applicant, Article 3.D.1.a. of the Military Separations Manual, COMDTINST M1000.4, states "Members whose active military service time exceeds their PGP are allowed to advance if that advancement occurs on or before 31 December of the year they reach their PGP." The applicant argued that this policy inadvertently allows members to remain eligible for advancement who have reached their PGP year. The applicant further argued that according to the Enlistment, Evaluations, and Advancements Manual, COMDTINST M1000.2B, the earliest a person can advance from the May SWE is January 1 of the year following the SWE. The applicant alleged that allowing HYT members to remain eligible for advancement contradicts the HYT policy timeline and the advancement terminal eligibility date. The applicant recommended that the Coast Guard better clarify HYT policy by changing the Military Separations Manual, COMDTINST M1000.4, to state that members are deemed ineligible to compete for further advancement after entering their PGP year since that advancement cannot be obtained prior to the December 31 cutoff date of their PGP year and, once a member is ineligible for advancement, he/she cannot be placed back on the advancement list.

On September 26, 2018, the Coast Guard issued ALCGENL 152-18 "2019 High Year Tenure (HYT) Professional Growth Point (PGP) Waiver Process for Active Duty Enlisted Force." Within this bulletin, the Coast Guard adjusted the PGP waiver request deadline from January to October for all 2019 HYT candidates. The bulletin did not make members ineligible to take the SWE during their PGP year, as the applicant had recommended in his memorandum.

On November 1, 2019, the applicant advanced to E-9 off the advancement list resulting from the May 2018 SWE.

VIEWS OF THE COAST GUARD

On June 26, 2020, a Judge Advocate (JAG) for the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the PSC.

The JAG argued that the applicant has misconstrued HYT waiver timelines and processes and that the Coast Guard followed the necessary policies when retaining and advancing the service member who placed above the applicant on the E-9 advancement list resulting from the May 2017 SWE. The JAG argued that the applicant's interpretation of Coast Guard policy—i.e. that the service member who was promoted ahead of him should have been removed from the 2018 advancement list—is not a correct reading of Coast Guard policy. The JAG argued that contrary to the applicant's contentions, Coast Guard policy explicitly contemplates advancement of HYT service members pursuant to a waiver after December 31st of their PGP year. According to the JAG, Article 3.D.1.a. of the Coast Guard's Military Separations Manual, COMDTINST M1000.4, requires that the Coast Guard withhold advancements of all HYT candidates until HYT PGP waiver results are announced. The JAG argued that this policy confirms that HYT policy requires that (1) service members reach their PGP on December 31; (2) these service members execute the

waiver process; and (3) the Coast Guard issue waivers or denials and then make any advancements for those with approved waivers as vacancies arise. The JAG further argued that the requirement to withhold all HYT advancements until the waiver process is complete confirms that HYT service members who receive waivers are still eligible for advancement off the newly effective advancement list and that nothing requires their removal from that list between December 31st and the date the HYT waivers are approved.

The JAG argued that the applicant's reliance on the provision in Article 3.A.13 of the Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2B, requiring removal from the advancement eligibility list is misplaced because HYT is not one of the conditions contemplated by that policy provision in subparagraphs (a) through (g)⁵. In addition, the JAG claimed that Article 3.A.14. of this same manual explicitly states that advancement eligibility for HYT candidates is addressed in the Military Separations Manual, COMDTINST M1000.4.

The JAG argued that that on October 5, 2017, ALCGENL 155-17 provided the necessary HYT waiver process timeframes for those service members who failed to meet their PGP in 2017. The JAG stated that ALCGENL 155-17 allowed those service members who failed to advance by December 31, 2017, regardless of their rate or grades, to apply for a waiver no later than January 12, 2018. This same ALCGENL required those service members who applied for a waiver but were denied, be retired no later than September 1, 2018. The JAG stated that the service member ahead of the applicant on the 2018 advancement list applied for and was given an HYT waiver for the 2018.

