

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-162

**XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX**

FINAL DECISION

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receiving the completed application on May 6, 2011, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 9, 2012, 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 expunge from his military record documentation of non-judicial punishment (NJP) he received at a captain’s mast on May 15, 2008. He stated that he was punished for an alleged violation of Article 117 of the Uniform Code of Military Justice (UCMJ)¹ but that he did not violate Article 117 because his provoking words were not spoken “in the presence of the person to which they were directed,” who was BMC A, the Executive Petty Officer (XPO) of his surf station. The applicant argued that because BMC A was not present during the incident, his NJP for an alleged violation of Article 117 of erroneous and unjust.

The applicant explained that the incident occurred while he was having a one-on-one conversation with another crewmate, a BM3, while they were in a park conducting a physical fitness test. Other crewmembers were present but not involved in their conversation. When the

¹ 10 U.S.C. § 917 (Article 117, UCMJ, stating that “[a]ny person subject to this chapter who uses provoking or reproachful words or gestures towards any other person subject to this chapter shall be punished as a court-martial may direct.”). Under the Manual for Courts-Martial, the elements of a violation of Article 117 include “(1) that the accused wrongfully used words or gestures toward a certain person; (2) that the words or gestures used were provoking or reproachful; and (3) that the person toward whom the words or gestures were used was a person subject to the code.” The explanation states the following in pertinent part: “As used in this article, ‘provoking’ and ‘reproachful’ describe those words or gestures which are used in the presence of the person to whom they are directed and which a reasonable person would expect to induce a breach of the peace under the circumstances.” MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), p. IV-62 (hereinafter MCM).

BM3 told him that BMC A might initiate his discharge if the BM3 could not pass the fitness test, the applicant replied, "Fuck Chief, he can't do that. Don't worry about it, he will be gone in a month." His words were overheard by other crewmembers and reported back to BMC A, who had stayed at the station.

At the time the applicant had been a BM1/E-6 for three years and was eligible to compete for advancement to BMC/E-7. However, as a result of the NJP, the applicant was demoted one pay grade to BM2/E-5. The applicant alleged that he failed to exercise his right to appeal the NJP at the time because he was frustrated and "mentally and emotionally finished" because before the mast he was required to undergo two psychiatric evaluations and counseling with the Group Command Master Chief and the District Command Master Chief.

The applicant alleged that the NJP is unfair because it is having a very long-lasting detrimental effect on his career even though the incident was "not reflective of [his] overall performance and professional demeanor." He noted that he received a Letter of Commendation at the end of his tour of duty at the station. Besides resulting in his demotion and having to recomplete for promotion, the applicant stated that he has not been able to follow his chosen career path as a surfman or to apply for any special duty assignments. Because of the NJP, he will not be eligible for special duty assignments until May 2012 and even after that he may not be chosen for certain select assignments, such as OIC of a station.

The applicant noted that he has not allowed the NJP and demotion to negatively affect his performance. At his current unit, he was "flected up" (given a superior assignment) to fill a supervisory position in the Operations Department, qualified as an underway deck watch officer, and was appointed Sailor of the Quarter in October 2010, which was documented on a highly laudatory Page 7 by the commanding officer of the cutter. He also regained his rank as a BM1.

Regarding the delay of his application, the applicant stated that he was unaware of the elements of Article 117 until recently and so did not know that his NJP had been erroneous.

SUMMARY OF THE EVIDENCE

The applicant enlisted in 1997. His early record contains several Page 7s documenting both positive and negative performance. He incurred an "alcohol incident" in 2003 when he got drunk and intentionally burned another intoxicated crewmember with his cigar seven times. He was awarded NJP on November 6, 2003, for violating UCMJ Articles 93 (Cruelty and Maltreatment) and 134 (Disorderly conduct, drunkenness). However, he earned advancement to BM1/E-6 in 2005.

The applicant transferred from a cutter to a surf station in 2006. On February 5, 2007, the Officer in Charge (OIC) of the surf station reported the following on a Page 7 in the applicant's record:

[The applicant] has been counseled this date for inappropriate behavior physical contact and poor leadership characteristics demonstrated in several encounters with subordinate members.

[Applicant], you have been verbally counseled on several occasions by senior members of the Command regarding your lack of human relations and leadership skills. Your continued deviation from both commonly accepted and Commandant mandated conduct has negatively impacted members of this Command.

