


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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-147

XXXXXXXXXX
XXXXXXXXXX

FINAL DECISION


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 August 17, 2005, upon the BCMR's receipt of the applicant's completed application.

This final decision, dated June 1, 2006, 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 Reserve officer in the Selected Reserve, asked the Board to remove his failure of selection for promotion by the Reserve captain selection board that met on July 11, 2005. He stated that when his record was reviewed by that selection board, it contained a significant, detrimental error that was later corrected by the BCMR. He alleged that the error likely caused his failure of selection. In support of his allegation, the applicant submitted a copy of ALCGPERSCOM 050/05 and ALCGPERSCOM 074/05, which show that he was considered for selection for promotion by the Reserve captain selection board that convened on July 11, 2005, but was not selected.

The applicant also noted that the "starting date" of an officer evaluation report (OER) in his record is erroneous as it should be January 17, 2000, instead of February 1, 2000. He stated that with the current starting date of February 1, 2000, his record has an impermissible gap since the "ending date" of his prior OER was January 16, 2000.

PRIOR HISTORY: BCMR DOCKET NO. 2004-158

On May 19, 2005, the Board signed a split decision with the majority recommending to the delegate of the Secretary that relief be granted in BCMR Docket No.

2004-158 by ordering the Coast Guard to correct an OER covering the applicant's performance from February 1 to September 30, 2000, by

- changing the date in block 1.m. to March 27, 2001 (2001/3/27);
- raising the mark for "Evaluations" in block 5.f. from 3 to 4;
- deleting from block 5 the comment, "Evaluation delayed due to sudden and unexpected transfer and lack of software and forms at new DOD command"; and
- removing the reviewer's comment page, CG-5315.

The disputed OER contained many very positive comments and noted that the applicant had recently been promoted. Aside from the low mark of 3 for "Evaluations," the applicant received one mark of 4, fifteen marks of 5, and one mark of 6 in the various performance categories, and a mark of 5 on the comparison scale.¹ In the corresponding comments section for the mark of 3, his supervisor wrote the following:

"Evaluation delayed due to sudden and unexpected transfer and lack of software and forms at new DOD command. Provided complete, well-documented evaluation; excellent input to CWO4 and GS-7s performance."

The reporting officer's comments indicated that the applicant was unexpectedly transferred to the U.S. Joint Forces Command and that he was "sorry to lose [the applicant's] expertise." The reviewer of the OER added an optional comment page stating the following:

"I am disappointed by the amount of time that elapsed between [the applicant's] departure from this command and his submission of OER input. His input was many months late, and directly contributed to the lateness of this report. This shortcoming is reflected in his 'evaluations' mark, and tarnishes an otherwise positive evaluation."

The majority of the Board recommended granting relief because the mark of 3 and supporting negative comments reflected conduct that occurred outside of the evaluation period for the disputed OER and therefore clearly violated Articles 10.A.4.f.11. and 10.A.4.c.11.g. of the Personnel Manual. The applicant was informed on October 17, 2000, that he had been transferred to a new command as of September 30, 2000, and that the transfer required him to initiate an OER. Since the applicant was not informed of his transfer during the evaluation period, any undue delay by him in providing input

¹ Coast Guard officers are evaluated in a variety of performance categories on a scale of 1 to 7, with 7 being best. 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. A comparison scale mark in the fifth place means the officer was rated to be a "distinguished performer; give tough challenging, visible leadership assignments."

for the OER necessarily occurred after the evaluation period ended. Therefore, the majority found, such delay should not have been mentioned and should not have been used to support a lower mark in his OER for the period ending September 30, 2000.

On July 25, 2005, the Chair informed the Coast Guard that the Board's majority recommended decision had become the final decision of the Board in accordance with 14 U.S.C. § 425(b)(1) because the delegate of the Secretary had returned the case to the BCMR without having taken action prior to the ten-month deadline for issuing a final decision on the case, which was July 14, 2005.

VIEWS OF THE COAST GUARD

On January 3, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief.

The JAG adopted the facts and analysis of the case provided in a memorandum by the Coast Guard Personnel Command (CGPC). CGPC stated that because when the selection board convened on July 11, 2005, the applicant's record contained negative information later removed by the BCMR, "it is likely that the applicant's record was prejudiced before the PY06 [promotion year 2006] IDPL [inactive duty promotion list] CAPT Selection Board." Therefore, CGPC recommended that the BCMR not only remove the applicant's failure of selection in 2005 but also, if he is selected for promotion by the next IDPL (Reserve) captain selection board to review his record as corrected, backdate the applicant's date of rank as a captain to the date he would have had had he been selected for promotion to captain in July 2005.

