

**DEPARTMENT OF TRANSPORTATION  
BOARD FOR CORRECTION OF MILITARY RECORDS**

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 1999-083**

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**FINAL DECISION**

**██████████ Attorney-Advisor:**

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on March 26, 1999, upon the BCMR's receipt of the applicant's completed application.

This final decision, dated March 9, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST FOR RELIEF**

The applicant, who was retired as a xxxxxx in the Coast Guard on August 1, 199x, asked the Board to correct "the manifest injustice in the treatment accorded me by the Xxxxxxx Selection Board that convened xxx 199x." The applicant was passed over for promotion to xxxxxxxx by that selection board.

If the Board grants relief by placing his name on the promotion list, the applicant asked also that his request for retirement be withdrawn. If the Board grants relief after he has been retired, the applicant asked that he be recalled to active duty and be assigned the date of rank he would have received had he been selected for promotion by the selection board in xxx 199x. He also asked to be awarded back pay and allowances. In the alternative, he asked to be retired at the rank and pay grade of xxxxxxxx.

**APPLICANT'S ALLEGATIONS**

The applicant alleged that his non-selection for xxxxxxxx was a mistake. He stated that the selection board selected xx out of xxx (62.4 percent) eligible xxxxxxxxs to be promoted but did not select him. With the proceedings of selection boards con-

fidential, and no record made of why he was not chosen, he alleged that his failure of selection must be in error. He alleged, however, that "it was not my Coast Guard that erred; it was a small group of individuals who[m] I do not know and who do not know me, who somehow evaluated my distinguished record and decided that I was in the lower 37.6% of all Xxxxxxxs who went up for Xxxxxxxx last time (xxxx 199x). ... I am not a 'lower third officer'!" The applicant alleged that his past supervisors had rated him as one in the top 10 percent.

The applicant indicated that his performance evaluations are "well above average" and recommend that he be promoted ahead of his peers. He indicated that he was performing an extremely demanding job as Deputy Group Commander and Executive Officer for Group xxxxx. He alleged that his group had recently received several awards and passed difficult audits and that he had played a major role in those accomplishments. He stated that on his officer evaluation reports (OERs), of the four xxxxxxxs who have supervised his work as a xxxxxxx, one rated his overall performance as "exceptional" and the most recent three recommended him for accelerated promotion.

The applicant also alleged that his 29 years on active duty, including service on two ships and two joint tours with other branches, work as a xxxxx and member of a xxxxxxx detail, and enlisted experience as a xxxxxxx and xxxxx made him an excellent candidate for promotion. He also stated that he had over 12 years experience in xxx and xxx and that he had helped build the Coast Guard's xxxxxx Program "from scratch." The applicant stated that his wide experience in many different Coast Guard missions and distinguished performance made him an excellent candidate for selection by a board whose goal is to select officers who are "able to help the Coast Guard provide superior public service across all missions ... [and] have the ability to form effective partnerships within and without the service."

The applicant hypothesized that he might have been passed over because he had not spent much time in "high-visibility jobs." He alleged that the Coast Guard sometimes promotes officers who have held "flashy operational jobs," even if they are not top performers, over better performers whose work is lower in profile. He said he should not be punished for accepting difficult assignments "outside of the limelight." The applicant also hypothesized that his failure of selection might have been due to the fact that he performed two three-year "joint" tours, working primarily in other agencies. The applicant alleged that he had been actively recruited for these positions and that the Coast Guard encourages officers to broaden their backgrounds by serving "joint" tours. However, he alleged, such positions are not "career-enhancing," and the OERs documenting an officer's performance in these positions are unfairly discounted, if not ignored altogether, by selection boards.

The applicant also alleged that his pass over for selection despite receiving top performance evaluations is a true error and not just a sign of inflation of performance evaluation marks. He submitted a report from the Coast Guard Personnel Command (CGPC) indicating that average marks assigned on OERs had not significantly increased over recent years.