Your recent interaction with a Second Class Petty Officer is cause for alarm. No matter how subtle or non-threatening you intended your actions to be, striking another member, regardless of rate or rank, is never an appropriate form of counseling. While your warrant for counseling may have been founded, your method was not in keeping with the Commandant expectation of performance. By definition, an Effective Leader is one whose followers are committed to and achieve desired results by having the right tools, information and working environment.

You are reminded that as a First Class Petty Officer you are responsible and accountable for your actions. As a Department head, your conduct is highly visible and sets an example for Junior members. Violent, harassing, irrational and inappropriate behavior can have a detrimental effect on morale as well as personal growth by lowering readiness, productivity and the quality of life of members of this Command.

Effective this date, as a result of these significant Leadership deficiencies, you are not Recommended for Advancement. That status will continue until over a reasonable period of time you have consistently demonstrated the Leadership Characteristics of your current pay grade and the next higher.

Any further incidents of this nature will most likely result in serious administrative action taken against you.

On the applicant's semiannual performance evaluation dated May 31, 2007, he received one "below-standard mark" of 3 (for the performance category Safety), one "standard" mark of 4, fourteen "above-standard" marks of 5, and nine "excellent" marks of 6,² and he was not recommended for advancement to BMC.³

On the applicant's semiannual performance evaluation dated November 30, 2007, he received three marks of 3 (for Evaluations, Setting an Example, and Loyalty), twelve marks of 4, and ten marks of 5, and was again not recommended for advancement to BMC.

On March 13, 2008, the applicant's command sent him to a certified physician's assistant for a "mental health screening prior to a command referral for a military psych. eval. at [a Naval Hospital]. His command states that [the applicant] has a volatile disposition, difficulty working with other members at the station, difficulty qualifying, and has been removed from supervisory duties. He has multiple negative Page 7 reports." The doctor reported that the applicant admits that "he does have a quick temper, but believes he gets over things quickly. He states he is very

² Enlisted members are evaluated in a variety of performance categories on a scale from 1 (unsatisfactory) to 7 (superior).

³ The evaluation form, CG-3788B, states the following regarding recommendations for or against advancement:

NOT RECOMMENDED: Check this block if, in the view of the rating official, the individual is not capable of satisfactorily performing the duties and responsibilities of the next higher paygrade.

RECOMMENDED: Check this block if, in the view of the rating official, the individual is fully capable of satisfactorily performing the duties and responsibilities of the next higher paygrade. This block may be checked irrespective of the individual's qualification or eligibility for advancement.

serious about his job and is intolerant of mistakes by other members of the station, which has given him a reputation of being difficult to work with. ... He understands that he is not well liked by the other members of the station, and believes there is a personality conflict between him and his chief.” The physician’s assistant referred the applicant for a psychiatric evaluation.

On April 1, 2008, the applicant reported for a “command directed mental health evaluation” at a Naval Hospital because of “anger issues, multiple negative reports, volatile temper, has been relieved of supervisory duties [due] to inability to work well with subordinates.” The psychiatrist noted that the command had failed to follow numerous procedures and conducted the assessment but refused to file a substantive report because of the number of procedural errors.

On April 15, 2008, the applicant was evaluated by an Army psychiatrist. The report states the following:

This service member presented now for initial psychiatric consultation. He is here now for a command-directed mental health assessment and reports frustration with his military unit, but no clinical signs or symptoms of mental illness. ... This duty assignment is a new challenge; he is attempting to ‘break into’ the motor surfman community, which has not been going well for the past year. He described an escalating series of interpersonal conflicts at work, starting with a negative page 7 entry into his service record last year when he and another BM had a conflict after a morning safety meeting. Over time, he has grown increasingly frustrated with his chain of command, leading to the incident that led directly to this referral/assessment. [He] acknowledges he was in the wrong when he “mouthed-off” in public at work, and has appropriate regret/remorse for doing so. ... He quit using nicotine (he used to use dipping tobacco) two months ago. ... he and his wife have been through about 8 sessions of marital counseling in recent months, his stress at work has been causing difficulty at home.

The psychiatrist’s discussion of the applicant is cut off in the report. He diagnosed the applicant with “occupational problem and family stress.”

The Report of Offense and Disposition shows that on April 28, 2008, BM1 S placed the applicant on report for violating Article 117 of the UCMJ. The charge reads as follows:

Article 117 – Provoking Speeches or Gestures: In that [the applicant] did, at Miller Park, on or about 06 March 2008, wrongfully use reproachful words while in the presence of Non-Rated and Petty Officers to wit; defamed the character and authority of the of the Executive Petty Officer, Station ..., towards BMC ..., US Coast Guard, Executive Petty Officer.

