

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-083

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

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 upon receipt of the applicant's completed application on January 27, 2011, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 13, 2011, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

BACKGROUND

The applicant, a lieutenant (LT) in the Reserve, is a prior applicant who was granted relief in BCMR Docket No. 2009-071, as shown in the following findings excerpted from that decision, which was approved by the delegate of the Secretary on November 29, 2010:

11. The applicant has proven by a preponderance of the evidence in the record that during the evaluation period for the disputed OER, he was assigned to administrative, finance, and logistics duties for which he had little to no experience or training; that he was erroneously evaluated by a single officer, the XO, in violation of the Personnel Manual; that the XO did not want him to be assigned to the unit and was predisposed to distrust and resent him; and that he ultimately received a derogatory OER that erroneously shows that his primary duty during the evaluation period was to be the AOO. Therefore, the Board finds that he has also proven by preponderance of the evidence that the disputed OER is erroneous and was negatively affected by a prejudicial violation of a regulation¹ and so should be removed from his record and replaced with an OER prepared "for continuity purposes only."²

12. The applicant voluntarily resigned from his active duty commission in June 2007 but is still a Reserve officer and has asked the Board to remove his failures of selection for promotion to lieutenant commander so that he will have two additional opportunities to compete

¹ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

² A continuity OER is one that includes a description of the officer's duties but does not contain any numerical marks or comments about his performance. PERSMAN, Article 10.A.3.a.5.

for promotion with a corrected record. His Reserve OERs and affidavits from his superior officers in the Reserve show that he has performed exceptionally well in the Reserve. [Reference to evidence omitted.] The JAG opted not to address the applicant's request to have his failures of selection for promotion removed. [Reference omitted.] When an applicant proves that his military record contained a prejudicial error or injustice when it was reviewed by a selection board, this Board must determine whether the applicant's failure of selection should be removed by answering 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 [the applicant] would have been promoted in any event?"³ Under this *Engels* test, 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, despite the plaintiff's *prima facie* case, there was no substantial nexus or connection" between the prejudicial error and the failure of selection.⁴ To void a failure of selection, the Board "need not find that the officer would in fact have actually been promoted in the absence of the error, but merely that promotion was not definitely unlikely or excluded."⁵

13. The disputed OER documenting the applicant's removal from his duties at the EMSST is clearly derogatory and highly prejudicial as it labels him as a "marginal performer" with "limited potential" and states that he is "[n]ot recommended for promotion." [Reference omitted.] Therefore, it clearly prejudiced his record when it was reviewed by the LCDR selection boards. Furthermore, the disputed OER contains the only negative marks in the applicant's record. [References omitted.] Therefore, it is not unlikely that the applicant would have been selected for promotion had the disputed OER not been in his record when it was reviewed by the selection boards. Accordingly, under the *Engels* test, the Board finds that the applicant's failures of selection for promotion must be removed from his record.

14. The applicant made no request regarding backdating of his date of rank should he be selected for promotion in the future.⁶ Therefore, the Board will not address this matter.

15. Therefore, the applicant's record should be corrected by removing the disputed OER; replacing it with a continuity OER; and removing his failures of selection for promotion.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, who was selected for promotion to LCDR by the promotion year (PY) 2011 Reserve LCDR selection board, which convened on August 16, 2010, now asks the Board to backdate his date of rank to lieutenant commander (LCDR) by one promotion year (PY 2010) because his record was prejudiced by the erroneous OER when it was reviewed by the PY 2010 selection board. He did not request full backdating to PY 2009, even though his record was also prejudiced by the erroneous OER when it was reviewed by the PY 2009 selection board, so as "to allow plenty of time to be evaluated as a LCDR prior to being considered for the next promotion" to commander (CDR). The applicant alleged that he would have been selected for promotion by the PY 2010 LCDR selection board if his record had not contained the erroneous, derogatory OER that has since been removed from his record by the Board's order in BCMR Docket No. 2009-071.

³ *Quinton v. United States*, 64 Fed. Cl. 118, 125 (2005); *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

⁴ *Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003), citing *Engels*, 678 F.2d at 175; *Quinton*, 64 Fed. Cl. at 125.

⁵ *Engels*, 678 F.2d at 175.

⁶ The applicant was selected for promotion to LCDR by the PY 2011 LCDR selection board, which convened on August 16, 2010. ALCGPSC 099/10 (September 30, 2010).