The applicant explained that he was filing his application before failing of selection a second time because the next time his record was reviewed by a selection board, he would be considered "above the zone." He stated that officers "above the zone" have almost no chance of selection. He also stated that if he waited to file an application until he was forced to retire, he would be even older and "less marketable in the civilian job sector."

### VIEWES OF THE COAST GUARD

On October 29, 1999, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board dismiss the application without prejudice "for incompleteness due to the failure of the Applicant to specify an actionable error or injustice."

The Chief Counsel stated that under 33 C.F.R. § 52.21(b), the Board cannot process an application unless it is complete, and a complete application requires one or more specific allegations of error or injustice accompanied by substantial proof. The Chief Counsel argued that the applicant's request is too vague for the Board to address effectively because the applicant did "not point to a specific error in his record nor has he provided the BCMR with any basis to infer that the deliberations of his July 199x Selection Board were anything but regular."

The Chief Counsel stated that, under the presumption of regularity, the Board must assume the selection board acted correctly, lawfully, and in good faith absent substantial evidence to the contrary. Furthermore, he stated, federal courts have long refused to interfere in military decisions regarding promotions and advancement. *Reaves v. Ainsworth*, 219 U.S. 296 (1911); *Orloff v. Willoughby*, 345 U.S. 83 (1953); *Brenner v. United States*, 202 Ct. Cl. 678 (1973). The Chief Counsel suggested that the Board stands in the same position as did the court in *Payson v. Franke*, 282 F.2d 851 (D.C. Cir. 1960), *cert. denied, sub nom. Robinson v. Franke*, 265 U.S. 815 (1961):

[T]he given reason for this hands-off policy is particularly valid with respect to the recommendations of selection boards for officer promotions, for the record of an individual on the list of eligible candidates is to be contrasted with similar records of the often hundreds of other candidates on the same list. The criteria [i.e., for promotion] were for the board in its sworn judgment to apply for the good of the service. Suffice it to say that we are in no position to assess and appraise that record by itself even were we free to do so. *Id.* at 854.

The Chief Counsel stated that the applicant has not presented substantial evidence indicating that his record before the selection board was in error or that the selection board somehow improperly reviewed his record.

### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On November 3, 1999, the Chairman forwarded a copy of the Chief Counsel's advisory opinion to the applicant and invited him to respond within fifteen days. On November 15, 1999, the applicant responded.

The applicant stated that the Chief Counsel's argument that the Chairman should dismiss his request because the application was incomplete is moot because the BCMR has already docketed his case and the regulations require that applications be considered complete before they can be docketed.

The applicant further stated that, though he agrees that there was no error in his record when it was reviewed by the selection board, his non-selection by that board was just the sort of "manifest injustice" that the BCMR was created to correct. 33 C.F.R. § 52.12. He argued that his non-selection for promotion is the error in his record he wants corrected.

The applicant also alleged that he has provided a basis for the Board to infer that the selection board erred. He argued that the inconsistency between his failure of selection and the many recommendations for promotion ahead of his peers in his OERs and the fact that many senior officers were surprised at his failure of selection constitute evidence that the selection board erred somehow in reviewing his record. The applicant also stated that the Coast Guard's long delay (from January 25, 199x, to November 1, 199x) in responding to his request for information about the selection board under the Freedom of Information Act suggests that the proceedings of the selection board may have been irregular.

Finally, the applicant stated that the Coast Guard's references to federal courts that refused to change military promotion decision are irrelevant because 33 C.F.R. Part 52 "gives the BCMR more than enough authority to act on my application."

### **COAST GUARD'S RESPONSE TO BOARD'S REQUEST**

On December 30, 1999, the Board met to consider this case. The Board decided that further information from the Coast Guard might shed light on the applicant's failure of selection. Therefore, on January 12, 2000, the Board asked the Coast Guard to provide, if possible, (1) written confirmation by one or more members of the selection board that the applicant's failure of selection was not due to an administrative oversight

and (2) certain statistical information concerning the records of officers near the cut-off point on the selection list.