The witnesses listed include BM1 X; a machinery technician, third class; and a seaman. BM1 Y served as the applicant’s mast representative at his request. The OIC appointed BMC Z to serve as a preliminary investigating officer.

At mast on May 12, 2008, the applicant’s commanding officer—a captain (O-6) serving as the Group Commander—awarded him NJP by reducing his rate and pay grade from BM1/E-6 to BM2/E-5. Pursuant to the NJP,⁴ the applicant also received a “disciplinary” performance evaluation dated May 12, 2008, on which he received five marks of 3 (for Communicating,

⁴ Article 10.B.5.b.3.a. of the Personnel Manual requires a command to prepare a “disciplinary” performance evaluation whenever an enlisted member is awarded NJP.

Responsibility, Setting an Example, Loyalty, and Judgment), eight marks of 4, nine marks of 5, and two marks of 6. He was not recommended for advancement and he also received an unsatisfactory conduct mark, terminating his eligibility for a Good Conduct Medal, as a result of the NJP. This disciplinary performance evaluation substituted for the regular, semiannual performance evaluation that the applicant would otherwise have received on May 31, 2008.⁵

On his October 31, 2008, performance evaluation as a BM2, the applicant received nine marks of 4, twelve marks of 5, and four marks of 6, and he was recommended for advancement to BM1. On his April 30, 2009, evaluation, the applicant received eight marks of 4, twelve marks of 5, two marks of 6, and three “superior” marks of 7, and he was recommended for advancement to BM1.

In June 2009, the applicant transferred to a cutter. Upon his departure from the surf station, the Group Commander gave him a Letter of Commendation for his service at the surf station from May 2008 (the month he received NJP) through June 2009.

On December 3, 2009, the applicant’s new commanding officer (CO) asked the Personnel Service Center to restore the applicant’s rank as a BM1/E-6. The CO stated that the applicant had not demonstrated any of the deficiencies described by his former command during his five months aboard the cutter and had shown a cooperative attitude, sound operational decision-making, and a “rare gift for marshalling the fullest efforts of his subordinates.” The CO also reported that the applicant was fleeting up to take on the duties of the BM1 billet on the cutter and was training to qualify as a deck watch officer. A Page 7 in the applicant’s record shows that he qualified as underway Officer of the Deck on January 5, 2011.

On February 19, 2010, the chief of the Enlisted Personnel Management branch of the Personnel Service Center disapproved the request of the applicant’s CO that his rank be restored to BM1 without having to re-compete for advancement. However, the applicant continued to receive strong performance evaluations. He competed for advancement and re-advanced to BM1 on June 1, 2011.

VIEWS OF THE COAST GUARD

On August 25, 2011, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief. In so doing, he adopted the findings and analysis in a memorandum provided by the Personnel Service Center (PSC).

The PSC argued that the applicant’s NJP was erroneous because he did not violate Article 117 of the UCMJ. The PSC stated that an offense under Article 117 requires the target of the provoking or reproachful words to be present and alleged that BMC A, who was the target of the applicant’s reproachful words, was not present when he spoke them. As evidence that BMC A was not present in the park, the PSC pointed out that the charge sheet shows that the incident occurred “in the presence of Non-Rated and Petty Officers.” The PSC stated that “[d]efaming

⁵ Article 10.B.5.a.4.a. of the Personnel Manual provides that for members in pay grades E-6 and below, no semi-annual performance evaluation is prepared if an unscheduled evaluation, such as a disciplinary evaluation, has been prepared within the prior 92 days.

the character and authority ... of a member within one's chain of command is not tantamount to inducing breaches of the peace toward that same member." The PSC stated that the command could have legitimately charged the applicant with a violation of Article 91 (Insubordinate conduct toward a warrant officer, non-commissioned officer, or petty officer), instead.⁶

The PSC stated that even though the applicant did not appeal his NJP, the NJP and all documentation of it should be expunged from his record, and he should be restored in rate and "receive relief commensurate with a state he would be in today had he been found not in violation of Article 117." The JAG concluded that the applicant "should be entitled to all back pay and allowances to include an adjusted date of rate/rank, if applicable."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 12, 2011, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a response within thirty days. The applicant agreed with the recommendation of the Coast Guard and noted that he had advanced to BM1 on June 1, 2011.