In addition, CGPC agreed that the starting date for the applicant's OER should be January 17, 2000, instead of February 1, 2000, since the ending date of the applicant's prior OER was January 16, 2000.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 12, 2006, the applicant stated that he agreed with the recommendation of the Coast Guard.

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 10 U.S.C. § 1552. The application was timely.

2. When the Reserve captain selection board met on July 11, 2005, the errors addressed by the Board in BCMR Docket No. 2004-185 had not yet been corrected. The applicant asked the Board to remove from his record his failure of selection by the Reserve captain selection board that convened on July 11, 2005, on the grounds that his record still contained prejudicial errors when the selection board reviewed it. The Coast Guard agreed with his assessment and recommended that the Board grant this relief. To determine whether the applicant's failure of selection should be removed, the Board must answer 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 [he] would have been promoted in any event?" *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

3. Article 10.A.4.c.4.g. of the Personnel Manual states that on an OER form a "mark of four represents the expected standard of performance." Therefore, a mark of 3 is considered a low mark reflecting a level of performance that does not meet the expected standard. In addition, the erroneous supporting comments removed by the BCMR in the applicant's prior case were negative assessments of his performance. Therefore, the Board finds that the applicant's record was prejudiced in the sense that it appeared worse than it would have in the absence of the errors when the selection board reviewed it.

4. The applicant's performance record, as corrected by the BCMR in Docket No. 2004-185, contains consistent recommendations for promotion, many high marks, many laudatory comments, and no mark lower than a 4 since the applicant was a lieutenant junior grade in 1988. Given the fine quality of the applicant's performance record, the Board finds that it is not unlikely that he would have been selected for promotion had his record been correct when it was reviewed by the Reserve captain selection board in 2005. Therefore, the Board agrees with the Coast Guard that the applicant has met both parts of the *Engels* test and is entitled to the removal of his failure of selection.

5. As the Coast Guard indicated, when the Board corrects an officer's record by removing a failure of selection by a selection board, the applicant is normally entitled to a backdated date of rank, as well as corresponding back pay and allowances, if he is selected for promotion by the next such selection board to review his record as corrected. See *Sanders v. United States*, 219 Ct. Cl. 285 (1979). Such relief reflects that mandated under 14 U.S.C. § 739(b) when, due to an administrative error, a Reserve officer's record is not considered by a selection board. In the instant case, if the applicant's record had not contained prejudicial errors on July 11, 2005, he might have been selected for promotion by the selection board. Therefore, if the applicant is selected for promotion to captain by the next selection board to review his record, his date of rank should be backdated to what it would have been had he been selected for promotion in July 2005, and he should receive corresponding back pay and allowances.

6. The applicant asked the Board to correct the starting date of one of his OERs from February 1, 2000, to January 17, 2000. The applicant's prior OER has an ending date of January 16, 2000. Article 10.A.4.c.1.j. of the Personnel Manual states that "[t]he regular reporting period commences the day after the ending date of the previous regular OER or the day of commissioning (for the first OER for newly commissioned officers) and ends on the date of the occasion for the current report. ... Elapsed time between permanent or temporary duty stations (in transit, on leave, hospitalized, etc.) shall be accounted for in the next period of report" Therefore, the Board agrees with CGPC that the starting date for the OER should be corrected to January 17, 2000.

7. Accordingly, the Board should grant relief by correcting the starting date of the applicant's OER to January 17, 2000; by removing his failure of selection by the Reserve captain selection board that met in July 2005; and by backdating his date of rank and awarding him corresponding pay and allowances if he is selected for promotion by the next captain selection board to review his record.

ORDER

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

The starting date in block 1.j. of the OER in his record for which the ending date is September 30, 2000, shall be corrected to January 17, 2000, instead of February 1, 2000.

His failure of selection for promotion by the PY 2006 Reserve (IDPL) captain selection board shall be removed from his record.

If selected for promotion by the next captain selection board to review his record, his date of rank shall be backdated to what it would have been had he been selected for promotion by the PY 2006 Reserve (IDPL) captain selection board, and he shall be paid corresponding back pay and allowances.

No copy of this decision shall be placed in the applicant's records.