On February 17, 2000, the Chief of the Office of Military Justice responded to the Board's request. He stated that the information requested by the Board was unavailable because (1) selection board members are required by statute to swear an oath not to divulge any information regarding the board's deliberative process and (2) all written materials prepared or used by selection boards are destroyed in accordance with 14 U.S.C. § 261.<sup>1</sup>

The Chief provided a copy of the report of the selection board. The report includes the name of the applicant on a list of "nonselectees." Based on the appearance of the applicant's name on this list, the Chief argued, "the Board may, under a presumption of regularity, conclude that Applicant was considered and ultimately rejected for selection to O-x by the PY [promotion year] 9x selection board."

### **APPLICANT'S RESPONSE TO THE COAST GUARD**

In accordance with 33 C.F.R. § 52.82(d), the Board sent the applicant a copy of the Coast Guard's response to the Board's request for further information and invited him to respond within 15 days. The applicant contacted the Board and asked for a copy of the Board's request to the Coast Guard, which was provided to him in accordance with 33 C.F.R. §§ 52.63 and 52.66. Those regulations require the Board to maintain a record of each proceeding that is available to the applicant for inspection.

On March 6, 2000, the applicant responded to the Coast Guard's response to the Board's request. The applicant described the Coast Guard's response as unjust because "any proof of the selection board's manifestly unjust treatment of me went into the shredder before the final gavel fell, and you can't ask any board members about me because they have sworn an oath not to talk about it." The applicant queried the need for such secrecy if "everything is on the up-and-up in these selection boards" as the Coast Guard alleged. The applicant argued that his failure of selection in light of his outstanding record should be sufficient to overcome the presumption of regularity and to require the Coast Guard to better explain his non-selection.

The applicant stated that he has learned a great deal about how selection boards operate from friends who have served on them. He alleged that selection board members initially scan all the candidates' files and divide them into three piles: a small "definitely promote" pile; a "definitely do not promote" pile; and a large "in the middle" pile. Thereafter, they are "under tremendous pressure to winnow out only a predetermined number of officers from the remaining 'in the middle' candidates." Under these conditions, the applicant alleged, "a simple comment by one member that an offi-

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<sup>1</sup> The Coast Guard initially cited 14 U.S.C. § 262. However, it subsequently corrected the citation.

cer might not measure up for one reason or another could have grave consequences.” “[S]uch an unrestricted process,” he argued, “is ripe for errors in judgement and manifest injustices, intentional or not.”

Furthermore, the applicant stated that, despite the destruction of the selection board’s documents, the Coast Guard could have constructed summaries of the OERs of the candidates who were selected for promotion, determined which three of them have the lowest average OER scores, and provided that information to the Board. And while selection is based on more than just OER scores, such as performance, leadership, professionalism, and education, those qualities are reflected in OER scores.

Finally, the applicant stated that the timing of submissions and responses in this case indicates that “the BCMR takes my application seriously, ... it seems the Coast Guard does not.” “[T]he Coast Guard has treated my application as a trivial attack on their secret and sacrosanct selection board process; nothing but a mere nuisance that will go away if they expend the absolute minimum amount of effort over the longest possible time. ... I believe my over 29 years of honorable, dedicated service to our country entitles me to better treatment than I have received from the Coast Guard ... .”

## **SUMMARY OF THE RECORD**

### *Applicant’s Personnel Record*

The applicant enlisted in the Coast Guard in 19xx and rose to the rank of xxxxx. He attended Officer Candidate School and on June x, 19xx, accepted a commission as an ensign in the Coast Guard. He was promoted to lieutenant junior grade on March 9, 197x, and to lieutenant on August 15, 198x. During this time, he served as a xxxxxx at the Coast Guard xxxxx. He also was assigned many administrative duties. In July 198x, he began serving as an xxxxx, planning xxxxx operations for the xxx District. In May 198x, he was made chief of the xxxxxxxxxxxxxx, while continuing to serve as an xxxxxx. In June 198x, the applicant began serving as a xxxxxx in Miami, planning joint xxxxx operations with other federal agencies.