APPLICABLE REGULATIONS

Article 5.C.4.b. of the Personnel Manual lists the following "eligibility requirements" for an enlisted member to advance to the next higher grade:

1. Each active duty member must complete and meet the eligibility requirements listed below by 01 February before the May SWE [service-wide examination] or 01 August before the November SWE. ...

- a. Complete required Enlisted Performance Qualifications (EPQ) and enlisted Professional Military Education requirements (EPME). Article 5.C.7.
- b. Complete required Performance Qualification Guide (PQG) rate training courses. Article 5.C.8.
- c. Successfully complete service course, if required, for particular pay grade or rating. Article 5.C.9.
- d. Meet citizenship or security clearance requirements for advancement in certain rates or ratings. Article 5.C.10.
- e. Be in proper path of advancement. Article 5.C.11.
- f. Fulfill special requirements for certain ratings. Article 5.C.12.
- g. Not be involved in circumstances which render him or her ineligible for advancement. Article 5.C.13.
- h. Fulfill special requirements; time in service, time in pay grade in present rating, and sea duty. Article 5.C.14 and 5.C.15.
- i. Fulfill additional eligibility requirements for personnel competing in the E- 7/8/9 examination. Article 5.C.5.
- j. Maintain the minimum factor average on his or her last evaluation. Article 5.C.6.

⁶ Actually, a violation under Article 91 also requires the target of the offensive language to be present. Apparently, speech that is merely reproachful and disrespectful (i.e., not threatening, indecent, disloyal to the nation, inciting mutiny, or amounting to disorderly conduct) and that is spoken not in the presence of the target is only prohibited under the UCMJ if the target is a superior commissioned officer—an offense charged under Article 89. MCM, pp. IV-17, IV-21.

k. Be a graduate of a military recruit training center for advancement to E-2. Article 5.C.26.

2. Be recommended by the CO/OIC (Article 5.C.4.e). Commanding officers shall ensure an Enlisted Employee Review (EER) counseling sheet in Direct Access is prepared when a member otherwise eligible for advancement is assigned a mark of "Not Recommended" because of adverse circumstances.

3. Meet time in service and time in pay grade in present rating requirements on or before the terminal eligibility date of 01 January after the May SWE or 01 July after the November SWE.

Article 5.C.4.e.4 of the Personnel Manual states that "[t]he CO/OICs recommendation for advancement is the most important eligibility requirement in the Coast Guard advancement system. A recommendation for advancement shall be based on the individual's qualities of leadership, personal integrity, adherence to core values, and his or her potential to perform in the next higher pay grade. Although minimum performance factors have been prescribed to maintain overall consistency for participation in SWE, the commanding officer shall be personally satisfied that the member's overall performance in each factor has been sufficiently strong to earn the recommendation. Note: The commanding officer's recommendation for advancement or change in rating by participation in the SWE is valid only for a specific competition and must be renewed for each succeeding competition."

Article 5.C.5.b. provides the following specific eligibility requirements for competing for advancement to pay grade E-7:

1. Be serving in enlisted status on active duty in pay grade E-6, in the rating for which recommended for advancement.

2. Have served on continuous active duty in the Coast Guard in pay grade E-6 during the entire two years immediately preceding the terminal eligibility date.

3. For 24 months prior to the terminal eligibility date (01 January following the May exam), and for the entire period from recommendation to advancement, have no unsatisfactory conduct mark, court martial (CM) or civil convictions, or nonjudicial punishments (NJP). ...

Under Article 5.C.3.b., the candidates for advancement to a particular rate, such as BMC, are ranked on advancement lists according to a calculation that assigns points for each candidate's SWE score (up to 80 points), performance marks (up to 50 points), time in service (1 point per year for up to 20 years), time in present pay grade (2 points per year for up to 5 years), medals and awards (varying from 1 point per Good Conduct Medal or Letter of Commendation up to 10 points for a Medal of Honor), and sea duty (1 point per month and a maximum of 2 points per year for up to 30 points), as shown on the PDE. Advancements are made off of these lists when vacancies at the next higher rank occur.

Article 5.A.2.a. of the Medals and Awards Manual states that a Good Conduct Medal is "[a]warded for satisfactory service which is defined as proficiency in rating, sobriety, obedience, industry, courage, and neatness throughout such period of service. As of 1 July 1983, an individual is required to perform three consecutive years of satisfactory service to earn this award. Subsequent awards are authorized for each additional three consecutive years of satisfactory ser-

vice.” Under Article 5.A.2.a.(2)(c), the eligibility period for a Good Conduct Medal ends and recommences when NJP is awarded.