SUMMARY OF THE RECORD

On [REDACTED] the applicant, a prior enlisted Reserve port security specialist, was appointed an ensign in the Coast Guard Reserve. He was promoted to lieutenant junior grade on [REDACTED] and began serving on extended active duty on [REDACTED]. On [REDACTED] he was integrated into the regular Coast Guard as a lieutenant junior grade. [REDACTED], he was promoted to lieutenant.

Aside from the erroneous, derogatory OER, which the Board has expunged, the applicant has received excellent OERs⁷ serving as a [REDACTED]

[REDACTED] On his final active duty OER, he received four marks of 5, eight marks of 6, and six marks of 7 (highest possible mark) in the various performance categories and a mark in the fifth spot on the comparison scale, denoting an “[e]xcellent performer, give toughest, most challenging leadership assignments.” In addition, he was strongly recommended for promotion.

On June 13, 2007, the applicant resigned his regular commission and returned to the Reserve. On June 1, 2008, he was assigned to serve as the Senior Reserve Officer in the xxxxxxxxxxxxxxxx at xxxxxxxxxxxxxxxx and as such was responsible for five Reserve officers and 22 petty officers on two Reserve Sector [REDACTED] Teams. The applicant received two outstanding OERs for this work with performance marks of 6 and 7 and marks in the fifth spot on the comparison scale. He was strongly recommended for promotion in both of these OERs, but was not selected for promotion in 2008 and 2009 by the PY 2009 and PY 2010 selection boards, respectively, with the disputed, derogatory OER in his record. The percentage of Reserve LTs eligible for promotion in 2008 and 2009 who were selected for promotion to LCDR was 71%.⁸ However, before the Board ordered the removal of the erroneous OER from his record in November 2010, the applicant was selected for promotion by the PY2011 selection board. Only 67% of the Reserve LTs eligible for promotion to LCDR were selected for promotion by that board.⁹

⁷ In OERs, officers are evaluated in a variety of performance categories, such as “Professional Competence,” “Teamwork,” and “Judgment,” on a scale of 1 to 7, with 7 being best. In addition, the reporting officer completes a “comparison scale” on which he compares the reported-on officer to all other officers of the same grade whom the reporting officer has known throughout his career. The 7 possible marks on the comparison scale range from a low of “[p]erformance unsatisfactory for grade or billet” to a high of “BEST OFFICER of this grade.”

⁸ ALCGRSV 024/08 (July 17, 2008) and ALCGRSV 035/09 (July 17, 2009).

⁹ ALCGPSC 099/10 (September 30, 2010).

VIEWS OF THE COAST GUARD

On May 4, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC), which stated the following in pertinent part:

d. In accordance with Title 14 USC § 736, all IDPL officers [officers serving on inactive duty] will be promoted on the same date as their running mate. Law limits the number of LCDR and above promotions, and the number is authorized each year by the Commandant. Each controlled grade can only comprise a certain percentage of the total officer corps. Even if the Coast Guard has vacant billets in a controlled grade, we can only promote officers until we reach our authorized cap. The authorized number of officers in each controlled grade is determined every year in May after the Academy class graduates and the Coast Guard officer corps is at its largest. Promotion numbers for controlled grades are significantly larger during the summer months due to the higher number of officer separations during these months.

e. As of April 13, 2011, the applicant had not yet been authorized to assume the rank of LCDR for the reasons noted above. Thus, the applicant's claim that his date of rank to LCDR be backdated is without merit as the applicant does not yet have such a date.

f. It is also erroneous for the applicant to assume "my record would have been successful for promotion based on the excellent OERs in my record." The criteria for promotion of officers vary from selection board to selection board based on the unique dynamics of each board. Furthermore, for the applicant to assume he would have vied successfully for promotion is nearly impossible to predict from his position, as promotion of officers is based on a "best qualified basis" when viewed holistically.

g. Since the applicant has not shown an error or injustice in his record, no basis exists on which to consider the removal of his selection to LCDR in PY11 for a selection to LCDR in PY10. Accordingly, the applicant's request should be denied.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 8, 2011, the applicant responded to the views of the Coast Guard. He stated that he himself has been directly involved with selection boards and, based on that experience, he knows that if the erroneous, derogatory OER had not been in his record, his chances to be promoted in 2008 and 2009 by the PY 2009 and 2010 selection boards, respectively, would have been significantly improved. The applicant also noted that in finding 13 of the Board's final decision for his prior case, BCMR Docket No. 2009-071, the Board stated that "it is not unlikely that the applicant would have been selected for promotion had the disputed OER not been in his record" and therefore removed the two non-selections for promotion from his record.