Throughout the 1980s, the applicant received high marks and excellent comments in his OERs. On July 1, 198x, the applicant was promoted to the rank of xxxxx, while continuing to serve as a xxxxxx, planning and evaluating xxx operations with other xxx agencies. From July 199x to June 199x, the applicant served as the chief of the xxx Branch of the xxx District. He supervised 24 persons involved in xxxxxx training. The OERs he received for this service appear as numbers 1 through 5 in the table below. They contain many laudatory comments from the officers who served on his rating chain. His reporting officer consistently recommended that he be considered for a command position. On January 1, 199x, prior to leaving this post, the applicant was promoted to the rank of xxxxxx.

From June 199x to June 199x, the applicant served as a branch chief at the xxxxxxxx in xxxxxx. His supervisor was a civilian federal employee (GS-15), but his reporting and reviewing officers were captains in the Coast Guard. The OERs he received for this work appear as numbers 6, 7, and 8 in the table below. They contain many laudatory comments, and his reporting officer consistently gave the applicant his "highest recommendation" for command and early promotion.

In June 199x, the applicant was appointed Deputy Group Commander of Group xxxxxxxx, overseeing the work of some 282 people. The OER he received for this assignment prior to the meeting of selection board in July 199x appears as number 9 in the table below. In the OER, his supervisor, who also served as his reporting officer, called him a "top-notch XO," a "flawless" planner, an "outstanding orator," and a "splendid leader," among many other laudatory comments. He praised the applicant's senior management abilities and gave him his highest recommendation for promotion to xxxxxxxx and for appointment to command of a Coast Guard Group.

In addition to his OERs, the applicant has received several awards and commendations for his work over the years, including two Coast Guard Commendation Medals for his work as a branch chief at the xxxxxxxx and as a xxxxxx Officer in xxxxx and a Coast Guard Achievement Medal for his work as chief of the xxxxxx Branch of the xxxxx District.

**APPLICANT'S MARKS IN 9 OERs FROM 7/1/xx THROUGH 3/31/xx**

CATEGORY <sup>a</sup>	1 <sup>b</sup>	2 <sup>b</sup>	3 <sup>b</sup>	4 <sup>b</sup>	5	6	7	8	9	AVE <sup>c</sup>
Being Prepared/Planning	6	6	7	6	6	6	6	6	6	6.1
Using Resources	6	6	6	6	6	6	6	7	7	6.2
Getting Results	6	6	6	6	6	6	7	7	6	6.2
Responsiveness <sup>d</sup>	5	6	6	6	6	5	6	7		5.9
Work-Life Sensitivity <sup>d</sup>				5	5	5	5	5		5.0
Adaptability <sup>d</sup>									6	6.0
Specialty Expertise/ Professional Competence	6	6	6	6	6	6	6	6	7	6.1
Collateral Duty <sup>d</sup>	5	5	6	6	6	6	6	7		5.9
Warfare Expertise <sup>d</sup>	6	NO <sup>e</sup>	NO <sup>e</sup>							6.0
Working with Others/ Teamwork	6	6	6	6	6	6	6	6	7	6.1
Human Relations/ Workplace Climate	5	5	5	5	4	5	6	4	7	5.1
Looking Out for Others	6	5	7	6	6	6	6	6	7	6.1
Developing Subordinates	6	6	7	6	6	5	7	7	6	6.2
Directing Others	6	6	6	6	6	6	6	7	6	6.1
Evaluations	6	5	7	5	5	5	5	6	5	5.4
Speaking & Listening	6	5	6	6	6	7	7	7	7	6.3
Writing	6	6	6	6	5	6	6	7	6	6.0
Initiative	6	6	6	7	5	6	7	7	7	6.3
Judgment	6	6	6	6	6	6	6	7	6	6.1
Responsibility	5	5	7	6	5	6	6	7	6	5.9
Stamina <sup>d</sup>	5	6	5	6	5	5	6	6		5.5
Health & Well-Being	5	5	5	5	5	5	5	5	5	5.0
Military Bearing <sup>d</sup>	6	5	6	5	5	6	6	6		5.6
Professionalism	6	6	7	6	6	6	7	7	6	6.3
Dealing with the Public <sup>d</sup>	6	6	6	5	5	6	6	7		5.9
Comparison Scale <sup>f</sup>	5	5	5	5	4	6	6	6	6	5.3
<b>Average for OER</b>	<b>5.7</b>	<b>5.6</b>	<b>6.1</b>	<b>5.7</b>	<b>5.5</b>	<b>5.7</b>	<b>6.1</b>	<b>6.4</b>	<b>6.3</b>	<b>5.9g</b>

<sup>a</sup> Some categories' names have changed slightly over the years.

