

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-156

XXXXXXXXXX.
Xxx xx xxxx, BM1

FINAL DECISION

Author: Ulmer, D.

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 application was docketed on August 4, 2006, upon receipt of the applicant's completed application and military records.

This final decision, dated April xx, 2207, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his military record by promoting him retroactively to chief boatswain's mate (BMC; pay grade E-7) effective January 1, 2003. The applicant stated that his request for reinstatement on the Reserve Advancement Eligibility List was denied by USCG Headquarters personnel on July 29, 2003.

APPLICANT'S ALLEGATIONS

The applicant who has served in the boatswain's mate rating for over twenty years alleged that he was erroneously denied advancement to BMC because the Coast Guard circumvented regulations regarding his request for a lateral change to the

investigator (IV) rating.¹ On September 15, 2002, the applicant, a BM1, requested a lateral change from the BM rating to the IV rating. He addressed his request to Commandant (G-O-CGIS), through CGIS special agent in charge, northwest region and commanding officer, USCG MSO, St. Louis, with a copy to USCG ISC (Integrated Support Command) St. Louis.

In October 2002, the applicant participated in the servicewide examination (SWE) for promotion to BMC.

On November 11, 2002, Commandant (G-O-CGIS) issued a letter to ISC Ketchikan and ISC St. Louis authorizing the applicant to pursue a lateral to the IV rate and assigned him to an RPAL investigator billet. The letter also requested that the ISC ensure that the applicant's personnel reporting unit assign the appropriate training rating indicator and to ensure that the applicant is advised that he is no longer eligible for advancement within the BM rating. The letter further advised that the applicant was recalled under title 10 of the United States Code and that he was assigned to serve on the FBI Joint Terrorism Task Force until September 30, 2003.

The applicant stated that under the Reserve Policy Manual before prospective CGIS agents could be considered for a lateral to the IV rating, the member must be approved by CGIS Headquarters and then receives approval from his ISC. The applicant argued that had the Reserve Policy Manual procedures been followed, he would have been required to wait until the appropriate ISC personnel had approved the lateral, which would have taken several months, at a minimum. According to the applicant, once he had been approved for the lateral by the ISC, he then would have been ineligible for further training or advancement in the BM rate.

The applicant stated that on December 31, 2002, the Reserve advancement eligibility list was published and he was listed as number 1 for advancement to BMC. The applicant further stated that on January 15, 2003, a master chief petty officer from the Human Resources Services and Information Center (HRSIC) called and informed the applicant that his request for a lateral to the IV rating had been approved and that the applicant would not be advancing to BMC. The applicant submitted an email, which according to the applicant shows that someone at his previous command (MSO Valdez) had advanced him to IV1. The applicant argued that the advancement to IV1 was erroneous because his previous command was not an ISC, and therefore could not advance him. He argued that the master chief petty officer improperly removed him from the BMC advancement list and his name was not included on the January 16, 2003 message authorizing advancements. The applicant alleged that an unauthorized computer entry was made into his Coast Guard Personnel file showing that he had been

¹ Lateral change is when a member changes his or her ratings without changing his or her pay grade. Article 7.C.9b. of the Reserve Policy Manual.

assigned a training rating indicator, which is used for personnel who have been approved to pursue lateral transfers. The applicant alleged that this entry was improper because it was made by someone other than ISC Ketchikan and that the entry had been back dated to have an effective date of November 11, 2002. The applicant submitted a computer print out for this entry showing the date entered as January 17, 2003, the day after his name was removed from the advancement list.

The applicant stated that in April 2003 he received a personal data extract stating that he was eligible to compete in the BMC SWE (even though he had supposedly been approved for a lateral to the IV rating). He stated that at that time he checked and his lateral had not been approved.

On May 6, 2003, the applicant requested to be reinstated on the BMC advancement list retroactive to January 1, 2003, because his request for a lateral had not been approved at the time the eligibility list was released. He stated that as of May 6, 2003, he had not received any correspondence written or electronic indicating that his request for a lateral to the IV rating had been approved.

