

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-024

**XXXXXXXXXX
XXXXXXXXXX**

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on November 8, 2007, upon receipt of the applicant's completed application and subsequently prepared the final decision for the Board as required by 33 CFR § 52.61(c).

This final decision, dated April 30, 2008, 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 correct his military record by removing his failure of selection for promotion to lieutenant junior grade (LTJG). He further requested to be promoted retroactively to that grade effective September 1, 2007. The applicant stated that when the LTJG selection board convened on June 4, 2007, he did not have a complete and accurate record because a concurrent officer evaluation report (concurrent OER) for the period January 4, 2007, to May 1, 2007, was not in his record when it was considered by the calendar year 2007 LTJG selection board. Although the OER was received by Coast Guard Personnel Command (CGPC) on May 7, 2007, it was not placed in his record until August 8, 2007.

The concurrent OER covers the applicant's performance while he was on temporary additional duty (TAD) as the Assistant Surface Operations Manager for seven stations and four patrol boats. He did not receive a mark lower than 4 in any performance dimension and on the comparison scale, in block 9, he was marked in the fifth block as "one of the many competent professional who form the majority of this grade." The reporting officer wrote in block 10 of the concurrent OER that the applicant had his strongest recommendation for promotion with the very best of his peers.

The applicant also requested that the regular OER for the period October 1, 2006, to March 31, 2007, be corrected to accurately reflect the days in which he was not observed by that rating chain. The regular OER shows that he was not observed for a period of 51 days because

he was on leave. The applicant alleged that he was on leave from September 1, 2006, to September 16, 2006, and from November 24, 2006, through January 3, 2007, and TAD from January 4, 2007, through May 4, 2007. This TAD period is not reflected in section 1.h. of the regular OER under discussion.

VIEWS OF THE COAST GUARD

On March 18, 2008, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant relief to the applicant, as recommended by the Commander CGPC in a memorandum attached to the advisory opinion as Enclosure (1). In recommending relief, CGPC stated the following:

Due to administrative oversight, the applicant's concurrent OER dated May 2007 did not go before the Selection Board. . . . However, the regular OER dated March 2007 went before the Selection Board and contained substandard marks in nine of eighteen performance dimensions. The regular OER also contained a reference to an alcohol incident and a statement not recommending the applicant for promotion to the next grade. Ultimately, the applicant was non-selected for promotion.

In order to rectify this situation, the applicant's complete record should go before the June 2008 [LTJG] selection board. If the applicant is selected for promotion, he should be given a date of rank, back pay and allowances commensurate with the promotion schedule for those officers selected to the grade of [LTJG] during the time period when the applicant initially failed of selection. If the applicant is non-selected for promotion then it should be considered the applicant's first non-selection for promotion. The applicant's record would then go before the next [LTJG] selection board scheduled for June 2009. Based on law and Coast Guard policy, this is the appropriate relief.

The applicant was temporarily assigned to another unit during [a portion of] his regular evaluation period and 86 days should have been reflected as days not observed in his March 2007 OER . . . The Board should grant relief with regard to the administrative data in section 1.h. of the March 2007 OER to accurately reflect the temporary assignment.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 19, 2008, a copy of the views of the Coast Guard was sent to the applicant for a reply. The Board did not receive a response from the applicant.

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 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.

3. The JAG admitted, and the Board finds, that the applicant did not have a substantially complete and fair record before the 2007 LTJG selection board. In this regard, the Board notes that the applicant's concurrent OER for the period January 4, 2007, to May 1, 2007, was not included in the applicant's record that was considered by the selection board. The concurrent OER was particularly important to the applicant's record because it provided a more positive evaluation of his performance when compared with that in the regular OER, which contained some below average marks and negative comments. The inclusion of the concurrent OER in the applicant's record probably would have made the applicant's record appear better and it would have increased the likelihood of the applicant's selection for promotion.

4. The JAG also recommended that section 1.h. of the applicant's regular OER for the period October 1, 2006 to March 31, 2007 be corrected to include the number of days from January 4 to March 31 that the applicant was TAD as non-observed, in addition to the 51 days that the applicant was on authorized leave. The Board agrees with this recommendation.

5. The Board having found errors must decide whether a causal connection might have existed between the errors and the applicant's failure to be selected by the 2007 promotion board. Having applied the test for prejudice under *Engels v. United States*, 678 F.2d 173, 175-76 (Ct. Cl. 1982)¹ and having found that the applicant suffered such prejudice by having an incomplete record before the 2007 LTJG selection, the Board finds, and the Coast Guard agrees, that there was likely a causal connection between the errors and the applicant's failure of selection for promotion to LTJG. In this regard, the Coast Guard recommended that "the applicant's complete record should go before the June 2008 [LTJG] selection board. If the applicant is selected for promotion, he should be given a date of rank, back pay and allowances commensurate with the promotion schedule for those officers selected to the grade of [LTJG] during the time period when the applicant initially failed of selection. If the applicant is non-selected for promotion then it should be considered the applicant's first non-selected for promotion. The applicant record would then go before the next [LTJG] selection board scheduled for June 2009."

6. Accordingly, the applicant should be granted relief.

¹ *Engels v. United States*, 678 F.2d 173, 175-76 (Ct. Cl. 1982) contains the standards to be applied in determining whether an applicant's record has been prejudiced by error. In *Engels*, the Court of Claims held that, if the Board finds that an officer's record contained an error when it was reviewed by a selection board, the Board should decide whether the officer's failure of selection for promotion should be removed by answering two questions: "First, was [the applicant's] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [the applicant] would have been promoted in any event?"

ORDER

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

The Coast Guard shall ensure, if it has not done so, that the concurrent OER for the period January 4, 2007, to May 1, 2007, is added to his record.

Section 1.h. of the regular OER for the period October 1, 2006, to March 31, 2007, shall be corrected to reflect accurately the total number days in which the applicant was not observed by that rating chain. Specifically, the number of days in which he was TAD for the reporting period shall be included in section 1.h.

His 2007 failure of selection for promotion to LTJG shall be removed from his record so that he shall have two more selection opportunities for promotion to that grade. If he is selected for promotion to LTJG by the calendar year 2008 selection board or the first Board to consider him for promotion to that grade based on a corrected record, his date of rank as an LTJG shall be adjusted to the date he would have had if he had been selected in 2007, with back pay and allowances once promoted to LTJG.

No other relief is granted.

Bruce D. Burkley

Randall J. Kaplan

James E. McLeod