<sup>b</sup> OER received for performance at the rank of xxxxxxx, prior to promotion to xxxxxx.

<sup>c</sup> Rounded average score of all OERs for category.

<sup>d</sup> Category discontinued or nonexistent until later years.

<sup>e</sup> Score given was "NO," which means there was no opportunity to observe this trait.

<sup>f</sup> The Comparison Scale is not actually numbered. In this row, "6" means the applicant was "strongly recommended for accelerated promotion." A "5" means the applicant was rated to be a "distinguished performer; give tough, challenging, visible leadership assignments." A "4" means the applicant was an "exceptional performer; very competent, highly respected professional."



g When limited to the last seven OERs “considered most significant” for promotion to xxxx (Personnel Manual, Article 14.A.4.d.), the final average remains 5.9.

### *Report of Lack of Evaluation Mark Inflation*

On February 26, 1999, the Coast Guard issued ALCGOFF 010/99, the report of an annual review of OERs. The report stated that the following:

Year-end statistical data validate the revised OER (implemented in Oct 1997). ... For those performance dimensions in the new OER which can be traced to performance dimensions in the previous OER, more than a third were resistant to marks inflation. For those dimensions that did increase, the increases were not significant, amounting to only a few hundredths of a point, and did not indicate universal inflation trends from previous years. In fact, for some officer grades, marks deflation occurred. The data also indicates that there continues to be no significant differences in marks averages among various officer groups (e.g. OCS vs. Academy, male vs. female, minority vs. non-minority, etc.)

The report also indicated that selection boards rely heavily on OERs to make their selections, particularly the "potential section," in block 10 of the OER.

### *Affidavits of Senior Coast Guard Officers*

In support of his application, the applicant submitted nine letters written on his behalf by senior officers. A retired captain who supervised the applicant from 199x to 199x stated that he was "an intelligent, capable and dedicated officer who always went that 'extra mile' to get a tough job done." He further stated that he was very surprised that the applicant had failed of selection, particularly since he had been recommended for accelerated promotion on his four most recent OERs.

A second retired captain, who supervised the applicant for two years when he served on a "joint" tour at the Department of xxxxx, stated that he was shocked to hear of the applicant's failure of selection and believes "there must have been a mistake or a grave injustice committed." While on the joint tour, he stated, the applicant was "hand picked ... to lead a task force of multi-agency personnel and contractors in pushing the boundaries to a truly revolutionary approach to xxxxxx." He stated that in his thirty years in the Coast Guard, he had not seen a better candidate for promotion to xxxx.

A third retired captain stated that the applicant's failure of selection must have been caused by "a mistake somewhere in his record or other information available to the [Selection] Board." He stated that he is "incredulous" about the applicant's apparent ranking by the selection board in the bottom third of eligible xxxxxxxs. He stated that the applicant was consistently recommended for accelerated promotion and that he was a "highly sought after officer thoroughly respected throughout the Service for his knowledge, experience, professionalism, potential for increased responsibility, creative management, [and] ability to get things done and create good-will among the

customers of the Coast Guard and his fellow servicemembers." There is "NO WAY," he stated, the applicant was in the bottom third.

