

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2009-179**

**XXXXXXXXXXXXX  
XXXXXXXXXXXXX**

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**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 upon receipt of the applicant's completed application on June 22, 2009, and subsequently prepared the final decision for the Board as required by 33 CFR § 52.61(c).

This final decision, dated March 11, 2010, 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 promoting him to chief warrant officer- W3 (CWO3) retroactively to January 1, 2009. He further requested that all documentation referencing a failure of selection for promotion be removed from his military record.

The applicant was not selected for promotion to CWO3 by the selection board that convened on October 20, 2008 (PY 2009 selection board). The applicant stated that after he was notified that he had not been selected for promotion, he contacted a LCDR at CGPC to review his PDR. The applicant stated that after that review the LCDR could not identify a specific problem but noted that the applicant had a lot of white space in some of the comment blocks on his officer evaluation reports (OERs) and that his marks should have been higher, especially the comparison scale marks in block 9 . The applicant indicated that the LCDR noted that the applicant had one negative page 7 from 1990. The October 30, 1990 page 7 counseled the applicant, who was a BM3 at the time, about his failure to ensure that junior personnel stood proper messenger watches.

The applicant stated that the Commandant directed members of the selection board to select officers based on a best-qualified and a fully qualified basis after evaluating them in the performance, professionalism, leadership, and education areas. The applicant argued that he excelled in each of the evaluation areas. In this regard, he stated that with respect to the education area, he has earned a Bachelor of Science and a Master of Science degree. In the

leadership area, he stated that since May 2007 he has served as the Resident Agent-in-Charge (RAC) of the Southeast Region. In that position, the applicant stated that he was responsible for the daily management of operational and administrative duties including the supervision of 13 agents. He argued that being assigned and receiving the written RAC designation is the highest position a CWO in CGIS can attain, regardless of seniority. He stated that of the 11 CWO2s competing against him in 2008, only one other held a RAC designation.

With regard to his performance, the applicant noted that he had been the case agent and/or participated in numerous internal and external felony cases of all types. He noted that he had been a liaison between CGIS and Coast Guard commands as well as civilian law enforcement agencies. He stated that he “single-handedly planned the new office space and relocation for CGIS RAO St. Petersburg, including the drawings and liaison with CEU Miami and Air Station Clearwater.”

With respect to professionalism, the applicant stated that a part of his responsibility was to brief flag-level officers, assistant U.S. attorneys, senior-level civilians, and other high ranking officials. The applicant stated that the U.S. attorney has a 100-percent conviction rate for cases from his office. The applicant stated that he was hand picked by the Commandant for a position on his detail.

The applicant offered the following for the Board’s consideration about a member of the CWO3 selection board:

In 2008, I was the case agent for a sensitive internal investigation involving two CG members assigned to CG Air Station Clearwater, in which the victim subsequently initiated three congressional investigations. During the course of my investigation, I interviewed numerous witnesses assigned to either Air Station Clearwater or Sector St. Petersburg. Two witnesses at Air Station Clearwater were questioned about CDR [D’s] alleged involvement with the victim at a local party in the fall 2007 . . . CDR [D] was a member of the CWO Selection Board for promotion to [CWO3]. Though I did not steer the investigation to interview CDR [D], he may have perceived that he was under suspicion during a CGIS criminal investigation, which could conceivably cast a negative shadow by his superiors and peers, which could be detrimental to a career officer. Even though I do not have direct evidence concerning CDR [D’s] neutrality toward me while participating on the board, the possibility that he was biased exists.

***Statement from the Applicant’s Supervisor***

The supervisor stated that when he heard that the applicant was not selected for CWO3 in 2008, he was in complete disbelief and knew there must have been a mistake. The supervisor noted the applicant’s OERs had nothing derogatory in them, that he had earned a masters degree, that he had attended the CWO professional development course, and that as the RAC he supervised an office of 10 agents. The supervisor stated, “I know of nothing personal or professional that would have precluded [the applicant] from being selected for promotion to

CWO3 and find it incomprehensible that he was not found to be among the best qualified for promotion to CWO3.”