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 10 U.S.C. § 1552. The application was timely filed within three years of the NJP.

2. 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.⁷

3. The applicant asked the Board to remove the NJP dated May 15, 2008, from his record. The Board begins its analysis in every case 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.⁸ 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.”⁹

4. The applicant has proved by a preponderance of the evidence that he was erroneously awarded NJP on May 12, 2008, for an alleged violation of Article 117 of the UCMJ (Provoking Speech and Gestures) on March 6, 2008. One element of an offense under Article 117 is that the target of the provoking speech or gesture must be present to witness it.¹⁰ However, the applicant’s provoking speech was apparently not made in the presence of the BMC/XPO against whom it was directed. Although the applicant submitted no direct proof of this allegation, the Board notes that the BMC is not listed as one of the witnesses on the Report of Offense; that the written specification of the charge states that the applicant spoke “in the presence of Non-Rated and Petty Officers” but merely “towards” the BMC; and that the Coast Guard has averred in the advisory opinion that the BMC who was the target of the applicant’s speech on March 6, 2008, was not present to hear it. Therefore, the Board finds that the applicant’s NJP on May 12, 2008, was erroneous and should be removed from his record. In addition, his reduction in rate to BM2, his disciplinary performance evaluation dated May 12, 2008, and any Page 7s or other documentation of or references to the NJP should be removed from his record. The applicant’s date of rank as a BM1 should be restored to what it was before his reduction in rate at mast.

⁷ See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that “whether to grant such a hearing is a decision entirely within the discretion of the Board”).

⁸ 33 C.F.R. § 52.24(b).

⁹ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

¹⁰ MCM, p. IV-62.

5. The applicant asked only that the NJP be removed, but he also complained about the long-term detrimental effect the NJP has had on his career and argued that his offense did not warrant the consequences he has suffered. In the advisory opinion, the Coast Guard somewhat vaguely recommended that the applicant “receive relief commensurate with a state he would be in today had he been found not in violation of Article 117” and that he “should be entitled to all back pay and allowances to include an adjusted date of rate/rank, if applicable.” Thus, the Board must consider whether the applicant is entitled to relief in addition to the removal of the NJP and related documentation. In this regard, the Board notes that the applicant’s NJP is not erroneous merely because of a mislaid charge—i.e., his command did not simply mistake which article of the UCMJ to cite. The NJP is erroneous because the UCMJ does not criminalize using provoking, reproachful, defamatory, or disrespectful words against someone not present to hear them unless the target of those words is a superior commissioned officer,¹¹ which the BMC/XPO was not. There is no evidence in the record that the applicant violated any article of the UCMJ on March 6, 2008. Therefore, it appears that the command’s decision to take disciplinary action against the applicant was improper. However, the applicant has not proved that the allegations concerning his conduct on March 6, 2008, were erroneous even though his conduct did not violate Article 117. The preponderance of the evidence shows that he spoke very disrespectfully about the XPO of his unit to a subordinate during a unit exercise and in the presence of several subordinates.

6. The applicant alleged that but for the NJP he would have been allowed to take the SWE and compete for advancement to BMC in 2008. However, a member who is not recommended for advancement may not take the SWE to compete for advancement.¹² The applicant was not recommended for advancement on either of his prior two performance evaluations, dated May 31, 2007, and November 30, 2007, and in light of his conduct on March 6, 2008, he clearly would not have been recommended for advancement in May 2008 even if the mast had not occurred. In this regard, the Board notes that Article 5.C.4.e.4 of the Personnel Manual states that “[t]he CO/OICs recommendation for advancement is the most important eligibility requirement in the Coast Guard advancement system. A recommendation for advancement shall be based on the individual’s qualities of leadership, personal integrity, adherence to core values, and his or her potential to perform in the next higher pay grade.” A first class petty officer who uses reproachful and defamatory language toward an XPO when speaking to a subordinate petty officer in the hearing of other subordinates is clearly lacking in leadership, not adhering to the Coast Guard’s core values of “honor, respect, and devotion to duty,” and not ready for advancement to chief petty officer.