The applicant submitted a June 3, 2003, unsigned letter from the Director of CGIS recommending that the applicant be reinstated to the eligibility advancement list. The Director stated that the authority for approving laterals rested with the ISC (pf) in accordance with Article 7.C.13.c.(1) of the Reserve Policy Manual.² The Director noted that the applicant stated that he had not been formally notified from either ISC Ketchikan or ISC St. Louis that his lateral had been approved. "I believe that [the applicant] should have been formally notified from either ISC Ketchikan or ISC St. Louis that his lateral was approved . . . and of his inability to advance within the BM rating." The Director noted that written notification of his lateral approval in November 2002 would have enabled the applicant to weigh his options and to determine whether continued pursuit of a lateral was in his best interest.

In a June 23, 2003 letter, ISC Ketchikan also favorably endorsed the applicant's request for reinstatement to the advancement eligibility list. The ISC Ketchikan letter stated the following in pertinent part:

[The applicant's] initial request for [a] lateral was not made in accordance with Article 7.C.13.b. of the Reserve Policy Manual . . . which states requests to pursue change in rating must be sent either to CGPC-rpm or the servicing (ISC(pf)). The servicing ISC(pf) for initial request was only copied. Proper endorsements . . . were also not provided.

² Article 7.C.13.c.(1) of the Reserve Policy Manual states that servicing ISCs shall approve requests for changes in general rate and lateral changes in rating for personnel in pay grades E-4 through E-6.

Recommend [the applicant] be advanced retroactively to BMC. Should [the applicant] wish to pursue lateral to IV, recommend following [the] latest revision of the RPM, promulgated on 18 May 2003.

The applicant stated that in August 2003, his request for reinstatement on the advancement eligibility list was disapproved because he had an approved request for a lateral to the IV rating. The applicant noted however that upon his release from active duty in March 2004 and he was returned to his original unit as a BM1. He further stated that on May 25, 2004 he reapplied for a lateral change to the IV rating and that in September 2004, he received orders assigning him to CGIS, almost two years after he had been removed from the BMC advancement list. The applicant also stated the following:

I imagine that it may be hard to understand how I was allowed to be a Special Agent when my lateral had not been approved. This is the explanation I was given. Since the attacks of September 11, 2001, the Coast Guard 17th District Office of Homeland Security had been desperately trying to find a Special Agent to work on the joint terrorism task force in Anchorage full time. The Captain in charge of the District Homeland Security Department found out that I was a Deputy U.S. Marshal and wanted me to start right away. The entire time I spent in Anchorage I was assigned to MSO Anchorage, not CGIS. The expenses associated with my recall to active duty were paid from the 17th District Homeland Security Budget, not the CGIS budget. I carried a CGIS badge and worked for the FBI. It was far from the normal course of events, but so shortly after 9/11, many things were done that were not normal.

VIEWS OF THE COAST GUARD

On December 14, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant the applicant alternative relief recommended by Commander Coast Guard Personnel Command (CGPC) by correcting his record to show that his request to lateral to the IV rating was approved retroactively on November 21, 2002, the date on which he received his CGIS credentials. CGPC stated the following conclusion with respect to the applicant's application:

The applicant, a reserve member who was serving on Title 10 active duty at the time requested to pursue a lateral change in rating from BM1 to IV1 . . . The applicant's request was incorrectly addressed to Commandant (G-O-CGIS). Commandant (G-O-CGIS) authorized the applicant to pursue a lateral to IV1. In their approval, Commandant (G-O-CGIS) directed the assignment of the HA (special agent) qualification code and that the

Applicant be 'advised he is no longer eligible for advancement within the advancement rating.'" As a result . . . the applicant was issued a CGIS badge/credentials on November 21, 2002.

The Applicant's record shows that the authorization to pursue the lateral issued by Commandant (C-O-CGIS) . . . was the basis for establishing the approval of the applicant's lateral request. There is no record of either the servicing ISC or CGPC-rpm approving the Applicant's lateral request. Additionally, on June 27, 2003, ISC Ketchikan (pf) states that the applicant did not have an approved lateral request. ISC Ketchikan (pf) acknowledges receipt of the Applicant's request and indicates that no action was taken since they were not listed as an addressee but rather a copy recipient. There is no indication that ISC Ketchikan (pf) or ISC St. Louis acted upon Commandant (C-O-CGIS) authorization . . . to effect change. However, database entries were made by the servicing personnel office effecting the lateral change in rating with a date of November 11, 2002. The applicant was aware that if the lateral change was approved that he would be ineligible for further advancement in his rating, as outlined in [the Reserve Policy Manual] to which the applicant made reference in his original request for a lateral change. Additionally, subsequent to November 11, 2002, the applicant received his CGIS badge and credentials and commenced GGIS duties. The applicant argues that he was unaware that his request was approved, however, the issuance of these credentials and duties would indicate otherwise.

