


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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2001-023

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 January 11, 2001, upon the BCMR's receipt of the applicant's completed application.

This final decision, dated November 15, 2001, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a lieutenant commander (LCDR; pay grade O-4) in the Coast Guard, asked the Board to correct his record to show that he was selected for promotion to the rank of commander (CDR) by the selection board that met in 1996. He alleged that a 10-year-old letter advising him of his first failure of selection to the rank of lieutenant (LT) was improperly in his record when it was reviewed by the CDR selection boards that met in 1996 and 1997. He alleged that if the LT failure of selection letter had not been in his record, he would have been selected for promotion to CDR in 1996. He asked the Board to backdate his CDR date of rank to the date it would have been had he been selected for promotion by the board that met in 1996 and to award him back pay and allowances.

The applicant alleged that the LT failure of selection letter was removed from his record in April 1998, before the CDR selection board met that year. Although he again failed of selection in 1998 and 1999 after the letter was removed, he alleged that the presence of the letter in his record in 1996 and 1997 "caused lesser effort to be placed by those boards on my value for promotion." The CDR selection board that met in July 2000 selected the applicant for promotion, XXXXXXXXXXXXXXXX.

5.¹ He was selected for promotion by the selection board that met in the summer of 2000.

¹ The comparison scale is not actually numbered. However, as with the performance categories, there are seven possible marks. Officers are supposed to be marked in comparison with all other officers of the same rank known to the reporting officer. In this row, a "5" means the applicant was rated to be an "excellent performer; give toughest, most challenging leadership assignments."

VIEWS OF THE COAST GUARD

Advisory Opinion of the Chief Counsel of the Coast Guard

On May 29, 2001, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case for lack of proof.

The Chief Counsel admitted that the February 10, 1986, letter was erroneously present in the applicant's record when it was reviewed by the CDR selection boards that met in 1996 and 1997. He submitted an affidavit from the captain who served as the chief of the Officer Boards, Promotions and Separations Branch of the Coast Guard Personnel Command (CGPC) indicating that the letter was found in the applicant's record in April 1998 and removed. However, the Chief Counsel argued that applicant has not proved that the presence of the letter prejudiced him before those selection boards or caused his failures of selection. He argued that the fact that the applicant continued to fail of selection for promotion to CDR in 1998 and 1999 even after the letter was removed from his record proves that the letter did not cause his failures of selection in 1996 and 1997. Therefore, the Chief Counsel argued, the applicant has not proved that any "nexus" existed between the presence of the letter in his record and his failures of selection in 1996 and 1997 and is not entitled to relief under *Engels v. United States*, 678 F.2d 173 (Ct. Cl. 1982).

The Chief Counsel included with his advisory opinion a memorandum on the case by CGPC. The memorandum, he alleged, "provides some compelling rationale" for the applicant's failures of selection in 1996 and 1997.

Memorandum of the Coast Guard Personnel Command

CGPC pointed out that the applicant was selected for promotion to LT in 1986 and to LCDR in 1991 even though the February 10, 1986, form letter was in his record when it was reviewed by those selection boards. CGPC stated that the letter was in his record when it was reviewed by the CDR selection boards in 1996 and 1997 and that it was removed in April 1998. However, the applicant failed of selection to CDR in 1998 and 1999 even though the letter was no longer in his record.

CGPC pointed out that selection boards are supposed to focus primarily on the officers' performance evaluations during the preceding seven years. Therefore, when the applicant was considered for promotion in 1996 and 1997, a performance evaluation for the period December 1, 1989, through June 4, 1990, on which he received a comparison mark of 3 would have been among those most carefully considered by the selection boards. CGPC also opined that the applicant's evaluations from 1995 through 1998 were "not as high as expected for someone serving in a command cadre position at a

small unit. That assignment was his chance to stand out from his peers, and he did not fully rise to the occasion.”

CGPC also stated that the applicant may have been passed over for selection in 1996 and 1997 because he did not quickly develop a “career specialty.” After his first tour ended with a poor evaluation with 2s and 3s, he was assigned to serve as an XXXXXXXXX at XXXXXXXX. Therefore, while his peers were developing career tracks, he was not because recruiting and admissions is not considered a career specialty. CGPC alleged that, with the comparison mark of 3 and no well developed career specialty, the applicant “would most definitely not have been selected for commander [in 1996 and 1997], even if the letter had been removed from this record.”