### ***Applicant's CWO2 OERS***

The applicant had four OERs that were reviewed by the CWO3 selection board. They covered a period from January 1, 2005 to June 30, 2008. On the first three OERs, the majority of the applicant's marks were 5s, with an occasional 4 or 6. On the last OER that the applicant received prior to the selection board for the period July 1, 2007, to June 30, 2008, the majority of the applicant's marks were 6s and 5s, with an occasional 4. This report listed the applicant's primary duty as the resident agent in charge (RAC), whereas the two previous reports listed his primary duty as special agent and noted in the description of his duties that he was the acting RAC. Each of the OERs contained reviewer comments as required by the Personnel Manual. The reviewer comments covered less than half a page, but contained such comments as “[the applicant] has demonstrated excellent initiative and resourcefulness during the reporting period” and “[the applicant] is a talented, dynamic, effective investigator, and his ready willingness to assist his superiors and peers in any tasks necessary to complete the mission are commendable.”

### **VIEWS OF THE COAST GUARD**

On November 20, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief to the applicant. The JAG stated that the applicant has failed to produce any evidence to overcome the presumption that the selection board members carried out their duties correctly, lawfully, and in good faith. The JAG stated that the applicant's allegations are speculative at best and are of no legal moment. The JAG stated that the selection board findings and decision were in accordance with Chapter 14 of the Personnel Manual. The JAG also stated the following:

[T]he applicant is in no position to second guess the findings and actions of selections boards. Thus, the conclusion can be reached that the selection board's results of not finding the applicant as best qualified for promotion as being an injustice is without merit. The applicant is not entitled to circumvent the Coast Guard's promotion board process and procedures by alleging the possibility of unsubstantiated bias with no evidence to prove such. The applicant failed to provide any evidence which would substantiate a finding of bias as to any of the selection board members.

The JAG attached a memorandum from the Commander of the Personnel Service Center (PSC) as a part of the advisory opinion. In recommending denial, PSC stated the following: “According to [the precept], members of the [selection board] shall swear or affirm that they will without prejudice or partiality, and having in view both the special fitness of officers and the efficiency of the Coast Guard, perform the duties imposed upon them.” The president of the selection board was directed to emphasize to the members of the board the importance of their obligation to confine themselves to facts of record and not predicate judgments on rumor or hearsay. The guidance also stated that at least two-thirds of the members of the selection board

must agree that those selected are fully qualified and the best qualified to carry out the duties and responsibilities of the grade to which they are selected.

PSC stated that the applicant asserted that his performance warranted selection to the next higher pay grade and implied that he was not selected because of a “prior indirect professional interaction with a board member that may have biased the board member’s consideration of [the applicant’s] record.” PSC stated it is impossible to say what impact, if any, the applicant’s prior interaction with a board member may have had on the proceedings, but the members of the selection board are deemed to have acted fairly and professionally in carrying out their assigned duties.

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

On December 22, 2009, the Board received the applicant’s reply to the views of the Coast Guard. The applicant stated that he is “re-requesting to know if any basis whatsoever existed that justified a denial of promotion and placement in the lower 5% of my peers in light of my stellar professional qualification record.” In this regard, the applicant stated:

In lieu of providing any basis for the denial of my promotion last year, the Board’s advisory opinion sought solely to shift the burden to me to prove bias. The Board was not approached to address the issue of bias but rather to provide some rational basis and/or any explanation for taking an action that I submit any other Board would certainly have done, as evidenced by my number one position on the subsequent list (2009 list). The focus on any potential bias is misplaced and should not be the focus of any attention or effort, since I plainly indicated that I have no evidence to support any claim of actual bias . . . I have attached [2009 CWO selection board] results, identifying me as the number one W2 out of 202 eligible candidates. This equates to 95% selection rate.