The applicant was above the advancement cut for BMC based on the October 2002 Reserve [SWE] and his name was subsequently removed from the advancement list due to the Coast Guard database reflecting that he was approved for a lateral change in rating to IV1. The applicant appealed the decision to remove his name from the advancement list and CGPC-rpm denied his request basing the denial on the November 11, 2002 authorization . . . for the applicant to pursue a lateral change in rating.

The Coast Guard erred in the fact that neither ISC Ketchikan nor ISC St. Louis approved the applicant's lateral request . . . Additionally, since CGIS credentials for reserve personnel are only issued to coincide with an approved lateral to IV, the Coast Guard further erred in issuing the applicant credentials without final authorization for the lateral from ISC or CGPC-rpm. Regardless, the applicant's acceptance of the credentials and previous acknowledgement of the limitations on a lateral transfer indicate that the Coast Guard and the applicant acted as though his request had been properly approved.

Once the applicant accepted his CGIS credentials, he actively began his lateral to IV1 and made career decision to forgo his pursuit for advancement to BMC. Director, CGIS and CGIS Northwest recognized that the applicant was in the IV1 path of advancement through issuance of the credentials . . .

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 9, 2007, the BCMR received the applicant's response to the views of the Coast Guard. The applicant disagreed with the advisory opinion and stated that the alternative relief recommended by the Coast Guard would be an erroneous entry into his service record. He stated that "[a]n inaccurate service record entry is not relief. If it had not been for the inaccurate database entry into his service file, none of this would be necessary. The applicant argued that it was a false assertion on the part of the Coast Guard to say that his name was removed from the advancement list based on the data base entry. According to the applicant, the data base entry was not made until after his name was removed from the list and after the promotion authorization message was released. The applicant submitted a copy of a computer print out showing the data entry date to be January 17, 2003.

The applicant disagreed with the advisory opinion statement that he had been serving as an IV since November 2002. In this regard, the applicant stated that when he was released from active duty in March 2004, he went back to his old reserve unit as a boatswain's mate and had to reapply for a lateral transfer because his earlier request was not approved in November 2002.

The applicant further stated the following:

The advisory opinion does not provide any evidence to suggest that the Coast Guard was not in error and contains several admissions that it was. There is nothing in the opinion that refutes my claim that, had the Coast Guard followed its own rules and regulations, I would have been advanced to BMC effective January 1, 2003.

When I first joined the Coast Guard, those senior to me made it clear, in no uncertain terms, that good enough isn't[;] that there is no substitute for following the rules and regulations. As I assumed a senior rule, I taught that same lesson to those junior to me. It was true then and it true now.

There are several very troubling aspects of this case. First among them is the assertion that I was removed from the advancement list because of a database entry. This is, of course, false because the entry wasn't made until two days after I was removed from the list and a day before the list

was published. Second, who made the erroneous database entry? The records I have provided make it clear that it wasn't done by anyone who was authorized to do so. This also begs the question, not only who but why? . . . I will say this . . . doesn't pass the "smell test".

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 section 1552 of title 10 of the United States Code. The application was timely.

2. The Board finds that both the applicant and the Coast Guard committed errors in the processing of the applicant's request for a lateral transfer to the IV rating. However the errors committed by the Coast Guard were much more serious than the error committed by the applicant. The Coast Guard's errors led to the commission of a serious injustice in the applicant's military record that prevented him from advancing to BMC as a result of the October 2002 SWE.

3. The applicant submitted a request for a lateral transfer to the IV rate in September 2002. However, he failed to properly address his request as required by Article 7.C.17b.(2) of the Reserve Policy Manual then in effect. This provision stated that letters requesting approval to pursue a change in rating must be sent to the servicing ISC via the member's chain of command. The applicant improperly addressed his letter to the COMDT (G-O-CGIS), through the special agent in charge, CGIS Northwest region, and the commanding officer, USCG MSO St. Louis, with a copy to USCG ISC St. Louis.