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 to the Board was timely because it was submitted within three years of the applicant's discovery of the alleged error.¹⁰

2. The applicant requested an oral hearing before the Board. The Chair denied the request, acting pursuant to 33 C.F.R. § 52.51, and recommended disposition of the case without a hearing. The Board concurs in that recommendation.¹¹

3. The applicant alleged that, because he has been selected for promotion by the PY 2011 Reserve LCDR selection board and because this Board has determined that his record was greatly prejudiced by an erroneous, derogatory OER when it was reviewed by the PY 2009 and PY 2010 selection boards, his date of rank should be backdated to what it would have been had he been selected for promotion by the PY 2010 selection board, and he should receive corresponding back pay and allowances. The applicant bears the burden of proving his claim by a preponderance of the evidence.¹² However, in the final decision for BCMR Docket No. 2009-071, the Board already found that the

disputed OER documenting the applicant's removal from his duties at the EMSST is clearly derogatory and highly prejudicial as it labels him as a "marginal performer" with "limited potential" and states that he is "[n]ot recommended for promotion." [Reference omitted.] Therefore, it clearly prejudiced his record when it was reviewed by the LCDR selection boards. Furthermore, the disputed OER contains the only negative marks in the applicant's record. [Reference omitted.] *Therefore, it is not unlikely that the applicant would have been selected for promotion had the disputed OER not been in his record when it was reviewed by the selection boards.* [Emphasis added.]

In light of this finding, the Board found that the Coast Guard should remove the applicant's non-selections for promotion by the PY 2009 and 2010 selection boards, as well as the disputed OER, from his record. The Board's decision was approved by the delegate of the Secretary.

4. The Board has already found that but for the erroneous, derogatory OER in his record, "it is not unlikely that the applicant would have been selected for promotion [by the PY 2009 and 2010 selection boards] had the disputed OER not been in his record when it was reviewed by the selection boards." The Board notes in this regard that

- the erroneous, derogatory OER contained the only negative marks in his record;
- aside from the derogatory OER, the applicant's OERs contain many 6s and 7s, the highest possible evaluation marks;
- 71% of the Reserve LTs eligible for promotion to LCDR were selected for promotion by the PY 2009 and 2010 selection boards, whereas only 67% were selected by the PY 2011 selection board, which selected the applicant for promotion;¹³ and

¹⁰ 10 U.S.C. § 1552(b).

¹¹ *See Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that "whether to grant such a hearing is a decision entirely within the discretion of the Board").

¹² 33 C.F.R. § 52.24(b).

¹³ ALCGRSV 024/08 (July 17, 2008); ALCGRSV 035/09 (July 17, 2009); ALCGPSC 099/10 (September 30, 2010).

- the applicant was selected for promotion by the PY 2011 selection board in August 2010 even *before* the Board ordered the derogatory OER removed from his record in November 2010.

Therefore, the Board finds that it is not only not unlikely but actually probable that the applicant would have been selected for promotion by the PY 2009 and 2010 Reserve LCDR selection boards had the erroneous, derogatory OER not been in his record when it was reviewed by those boards. Specifically, the Board finds that the preponderance of the evidence shows that the erroneous OER prevented the applicant's selection for promotion by the PY 2010 Reserve LCDR selection board. His non-selection for promotion by that board is an injustice caused by the erroneous OER, which was entered in his record by his Coast Guard rating chain.

5. The Coast Guard argued against backdating the applicant's date of rank to what it would have been had he been selected for promotion by the PY 2010 selection board. However, the Secretary, acting through the Board, "is obligated not only to properly determine the nature of any error or injustice, but also to take 'such corrective action as will appropriately and fully erase such error or compensate such injustice.'"¹⁴ Moreover, "once the Board decides to give a remedy, it should not be free to slice the relief illegally or arbitrarily, sending the claimant forth with half-a-legal-loaf or even less."¹⁵ When a military officer's record has been prejudiced by an error when it was reviewed by a selection board, full relief—erasing the error—normally includes backdating the officer's date of rank if he is selected for promotion by the next selection board to review his record and paying him back pay and allowances.¹⁶ Such relief has long been provided by this Board in similar cases,¹⁷ and in fact the Coast Guard itself has typically recommended backdating an officer's date of rank and paying back pay and allowances when it found that the officer's record was prejudiced by error before a selection board.¹⁸ Thus, in

¹⁴ *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Caddington v. United States*, 147 Ct. Cl. 629, 632 (1959)).