I have been on active duty in the CG for 22 years and have been subjected to the promotion process throughout my career. In accordance with applicable CG policies, I was not provided the opportunity to review the 202 military records of those eligible for promotion during the PY09 chief warrant officer selection process. While this is the norm, precluding me from any review of the records and then relying on my inability to provide a rational explanation of how this could have occurred from a confidential process, leverages a policy to which I am naturally disadvantaged. I leave it to the [BCMR] to utilize its judgment and experience to fill in the blanks that I cannot. Further, while I understand that promotion board precepts differ from year to year; my record reflects sustained stellar performance and achievement under any precept. Therefore, by default some other explanation exists and in the absence of any blemishes, I sincerely cannot account for how else I could be in the bottom 5% of one, 200-person promotion group and the top .05 of the next one of approximately the same size. Any suggestion that 95% of the first candidate pool was truly better qualified for advancement than the entire following candidate pool runs counter to my 22 years experience and what I subjectively perceive as common sense.

## 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 applicant requested to be promoted to CWO3 retroactive to the date he would have been promoted if he had been selected by the PY 2009 selection board, with back pay and allowances. The Board's policy is not to promote, but to remove a failure of selection if the applicant establishes a nexus between an error or injustice and the non-selection. Therefore the Board treated the applicant's request as one for the removal of his failure of selection for promotion to CWO3. The applicant has the burden of proof in this case, which he has failed to meet.

4. To obtain the removal of his failure of selection, the applicant must prove that his record before the CWO3 selection contained a prejudicial error or injustice or that an error or injustice existed with the CWO3 selection board process itself. With respect to his military record, the applicant noted his excellent performance, which included service as a RAC, involvement in numerous internal and external felony cases, supervision of other special agents, liaison with other law enforcement communities, and his receipt of Bachelor and Master of Science degrees, all of which was before the selection board. He stated that a LCDR suggested that the applicant's OER marks were not high enough or that there was too much white space in some areas on his OERs. However, the applicant did not allege any specific errors in his performance record and referred to it as stellar. Therefore, the Board finds that the applicant had a substantially accurate and complete record before the FY 2009 selection board.

6. Nor has the applicant made a specific allegation of error or injustice in the selection board process itself. The applicant asserted that he was both fully and best qualified for promotion and should have been selected for CWO3. However, his belief that his record of performance supported his selection for CWO3 is not a basis for this Board to find error or injustice. Selection Board deliberations are secret and the selection board is only required to explain why a member is not selected if it finds the member's performance unsatisfactory. Article 10.A.10.e.(2)(2) states that "there is no requirement to identify reasons for those officers who were fully-qualified but not best qualified. However, if an officer is found to be performing in an unsatisfactory manner, the Board shall specify the reason for that finding." Since the applicant did not receive any notification that his performance was unsatisfactory, the Board concludes that he was fully qualified but not best qualified. Although we will not speculate how the selection board made its decision, what is known about the process in this case suggests that nothing was wrong.

7. The applicant suggested that there could possibly have been some bias against him by one of the selection board members, but he admitted that he had no proof of such bias. Moreover, for a member of the selection board to do other than to select those individuals for promotion based on their records would have been to violate his oath as a member of that selection board. It is presumed that this officer and other members of the selection board followed the directions of the Commandant in performing their duties. The applicant has not presented sufficient evidence to rebut this presumption of regularity.

8. The applicant's argument that his selection by the subsequent 2009 (PY 2010) selection board is proof that the earlier board committed an error or injustice against him is speculative. For example, the records before the 2009 selection may not have been as competitive as those before the earlier board or maybe the applicant's performance increased significantly subsequent to the 2008 selection board. There could be any number of reasons why the applicant was selected the second time and not the first. The Board cannot correct the applicant's record based on speculation. He has not shown an error or injustice in his failure to be selected by the 2008 (PY 2009) CWO3 selection board.

9. The applicant wants an explanation for his non-selection. The Board cannot answer this question and the answer may never be known. While the applicant has a very good record, the Board cannot say that the 2008 selection board committed an error or injustice by not selecting him without proof of an error or injustice.

10. Accordingly, the applicant has failed to prove an error or injustice and his request should be denied.

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

**ORDER**

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