Finally, CGPC stated that the opportunity for selection to the rank of CDR was 71% in 1996, 71% in 1997, 72% in 1998, 75% in 1999, and 80% in 2000. Therefore, his chances for promotion in 2000 were much better than in previous years not only because of his stronger evaluations and more developed career specialty, but because the overall opportunity for promotion had significantly improved.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 31, 2001, the BCMR sent the applicant a copy of the Coast Guard’s views and invited him to respond within 15 days. The applicant responded on June 11, 2001.

The applicant stated that he disagreed with the Chief Counsel and was disappointed with the disparaging and disrespectful tone of CGPC’s memorandum. He stated that CGPC’s reliance on the comparison mark of 3 he received in 1990 to explain his failures of selection was unjustified because in that evaluation his marks in the performance categories were all 4 or above and he received a mark of 7 in the performance category “professionalism.” He alleged that when he received this evaluation with the inconsistent comparison mark of 3, his mentors advised him that a selection board would notice the inconsistency between the performance category marks and the comparison scale marks. He alleged that the selection board did notice the inconsistency since he was selected for promotion to LCDR in 1991. Therefore, he argued, the old comparison mark of 3 would not have prejudiced the 1996 and 1997 CDR selection boards against him.

The applicant alleged that CGPC was wrong to raise the subject of his career path, especially since he could not choose his own assignments. He alleged that he was chosen to serve as an XXXXXX at XXXXXX because of his good performance on the cutter and his race (African American) and that he stayed focused and earned a Commendation Medal because he believed that you should “bloom where you are planted.”

The applicant alleged that the February 10, 1986, letter was “the dominant discriminator” in his record and that it “tipped the scales” and prevented his selection in 1996 and 1997.

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 has proved by a preponderance of the evidence that, when his military record was reviewed by the CDR selection boards in 1996 and 1997, it contained a copy of a February 10, 1986, form letter informing him that he had not been selected for promotion by the LT selection board that met in 1985. The Chief Counsel has admitted that such letters are not supposed to appear in officers' military records when they are reviewed by selection boards.

3. Under *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982), when an applicant has proved that his military record was in error when it was reviewed by a selection board, the Board must answer the following two questions to determine whether he is entitled to have the failure of selection removed and his promotion backdated: First, was his record prejudiced by the error in the sense that it appeared worse than it would have in the absence of the error? Second, even if there was some such prejudice, is it unlikely that he would have been selected for promotion in August 1999 in any event?

4. For the following reasons, the Board finds that the presence of the February 10, 1986, form letter in the applicant's record did not make his record appear significantly worse than it would have without the letter:

a) The letter was more than ten years old. Selection boards are instructed to focus upon only the most recent seven years of an officer's record.

b) The letter was a form letter with no negative information other than a statement indicating that the applicant was not selected for promotion to LT in 1985. His 1985 failure of selection was a fact that any selection board member would know just by observing how long he had served in the rank of lieutenant junior grade, which is information readily available in other documents in his military record. Therefore, the letter did not inform the selection board members of anything that they could not learn from other sources in his record.

c) The applicant was selected for promotion to LT in 1986 and to LCDR in 1991 despite the presence of the letter in his record. As time passed, the significance of the letter is likely to have diminished, while his performance evaluations improved.

5. The Board also finds that, even if the letter had not been in the applicant's record in 1996 and 1997, it is unlikely that he would have been selected for promotion in any event. This is supported by the fact that in 1998 and 1999, the applicant still failed of selection even though (a) the letter had been removed from his record; (b) he had received stronger performance evaluations and medals; and (c) he had developed a longer track record in a career field.

6. Accordingly, the applicant has not proved that the February 10, 1986, letter caused his failures of selection in 1996 and 1997, and his request should be denied.

ORDER

The application of XXXXXXXXXXXXXXXXXXXX, for correction of his military record is denied.