¹⁵ *DeBow v. United States*, 193 Ct. Cl. 499, 504 (1970), *cert. denied*, 404 U.S. 846 (1971); *see Bonen v. United States*, 229 Ct. Cl. 144, 149 (1981) ("The 'half-a-loaf' doctrine normally applies where a corrections board grants plaintiff's claim, but stops short of awarding the full appropriate relief requested by plaintiff. Failure of the board to grant full relief where it is mandated by the records change results in 'a new cause of action' or "'continuing' claim' which revives the statute of limitations.")

¹⁶ *See* 10 U.S.C. § 628(d) ("Persons considered by promotion boards in unfair manner ... A person who is appointed to the next higher grade as the result of the recommendation of a special selection board convened under this section shall, upon that appointment, have the same date of rank, the same effective date for the pay and allowances of that grade, and the same position on the active-duty list as he would have had if he had been recommended for promotion to that grade by the board which should have considered, or which did consider, him"); *Richey v. United States*, 322 F.3d 1317 (Fed. Cir. 2003).

¹⁷ *See, e.g.*, the following BCMR decisions in which the Board has ordered backdating of an officer's date of rank and awarded back pay and allowances when the officer's record was prejudiced by error before a selection board: BCMR Docket Nos. 2011-082, 2011-035, 2010-252, 2010-097, 2008-115, 2008-106, 2008-071, 2008-026, 2007-141, 2007-138, 2007-114, 2007-022, 2006-147, 2006-070, 2006-001, 2005-147, 2005-046, 2004-159, 2004-120, 2004-115, 2004-109, 2004-105, 2004-095, 2004-023, 2002-007, 2001-041, 2000-162, 2000-128, 2000-106, 2000-016, 1999-183, 1999-142, 1998-018, and 1998-073.

¹⁸ *See, e.g.*, the following BCMR cases in which the Coast Guard has recommended backdating an active duty or Reserve officer's date of rank and awarding back pay and allowances when the officer's record was prejudiced by error before a selection board: 2011-082, 2011-035, 2010-252, 2008-115, 2008-106, 2008-071, 2007-141, 2007-114, 2006-147, 2006-070, 2006-001, 2005-147, 2005-046, 2004-159, 2004-120, 2004-109, 2004-105, 2004-095, 2004-023, 2000-162, 2000-128, 2000-106, and 1999-183.

recommending that the Board deny the requested relief, the Coast Guard is going against precedent and against its own prior recommendations in many similar cases.

6. The Coast Guard argued that the applicant is not entitled to a backdated date of rank because it is impossible to assume or know for certain whether he would have been selected for promotion by the PY 2010 selection board had the erroneous OER not been in his record. However, the same has been true in past similar cases in which the Coast Guard has recommended backdating an officer's date of rank because selection board proceedings are not disclosed.¹⁹ Moreover, the Coast Guard's argument that the applicant should be required to prove that but for the erroneous OER, he would have been selected for promotion by the PY 2010 selection board is contrary to precedent because courts have long rejected this "but for" test when determining an officer's entitlement to a backdated date of rank and back pay and allowances when his record has been prejudiced by error before selection boards.²⁰ However, as indicated in finding 4, the preponderance of the evidence shows that the applicant in this case would receive a backdated date of rank even if the "but for" test applied.

7. The Coast Guard argued that the applicant is not entitled to a backdated date of rank because he has not yet been promoted to LCDR pursuant to his selection for promotion by the PY 2011 LCDR selection board. In so arguing, the Coast Guard ignores the fact that prospective backdating of a date of rank contingent upon the officer's being selected for promotion and promoted pursuant to a subsequent selection board is the usual relief recommended by the Coast Guard and awarded by the Board when an officer's record has been prejudiced by error before a selection board.²¹ In this case, the applicant has already been selected for promotion and so backdating his date of rank need only be contingent upon his actual promotion pursuant to his selection by the PY 2011 LCDR selection board.