7. The record shows that the applicant’s conduct improved significantly after the mast. He received the command’s recommendation for advancement to BM1 on his October 31, 2008, and April 30, 2009, performance evaluations and received a Letter of Commendation for his post-mast performance at the surf station. Therefore, if he had not been reduced to BM2 at mast in May 2008, he might have been recommended for and eligible to take the SWE for advancement to BMC in May 2009. Whether the applicant would have advanced to BMC had

¹¹ See footnote 6, above.

¹² Personnel Manual, Article 5.C.4.b.2.

he been eligible to take the SWE in 2009, 2010, or 2011 is unknowable.¹³ Once a member takes the SWE, his placement on the advancement list depends upon many factors, and a major one is the member's performance marks.¹⁴ The applicant received many low and mediocre marks in 2007 and 2008. However, the Board finds that because the applicant might have been erroneously deprived of the opportunity to compete for advancement to BMC in 2009, 2010, and 2011, if he is eligible and recommended for advancement to BMC this spring, takes the SWE, and places above the cut and/or advances to BMC off the advancement list resulting from the SWE, his date of advancement should be backdated to what it would have been had he been the last person to advance to BMC from the advancement list resulting from the 2009 SWE, and he should receive corresponding back pay and allowances.

8. The removal of the applicant's NJP dated May 12, 2008, also removes the termination of the applicant's three-year eligibility period for a Good Conduct Medal that presumably commenced in November 2006 and would otherwise have ended in November 2009.¹⁵ With the NJP in his record restarting his eligibility period on May 13, 2008, he would not have received another Good Conduct Medal until May 13, 2011. Therefore, assuming the applicant earned a Good Conduct Medal in 2011, the Coast Guard should correct the date of the medal to the date he would have received one had he not received NJP on May 12, 2008.

9. The Board concludes that relief should be granted by expunging from the applicant's record the NJP dated May 12, 2008, and all other documentation of and references to that NJP, including the associated Enlisted Employee Review and the termination of his eligibility for a Good Conduct Medal on that date. The date of any Good Conduct Medal he has received since the mast on May 12, 2008, should be backdated to the date he would have received the medal had no NJP been awarded on May 12, 2008. His reduction in rate as a result of the NJP should also be expunged so that his date of rank as a BM1 will be the date he originally advanced to BM1 in 2005, and he should receive the back pay and allowances he would have received from May 12, 2008, to June 1, 2011, as if his rate had remained BM1. These corrections should be made promptly so that he may take the May 2012 SWE for advancement to BMC if he is recommended for advancement and otherwise eligible to compete for advancement to BMC. If he takes the May 2012 SWE for advancement and places above the cut for advancement and/or is advanced to BMC off the advancement list resulting from the May 2012 SWE, his date of advancement should be backdated to what it would have been had he been the last person to advance to BMC from the advancement list resulting from the May 2009 SWE, and he should receive corresponding back pay and allowances.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

¹³ For example, upon inquiry by the BCMR staff, the PSC stated that following the May 2009 SWE, there were 608 candidates for advancement on the BMC advancement list and only 107 advancements were made off the list while it remained in effect from January 1, 2010, to December 1, 2010.

¹⁴ Personnel Manual, Article 5.C.3.b.

¹⁵ Because of the applicant's November 2003 NJP, a 3-year eligibility period would have commenced in November 2003 and presumably ended in November 2006, when the next period would have commenced.

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted as follows:

The Coast Guard shall expunge from his record the NJP dated May 12, 2008; his reduction in rate to BM2; and all other documentation of and references to the NJP, including the Enlisted Employee Review dated May 12, 2008, and the termination of his eligibility for a Good Conduct Medal. His date of rank as a BM1 shall be the date in 2005 that he originally advanced to BM1, and he shall receive the back pay and allowances he is due as a result of these corrections. The date of any Good Conduct Medal he has received since May 12, 2008, shall be backdated to the date he would have received it had no NJP been awarded on May 12, 2008.

The Coast Guard shall make the above corrections to his record and personnel data extract in time for him to take the May 2012 SWE for advancement to BMC if he is recommended for advancement and otherwise eligible to compete for advancement to BMC.

If he takes the May 2012 SWE for advancement to BMC and places above the cut for advancement or is advanced off the May 2012 SWE BMC advancement list, his date of rank as a BMC shall be backdated to what it would have been had he been the last person to advance from the May 2009 SWE BMC advancement list, and he shall receive corresponding back pay and allowances.

Troy D. Byers

Dana Ledger

Donna A. Lewis