A rear admiral who commanded all Coast Guard and Navy surface and air forces engaged in xxxxxxxxxxx xxxxx in the xxxxxx while the applicant served at the U.S. xxxxxxxx in xxxxxx also submitted an affidavit. He stated that he was "astounded and dismayed" by the applicant's failure of selection. He had been "continually impressed with [the applicant's] exceptional leadership, input, and ability to gain complete cooperation from the military and civilian law enforcement agencies that he interacted with." He also stated that he had "followed" the applicant's career and knew that the applicant "has demonstrated consistently outstanding performance in a wide range of critical Coast Guard and joint assignments." The rear admiral stated that when he was the xxxxxxxx of Group xxxxxx he had specifically requested that the applicant be assigned to the critical and demanding position of Deputy Group Commander because of his outstanding abilities.

A second rear admiral submitted an affidavit in which he praised the applicant's enthusiasm, professionalism, and ability to learn the new skills required by each new post throughout his career.

A third rear admiral who had served as Executive Officer at xxxxxxxx when the applicant was an xxxxxxxxx officer also submitted an affidavit. He stated that the applicant was "the driving force in meeting a demanding timeline and making the program an operational success." Over the past year, he stated, the applicant has consistently gotten results and promoted excellent interagency relationships while serving as the Executive Officer of Group xxxxxx. He indicated that he was very surprised the applicant was not selected for promotion.

A retired rear admiral, who served as the applicant's supervisor in the late 1980s in xxxxx, stated that as a xxxxx, the applicant had had "principal responsibility for the day-to-day management" of one of the "busiest components of the busiest operational district at the busiest period." The applicant "performed in a spectacular—even heroic—manner" and his "performance was at THE HIGHEST level." The rear admiral described one incident in which over one weekend, the applicant was required to create from scratch with the help of one other lieutenant an "enormous volume of policy directives, operations order, rules of engagement, standard operating procedures, doctrine, etc., to enable the first xxxxxxxxxxx to take place on Monday morning." He stated that for this service, the applicant received the Meritorious Service Medal, which, he stated, is "usually reserved for very senior officers with great span of authority."

A retired vice admiral who has followed the applicant's career stated that he was astonished the applicant was not selected for promotion. He described the applicant's performance as exceptional and quite outstanding. He stated that very few Coast

Guard officers have the applicant's diverse background, which makes him a "most well rounded and mature professional."

A retired admiral stated that while he had not witnessed the applicant's performance as a xxxxxxx, he believes that in light of the applicant's many recommendations for accelerated promotion, his non-selection for promotion should be reviewed.

### **APPLICABLE LAW**

According to 10 U.S.C. § 1552(a)(1), "[t]he Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. . . . The Secretary of Transportation may in the same manner correct any military record of the Coast Guard."

According to 33 C.F.R. § 52.12, the function of the BCMR is to determine "[w]hether an error has been made in the applicant's Coast Guard military record, whether the applicant has suffered an error or injustice as the result of an omission or commission in his or her record, or whether the applicant has suffered some manifest injustice in the treatment accorded him or her; and ... [w]hether the Board finds it necessary to change a military record to correct an error or remove an injustice."

According to 33 C.F.R. § 52.21(c), no application shall be processed until it is complete. An application is not complete unless it includes, among other things, "a specific allegation of error or injustice, accompanied by substantial proof in support of such allegation."

According to 33 C.F.R. § 52.32, the Chairman may, without prejudice, "deny in writing all requested relief to an applicant at any time prior to consideration of the applicant's case by a Board if: (1) The information or evidence submitted by the applicant is insufficient to demonstrate probable substantial error or injustice; ...."

According to 14 U.S.C. § 254, every member of a selection board must swear an oath that "he will, without prejudice or partiality, ... perform the duties imposed upon him."

According to 14 U.S.C. § 261(d), "[e]xcept as required by this section, the proceedings of a selection board shall not be disclosed to any person not a member of the board."

According to 14 U.S.C. § 260, each selection board must submit a written report, signed by all members, containing the names of the officers recommended for promo-

tion. The report also must certify that the officers recommended for promotion are the best qualified.

According to 14 U.S.C. § 262(b), “[a]n officer shall not be considered to have failed of selection if he was not considered by a selection board because of administrative error.”