8. The Coast Guard argued that the applicant is not entitled to a backdated date of rank because of the statute regarding running mates and the limitation on the size of the officer corps.²² However, these statutes have been in existence for many years and have not previously stopped the Coast Guard from recommending or the courts or the Board from ordering the backdating of an officer's date of rank. The Coast Guard has provided no explanation for why these statutes should suddenly prevent the Board from granting full relief when an officer's record has been prejudiced by error before a selection board. In this regard, the Board notes that backdating a Reserve officer's date of rank under such circumstances is completely consistent

¹⁹ 14 U.S.C. § 261(d) ("the proceedings of a selection board shall not be disclosed to any person not a member of the board") (originally enacted as Pub. L. 88-130, § 1(10)(C), 77 Stat. 181 (1963)).

²⁰ See, e.g., *Sanders v. United States*, 594 F.2d 804, 816 (Ct. Cl. 1979); *Porter v. United States*, 163 F.3d 1304, 1316 (Fed. Cir. 1998); *Richey v. United States*, 50 Fed. Cl. 3, 9 n4 (2001), *rev'd on other grounds*, 322 F.3d 1317 (Fed. Cir. 2003).

²¹ See, e.g., the following cases in which the BCMR's backdating of an officer's date of rank was made contingent upon the officer actually being promoted pursuant to his selection by a subsequent selection board: BCMR Docket Nos. 2011-082, 2011-035, 2010-252, 2008-115, 2008-071, 2008-026, 2006-147, 2006-070, 2006-001, 2005-147, 2004-120, 2004-109, 2004-105, 2004-023, 2000-162, and 2000-106.

²² 14 U.S.C. § 736(a) ("When a Reserve officer is promoted to the next higher grade under this subchapter, the date of rank shall be the date of appointment in that grade, unless the promotion was determined in accordance with a running mate system ..."); 14 U.S.C. § 702 (allowing the Secretary to determine the number of officers at each grade within the Coast Guard Reserve).

with the law in 14 U.S.C. § 739(b),²³ which expressly authorizes the Coast Guard to backdate a Reserve officer's date of rank and adjust his precedence on the inactive duty promotion list (IDPL) accordingly,²⁴ even without a BCMR order to do so, when a selection board has failed to review an eligible officer's record because of an administrative error. This statute requires a change of running mate and reordering of the IDPL when a Reserve officer's date of rank is corrected pursuant to the statute, and it retroactively increases the number of officers in the higher rank beyond the prior limit.²⁵ Congress clearly does not consider the order of the IDPL and the limitation on the size of the officer corps to be so sacrosanct as to preclude fully correcting an officer's record when he has been denied a fair opportunity for promotion but is later selected for promotion.

9. Accordingly, relief should be granted by backdating the applicant's LCDR date of rank, once he has been promoted pursuant to his selection by the PY 2011 selection board, to the LCDR date of rank he would have had if he had been selected for promotion by the PY 2010 selection board, by adjusting his precedence on the IDPL accordingly, and by awarding him the back pay and allowances he is due as a result of these corrections.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

²³ "A Reserve officer is not considered to have failed of selection if the officer was not considered by a selection board because of administrative error. If that officer is selected by the next appropriate selection board after the error is discovered, and is promoted, the same date of rank and precedence shall be assigned that would have been assigned if the officer had been recommended for promotion by the selection board that originally would have considered the officer but for the error." 14 U.S.C. § 739(b). This statute is reflected in Article 7.A.8.b. of the Reserve Policy Manual, which states that "[a] Reserve officer is not considered to have failed selection if the officer was not considered by a selection board due to administrative error." The article further states that if an officer is selected by the next board after the error is discovered, that officer is entitled to have the date of rank and precedence on the IDPL that would have been assigned if the officer had been selected by the appropriate board.

²⁴ Reserve officers are listed on the inactive duty promotion list (IDPL) by their date of rank. Therefore, backdating a Reserve officer's date of rank inherently involves adjusting his precedence on the IDPL.

²⁵ 14 U.S.C. § 739(b).

ORDER

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

Upon his promotion to LCDR pursuant to his selection for promotion by the PY 2011 IDPL LCDR selection board, the Coast Guard shall

(a) backdate his LCDR date of rank to the date of rank he would have received if he had been selected for promotion by the PY 2010 IDPL LCDR selection board;

(b) correct his precedence on the IDPL to the precedence he would have had he been selected for promotion by the PY 2010 IDPL LCDR selection board; and

(c) pay him any back pay and allowances that he is due as a result of these corrections.