Finally, the JAG argued that the applicant failed to provide any evidence to support his allegation that the service member promoted ahead of him received any kind of favorable treatment during the waiver and promotion process. The JAG argued that all service members had the same notice and opportunity to submit an HYT waiver request in 2018.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 26, 2020, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited him to respond within thirty days. No response was received.

APPLICABLE LAW AND POLICY

Article 3 of the Enlistments, Evaluations and Advancements Manual, COMDTINST M1000.2B states the following about advancement eligibility for HYT candidates.

3.A.14. High Year Tenure (HYT). See Chapter 3 of Reference (c), Military Separations, COMDTINST M1000.4(series) for advancement eligibility for members who are High Year Tenure candidates.

⁵ Article 3.A.13(a)-(g) of COMDTINST M1000.2B requires removal from the advancement eligibility list for: (a) disciplinary status, (b) loss of CO's advancement recommendation, (c) confinement, (d) members selected for CWO appointment, (e) disabled members, (f) members with approved request for retirement, and (g) members who cancel requests for retirement.

Article 3 of the Military Separations Manual, COMDTINST M1000.4, provides the necessary guidance on HYT PGP waiver process. In relevant part:

3.B.4. HYT PGP Waiver. A waiver from this policy granted by Commander (CG PSC-EPM) allowing the member to continue on active duty past the required separation or retirement date listed in Article 3.H. of this Manual. This is separate and distinct from a waiver described in the Command Senior Enlisted Leader (CSEL) Program, COMDTINST 1306.1 (series) and Military Assignments and Authorized Absences, COMDTINST M1000.8 (series), for Rating Force Master Chiefs (RFMC).

...

3.D.1.a. Eligibility to Advance.

- (1) Members whose active military service time exceeds their PGP are allowed to advance if that advancement occurs on or before December 31 of the year they reach their PGP.
- (2) HYT candidates, (i.e. those members whose active military service time is greater or equal to their PGP on December 31) are not eligible to advance after December 31, unless authorized by a waiver covered by Article 3.H. of this manual. These advancements shall be withheld by Commander (CG PSC-EPM) until HYT PGP eligible waiver results are announced Commander (CG PSC-EPM) shall advance the next eligible member as appropriate. HYT candidates who do not receive a HYT PGP waiver with the advancement option shall lose their advancement. If a waiver is approved with the ability to advance, the advancement date will not be retroactive.

...

3.H.1. Granting Waivers.

3.H.1.a.2. Authority. Commander (CG PSC-EPM) is the sole waiver granting authority for HYT PGP waivers.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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.
2. The application was timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).
3. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.⁶
4. The applicant alleged that his failure to advance to E-9 on December 1, 2018, was erroneous and unjust because the Coast Guard failed to adhere to separation policy and procedures when they advanced a service member who should have been removed from the 2018 advancement list after he failed to secure an HYT waiver before reaching his PGP on December 31, 2017. When considering allegations of error and injustice, the Board begins its analysis by presuming that the

⁶ *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).

disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving, by a preponderance of the evidence, that the disputed information is erroneous or unjust.⁷ 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."⁸

5. The applicant alleged that the Coast Guard failed to follow separation policies and procedures when they allowed another service member, who had reached his PGP on December 31, 2017, to promote ahead of him. According to the applicant, under Coast Guard policy, this service member should have been removed from the 2018 advancement list because he did not secure a waiver before his PGP date of December 31, 2017. The Board disagrees for the following reasons:

- a. With respect to the HYT waiver process, Article 3 of the Coast Guard Military Separations Manual, COMDTINST M1000.4, is silent as to an exact date an HYT waiver must be received for service members who reach their respective PGP by December 31st to remain on the following year's advancement list. December 31st is stated as the deadline for being advanced to avoid becoming an HYT candidate, not the deadline for submitting an HYT waiver request. And nothing in that manual or COMDTINST M1000.2B, the Enlistments, Evaluations, and Advancements Manual, states that an HYT candidate's name must be removed from an advancement list immediately as of January 1st because they were not advanced by the day before, December 31st.
- b. The policies in COMDTINST M1000.4 are still instructive, however, and provide sufficient guidance in this case. Article 3.D.1.a.2. states the following:

HYT candidates (i.e., those members whose active military service time is greater or equal to their PGP on 31 December) are not eligible to advance after 31 December, *unless* authorized by a waiver covered in Article 3.H. of this Manual. ***These advancements shall be withheld by Commander (CG PSC-EPM) until HYT PGP waiver results are announced.*** (Emphasis added.)

