

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-141

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

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. The Chair docketed the case on June 8, 2007, upon receipt of the completed application, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 21, 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

The applicant, who was still a lieutenant when he submitted his application, asked the Board to correct his record to show that he was selected for promotion by the promotion year 2007 (PY07) lieutenant commander (LCDR) selection board, which convened on August 21, 2006. He asked the Board to assign him the date of rank as a LCDR that he would have received had he been selected for promotion by the PY07 LCDR selection board; to adjust his placement on the active duty promotion list; and to award him corresponding back pay and allowances.

The applicant alleged that he was not selected for promotion by that board because of an erroneous officer evaluation report (OER) in his record, which has since been corrected by the Personnel Records Review Board (PRRB). The OER covered his performance from June 1, 2005, through May 31, 2006. He argued that if the OER had been prepared correctly, he would have been selected for promotion in 2006 and promoted to LCDR on August 1, 2007. Instead, he was selected for promotion by the PY08 LCDR selection board, after the OER had been corrected through the PRRB, and was not promoted until January 1, 2008.

The applicant alleged that the erroneous OER prejudiced his record because the "Description of Duties" in block 2, which is the most critical part of an OER considered by a selection board, contained clear errors that significantly understated his responsibilities. The erroneous OER failed to show that he supervised anyone or managed any resources as the Assistant Prevention Department Head and Chief of the Investigations Division. His role as Chief of the Investigations Division was not mentioned and his duties as Assistant Prevention Department

Head were prefaced with the phrase “During dept head’s absence ...,” which erroneously indicated that he only performed these duties on rare occasions when his supervisor was absent. Moreover, the erroneous OER indicated that he was the Assistant Public Affairs Officer (APAO) for his unit, whereas in fact he was the Public Affairs Officer (PAO). The applicant alleged that these errors are particularly egregious because they mislead a reviewer to conclude that his duties, which had been correctly reported on his previous OER, had been reduced, as if he had been demoted from supervisory duties. In support of these allegations, the applicant submitted copies of the original OER and the OER as corrected through the PRRB:

The following is the Description of Duties in the applicant’s original OER for the period June 1, 2005, through May 31, 2006, which was reviewed by the PY07 LCDR selection board on August 21, 2007, but later corrected through the PRRB:

SENIOR INVESTIGATING OFFICER (SIO): Leads investigations & enforcement activities of all marine casualty, civil violation of US/international regs/laws/treaties & merchant mariner misconduct or negligence. Takes appropriate action through written warnings, civil penalties, or dispensation of cases before a Federal Administrative Law Judge. ASST CHIEF, PREVENTION DEPT (APREV): During dept head’s absence supervises/manages 2 civ, 10 Os, 6 Enl personnel & \$8K budget, conducting safety & security inspections onboard foreign/domestic vsls & 200+ outer continental shelf (OCS) oil & natural gas production units. COLLATS: Assistant Public Affairs Officer (APAO), Senior Performance Health Coordinator.

The following is the Description of Duties in the applicant’s OER for the period June 1, 2005, through May 31, 2006, as corrected by the Coast Guard Personnel Command through the PRRB on January 16, 2007:

INVESTIGATIONS DIVISION CHIEF: Leads 1 Ofcr & 3 Enlisted conducting marine casualty & mariner misconduct/drug use/negligence invest’gns & reslting enforcement of US/intn’l regs/treaties violations. Issues warnings, civil penalties & resolves mariner credential suitability. ASST CHIEF, PREVENTION DEPT (APREV): (acting Dept head 25 days) Directs 2 civ, 10 Ofcrs, 6 enlisted & administers \$12K AFC-30; in complex safety/security inspections & investigations on 1100+ vsls & 200+ outer continental shelf (OCS) petroleum drill/production units. Coord’s dept 24/7 response to casualties. Hurr Rita: Resource Unit Ldr & Joint Info Ctr (JIC) Public Affairs Officer (PAO). Unit PAO, Sr. Performance Health Coordinator.

VIEWS OF THE COAST GUARD

On October 18, 2007, the Judge Advocate General of the Coast Guard forwarded to the Board a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC) and asked the Board to accept the findings and recommendations therein as the Coast Guard’s advisory opinion.

CGPC recommended that the Board grant relief by correcting the applicant’s record “to reflect as though he was selected by the PY07 LCDR Selection board with a back date of rank and pay/allowances commensurate with such change.” CGPC stated that it “is plausible that these ultimately expunged inaccuracies in the disputed OER in part resulted in the applicant’s non-selection by the PY07 Lieutenant Commander Selection Board.” CGPC stated that this allegation is supported by the fact that the applicant was selected for promotion after the disputed OER was corrected. CGPC stated that it is “reasonable to conclude” that the applicant would have been selected for promotion in August 2006 if his OER had been correctly prepared.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 30, 2007, the applicant responded to the Coast Guard's advisory opinion by agreeing with CGPC's recommendation. He noted that because of his failure of selection in 2006, he has missed various leadership opportunities.

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. Article 10.A.1.b.1. of the Personnel Manual provides that "Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command." In light of the corrections made to the applicant's OER through the PRRB, this Board finds that the applicant has proved by a preponderance of the evidence that his performance record was inaccurate when it was reviewed by the PY07 LCDR selection board because the Description of Duties in his then most recent OER failed to reflect the full scope of his responsibilities.

3. Under *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982), when an officer proves that his record contained an error when it was reviewed by a selection board that did not select him for promotion, this Board must answer the following two questions to determine if the applicant is entitled to the removal of his failure of selection: "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 [selected for promotion in 2006] in any event?"

4. The Board is persuaded that the applicant's record was prejudiced before the PY07 LCDR selection board by the errors in the Description of Duties block in his original OER for the period June 1, 2005, through May 31, 2006. The original Description of Duties reports his primary duty as Senior Investigating Officer, instead of Investigations Division Chief, and fails to show that in performing those duties he supervised one other officer and three enlisted members. The original version also denotes his first collateral duty as Assistant Public Affairs Officer, instead of Public Affairs Officer, and in comparison with the corrected version, it significantly understates his responsibilities and authorities.

5. When an officer shows that his record was prejudiced before a selection board by error, "the end-burden of persuasion falls to the Government to show harmlessness—that ... there was no substantial nexus or connection" between the prejudicial error and the failure of selection.¹ In this case, the Coast Guard has conceded that it is plausible and reasonable to con-

¹ *Quinton v. United States*, 64 Fed. Cl. 118, 125 (2005), citing *Engels v. United States*, 678 F.2d 173, 175 (Ct. Cl. 1982).

clude that the applicant would have been selected for promotion by the PY07 LCDR selection board had the Description of Duties in his most recent OER correctly reflected the full scope of his responsibilities and authority. Therefore and in light of the fact that the applicant was selected for promotion to LCDR following the revision of the OER, the Board finds that it is not unlikely that he would have been selected for promotion by the PY07 LCDR selection board if his record had been correct when reviewed by that board.

6. Accordingly, the applicant's record should be corrected to show that he was selected for promotion by the PY07 LCDR selection board. His date of rank should be backdated to what it would have been had he been selected for promotion by the PY07 LCDR selection board, and his position on the active duty promotion list should be adjusted accordingly. The Coast Guard should pay him any back pay and allowances he may be due as a result of these corrections.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

His record shall be corrected to show that he was selected for promotion by the PY07 LCDR selection board. His LCDR date of rank shall be backdated to what it would have been had he been selected for promotion by the PY07 LCDR selection board, and his position on the active duty promotion list shall be adjusted accordingly. The Coast Guard shall pay him any back pay and allowances he may be due as a result of these corrections.