4. However, the incorrect addressing of the applicant's request for a lateral transfer did not significantly delay the processing of his request. In this regard, on November 11, 2002, the Director CGIS, who is also Commandant (G-O- CGIS) by position, informed ISC Ketchikan and ISC St. Louis that the applicant was authorized to pursue a lateral, that he was eligible for assignment to an RPAL investigator billet, and that he was eligible for assignment of the HA (special agent) qualification code. This letter further requested that the applicant's servicing personnel reporting unit (PERSRU) assign the appropriate training rating indicator to the applicant and advise him that he was no longer eligible for advancement within the BM rate. The letter informing the ISC that COMDT (C-O-CGIS's) had authorized the applicant to pursue a lateral to the IV rate, although not the final step in the process, was a necessary step toward obtaining approval for a lateral transfer to the IV rate. Article 7.C.17b.(2) states in pertinent part that "the ISC will consult the appropriate Special Agent in Charge

before approving the lateral. The Special Agent in charge reviews the request ensuring the member meets all requirements to hold Special Agent credentials, that all other IV rating requirements are met, and that a vacant billet exists." However, no where in the regulation then in effect was anyone, except the servicing ISC, given authority to approve a member's request for a lateral transfer. There is no evidence in the record that either ISC Ketchikan or ISC St. Louis approved the applicant's request to lateral to the IV rating.

5. The Coast Guard admitted in its advisory opinion that neither of the two ISC offices discussed above acted to grant approval of the applicant's request for a lateral transfer after receipt of the letter from COMDT (G-O-GIS) granting permission for the applicant to pursue a lateral to the IV rate. The advisory opinion indicates that a servicing personnel office effected the change in rate by making certain entries to the applicant's electronic record. However, the Board concludes that such entries were erroneous because as stated in the advisory opinion, approval for the lateral had not been obtained from the appropriate ISC. Therefore, whoever made the entries into the applicant's electronic PDR by changing his rate from BM1 to IV1, did so without authority. Article 7.C.13f. of the Reserve Policy Manual states that once a change in rating is approved by the ISC, the servicing PERSRUs will assign the appropriate training rating indicator to the individual.

6. The erroneous entry into the applicant's electronic military record constituted error by the Coast Guard, which resulted in the applicant suffering an injustice that shocks the Board's sense of justice. The applicant acted as any career minded Coast Guard member would have by taking the October SWE for advancement even though he had requested a lateral to the IV rating because the submission of a lateral request did not mean that it would be approved. When the advancement results from the October 2002 SWE were published with the applicant ranking number one for advancement to chief boatswain's mate, the erroneous computer entry indicated that he was not eligible for advancement. At least five BM1s were advanced to BMC from that list in January 2003 and certainly the applicant would have been advanced, if the erroneous database entry had not been made.

7. Although the applicant requested to have his name reinstated on the advancement list, the Coast Guard denied it stating that his request to lateral to the IV rating was approved on November 11, 2002. However, the denial letter does not state who gave the approval nor was a copy of the approval attached to the July 29, 2003 letter. Therefore, the Board can only conclude that the denial of the applicant's request for reinstatement to the advancement list was based either on the unapproved database entry or upon the letter from COMDT (C-O-CGIS) who, under the regulation, did not have authority to approve the applicant's request for a lateral transfer. The fact that on May 25, 2004, the applicant reapplied for a lateral to the IV rate and in September 2004 received orders assigning him to CGIS is further evidence that the electronic entry and

COMDT (C-O-CGIS) letter were insufficient to effect the applicant's lateral from BM1 to IV1.

8. If the Coast Guard had followed its regulation and the lateral process had been completed before the publication of the advancement eligibility list, the applicant would have no claim for advancement because Article 7.C.13f.(2) of the Reserve Policy manual states "Personnel may not train or advance in their present (old) rating" once a request for a change in rating is approved. The erroneous electronic database entry was made before the applicant's request to lateral was approved. Moreover, it appears to the Board that the ISC never approved the applicant's 2002 request for a lateral transfer.