The clear meaning of this rule is that a service member who becomes an HYT candidate on December 31st can still advance, as long as he or she secures an HYT waiver. And PSC must withhold any advancements of HYT candidates until the waiver panel results are announced. The corresponding policy in Article 3.H.1.a.4. of the same manual, which states:

Commander (CG PSC-EPM) shall announce which HYT candidates are eligible to request a waiver at least thirty days before convening a HYT PGP waiver panel.

Therefore, PSC is only required to give a minimum thirty-day notice before it can convene an HYT waiver panel. Policy does not require that the waiver panel be

⁷ 33 C.F.R. § 52.24(b).

⁸ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

convened before December 31, when service members potentially become HYT candidates.

- c. In the applicant's case, PSC published two bulletins (ALCGENLs) that provided the necessary timeframes and deadlines for 2018 HYT candidates. The first, ALCGENL 155-17, was published on October 5, 2017, and provided an HYT waiver request deadline of January 12, 2018, for members in pay grades E-6 through E-8 for a waiver panel scheduled to convene from January 22 to 26, 2018. The second, ALCGENL 177-17, was published on December 1, 2017, and changed the waiver panel dates to convene five days earlier, but the deadline for submitting an HYT waiver request remained January 12, 2018. The applicant has submitted no evidence to show that the E-8 who was at the top of the E-9 advancement list for his rating failed to meet the prescribed January 12, 2018, deadline. In addition, the applicant admitted that the E-8 received an HYT waiver. Therefore, under Article 3.D.1.a.2. of COMDTINST M1000.4, the E-8 was not subject to an HYT separation in 2018 and was eligible to remain on the 2018 advancement list and to be advanced when the next E-9 vacancy arose in his rating, which was apparently December 1, 2018. As such, the applicant has failed to show that the Coast Guard committed an error or injustice when it promoted another service member ahead of him on the 2018 advancement list and his request for relief should be denied.
 - d. The applicant also complained that the Military Separations Manual, COMDTINST M1000.4, and the Enlistments, Evaluations and Advancements Manual, COMDTINST M1000.2B, contradict one another in regard to advancement eligibility. According to the applicant, under Article 3.A.13. of the Enlistments, Evaluations, and Advancements Manual, the applicant was required to be removed from the 2018 advancement list at midnight on January 1st because he had failed to maintain eligibility. However, the instances provided in Article 3.A.13. that render a service member ineligible to advance do not include failure to obtain an HYT waiver before December 31st of the year the service member exceeds his or her PGP. On the contrary, Article 3.A.14. of the Enlistments, Evaluations, and Advancements Manual specifically carves out an exception for HYT eligibility. Article 3.A.14. directs the reader to Article 3 of the Military Separations Manual for guidance on advancement eligibility for HYT candidates, indicating that the necessary authority for HYT eligibility is in Article 3 of the Military Separations Manual, not in the Enlistments, Evaluations and Advancements Manual. Therefore, the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard's policies contradicted one another and erroneously caused him to be denied promotion to E-9.
6. The applicant alleged that when the Coast Guard allowed another service member, who was an HYT candidate, to advance ahead of him, it gave an appearance of favoritism or nepotism. However, the applicant has failed to provide any evidence to show that the other member benefited from any favoritism or nepotism or that his advancement was unjustly withheld. The applicant has failed to prove by a preponderance of the evidence that the Coast Guard committed

an error or injustice by granting the other E-8's request for an HYT waiver or by advancing him to E-9 in 2018. Therefore, the applicant's request for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