Article 14.A.3. of the Personnel Manual describes in detail the following four basic criteria considered by selection boards: performance evaluations, professionalism, leadership, and education.

Article 14.A.4.i. of the Personnel Manual prescribes: “Except for its Report of the Board, the board members shall not disclose proceedings or deliberations to any person not a member of the board (14 U.S.C. 261).”

## FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant alleged that his rank and non-selection for promotion to xxxxxx, as shown in Coast Guard records, were unjust and the result of errors made by the selection board. He submitted nine affidavits supporting his claim that his non-selection must have been due to an oversight. The Board concludes that the applicant's application was properly completed and docketed by the Chairman under 33 C.F.R. §§ 52.12, 52.21(c), and 52.32.

3. In xxxx 199x, a selection board of senior Coast Guard officers reviewed and compared the records of xx xxxxx and chose xx to be promoted to xxxxx. The applicant's name appeared on the list of the xx xxxxxx not chosen for promotion despite his excellent record and abilities.

4. The supporting affidavits submitted by the applicant indicate that, in light of the applicant's fine performance and background, senior officers were surprised that he was not selected for promotion to xxxxx. The applicant's record indicates that he was a very hard-working, responsible, effective, and knowledgeable professional who was a strong leader and respected officer. In the early 1990s, his reporting officers recommended that he be considered for a command position. Since 199x, his reporting officers have given him their highest recommendation for command and accelerated promotion in their OER comments.

5. The applicant has not alleged or proven any irregularity, prejudice, or bad faith on the part of the selection board in failing to select him for promotion. The applicant asked the BCMR to infer from his excellent record that a mistake was made and that his non-selection for promotion to xxxxx is therefore in error and unjust.

6. It is apparent that the applicant was very well qualified for promotion to xxxxxx. Nothing in his record, however, proves that he was more fit for promotion than the xx xxxxxxx who were chosen. Moreover, the factors taken into consideration by a selection board are not limited to OER marks and comments but are myriad, as indicated in the selection board's precept and Article 14.A.3. of the Personnel Manual.

7. Because of the applicant's excellent record, the Board sought from the Coast Guard additional information that might shed light on the applicant's failure of

selection or prove it was not due to an administrative oversight. The Coast Guard responded that the information requested by the Board was unavailable. The Coast Guard explained that, under 14 U.S.C. § 261, selection board members are required by statute to swear an oath not to divulge any information regarding the board's deliberative process, and all written materials prepared or used by selection boards are destroyed. However, the Coast Guard submitted a copy of the report of the selection board, signed by all members, listing the applicant's name among those not chosen for selection. Therefore, the Board finds that there is no evidence of administrative error and that the preponderance of the evidence establishes that the applicant's record was considered by the selection board and that his failure of selection was not due to an administrative oversight.

8. Contrary to the position of the Coast Guard in responding to the Board's request for additional information, the Board finds that 14 U.S.C. § 261 does not prohibit members of a selection board from confirming that an officer's record was reviewed. In 14 U.S.C. § 262(b), Congress clearly anticipated that administrative errors might prevent an officer's record from being considered. If selection board members were unable to report or deny such administrative mistakes, this statute would be rendered ineffectual.

9. While the applicant's record is excellent, the Board cannot find, on the basis of the application and the record before it, that the selection board erred in performing its duties when it did not select the applicant for promotion. Nor will the Board usurp the role of the selection board or require the Chief Counsel's office to do so. The preponderance of the available evidence indicates the applicant's record was considered by the selection board and, absent evidence of bad faith, prejudice, or irregularity in those proceedings, the Board has no grounds for substituting its judgment for that of a duly convened selection board of experienced Coast Guard officers.

10. Accordingly, the applicant's request should be denied.

**[ORDER AND SIGNATURES APPEAR ON FOLLOWING PAGE]**

**ORDER**

The application of retired XXXXXXX, USCG, for correction of his military record is hereby denied.

(see \* below)

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\*This Board member was unable to sign the order page because she was detailed to another Department at the time of signature. However, she fully participated in the Board's deliberations and orally concurred in the outcome of this decision.