9. The Coast Guard admitted that errors were committed in the processing of the applicant's request for a lateral change in rating but argued that both the applicant and the Coast Guard acted as if the lateral had been approved because the Coast Guard issued CGIS credentials to the applicant and he accepted them and began working as a CGIS agent. If the CGIS and the applicant's actions operated to approve the applicant's request for a lateral transfer, why was it necessary for the applicant to reapply for the transfer in May 2004, when a properly approved lateral transfer request is effective for three years. Article 7.c.13g. of the Reserve Policy Manual states, "changes in rating must be completed within three years." The fact that the applicant was required to reapply for the lateral before November 11, 2005, strongly corroborates his contention that he had not obtained the necessary approval to pursue a lateral to the IV rating before the release of the SWE advancement eligibility list on December 31, 2002. Moreover, there is no evidence in the record that the Coast Guard acted to approve the lateral request prior to removing the applicant's name from the advancement eligibility list.

10. The Board would further note that Article 7.C.17.b.(2) of the Reserve Policy Manual then in effect stated that "[l]ateral changes in rating to IV will not be authorized for E-6 and above." Therefore, it appears that the applicant should not have been permitted to lateral to the IV rate in 2002 because he was a petty officer first class. Although the CGIS Manual authorized first class petty officers to lateral to the IV rate, it cautioned that "[in] cases of apparent conflict between this Manual and provisions of statutes and regulations, the latter provisions shall be applied." Accordingly, the Reserve Policy Manual controlled in this situation and the applicant, as a BM1, was prohibited from obtaining a lateral to the IV rate at that time. In May 2003, with the publication of the current Reserve Policy Manual, this policy was changed.

11. In light of the above, the Board finds that the Coast Guard committed a series of errors by its failure to follow the procedures outlined in the Reserve Policy Manual for processing and approving the applicant's request for a lateral from BM1 to IV1. The Coast Guard's failure to follow the regulation resulted in an erroneous entry into the applicant's electronic military record that caused his name to be removed from the

advancement eligibility list, when in fact, necessary and proper approval of his lateral had not been obtained.

12. In light of the errors identified above, the Board must determine if the remedy recommended by the Coast Guard is sufficient relief. The Coast Guard recommended that the applicant's record be corrected to show that he received approval to pursue the IV rate on November 11, 2002, to which the applicant objects. However, the Coast Guard's recommendation does nothing to address the fact that an erroneous database entry was the basis for removing applicant's name from the advancement eligibility list; nor does it address the fact that the applicant's request for a lateral transfer to the IV rate languished unapproved for approximately two years. The Board finds the JAG's argument that both the applicant and Coast Guard acted as if the lateral was approved to be disingenuous, since it was necessary for the applicant to reapply for a lateral in May 2004.

13. Without an approved request to pursue a lateral to the IV rate, the applicant was entitled to continue to compete for advancement in the BM rate. The Board finds nothing in the regulation that states that an incomplete or partially processed request for a lateral transfer is sufficient to cause an applicant to be ineligible for advancement. Therefore, the board finds that the only remedy that makes the applicant whole is to direct the Coast Guard to advance him to BMC prior to the expiration of the December 31, 2003 advancement list. Under the current Reserve Policy manual, unlike the earlier Manual, the provision prohibiting E-6s from requesting a lateral change to the IV rate has been removed. In addition, the Reserve Policy Manual now in effect does not prevent an E-7 from obtaining a lateral transfer. In this regard Article 7.C.9.d.(2) of the Reserve Policy Manual states that the servicing ISC shall forward requests from reservist in pay grade E-7 and above for lateral changes to CGPC-rpm for determination. The Board notes that although the CGIS Manual states that as a matter of policy members in pay grades E-7 through E-9 can not lateral to the IV rate, the Reserve Manual controls because as stated above, the CGIS Manual states that that "[in] cases of apparent conflict between this Manual and provisions of statutes and regulations, the latter provisions shall be applied."

14. Accordingly, the Board finds that the applicant's record shall be corrected to show that he was advanced to BMC as a result of the October 2002 SWE. The Coast Guard shall pay the applicant any back pay and allowances to which he is entitled as a result of this correction.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of BM1 XXXXXXXXXXXX, , for correction of his military record is granted. His record shall be corrected to show that he was advanced to BMC prior to the expiration of the advancement eligibility list resulting from the October 2002 SWE, with back pay and allowances. His approval to lateral to the IV rate resulting from his May 25, 2004, request shall remain in effect.
