

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-215

**XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX**

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 application upon receipt of the applicant's completed application on July 28, 2011, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated June 21, 2012, 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 record by promoting him to commander (CDR) with the date of rank he would have had if he had been selected for promotion year (PY) by the PY 2011 selection board. In the alternative, he asked that his record be corrected by removing his two non-selections for promotion to commander CDR before the PY 2011 and 2012 CDR selection boards.^{1,2} He also requested that if selected by the first selection board to consider him with a corrected record that his CDR date of rank be backdated to the date he would have received if selected by the PY 2011 selection board.

The applicant alleged that he had an incomplete record before the PY 2011 CDR selection board. In this regard, the evidence shows that his record of professional development (CG-4082) covering courses and training that he completed from approximately June 9, 2005 to August 14, 2009 (approximately 22 courses) was not in his record. In addition, the applicant stated that the evaluation summary sheet in "Direct Access" showed his job classification as that of a LT when he was a LCDR filling a LCDR's job. One of the documents submitted by the applicant entitled "My Employee Review" has two entries. One entry shows that from June 29,

¹ At the time he submitted his application, the applicant had only one failure of selection for promotion to CDR. While his application was pending before the BCMR he encountered his second non-selection before the PY 2012 CDR selection board.

² The terms non-selection, failure of selection, and passovers are used interchangeably in this decision.

2005 to April 30, 2006, his job and position codes were that of a lieutenant.” The more recent entry shows that from May 1, 2006 to April 30, 2007, his job and position codes were that of a LCDR. His LCDR date of rank is March 1, 2006.

The applicant submitted evidence showing that he made every effort to have a corrected record before the PY 2011 CDR selection board. He submitted several documents including the record of professional development to PSC for inclusion in his record prior to convening of the PY 2011 selection board. However, the last two pages of the professional development record were not in his record before the PY 2011 selection board.

It appears from the record that the discovery of the alleged error with respect to the alleged incorrect LT job classification occurred after the PY 2011 non-selection.

VIEWS OF THE COAST GUARD

On October 20, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant relief in accordance with a memorandum submitted by the Commander, Personnel Service Center (PSC).

PSC stated that “despite the applicant’s attempts to rectify the situation with respect to errors in his record, not all items were added to his record or corrected in time for the [PY 2011] promotion board and thus an injustice has been substantiated.” PSC added that the omitted documents could have had an impact on the selection board’s determination not to select the applicant because the applicant had a 5-year gap in his professional development history.

However, PSC affirmed that the applicant’s record was corrected in time for evaluation by the PY 2012 CDR selection board, but the applicant was not selected for promotion to CDR by that board with a corrected record. Therefore, PSC argued that the non-selection before the PY 2012 selection should not be removed from the applicant’s record.

In light of the above, PSC recommended the removal of the applicant’s PY 2011 non-selection for promotion to CDR, but PSC did not recommend the removal of the applicant’s PY 2012 non-selection and stated that the PY 2012 failure should count as the applicant’s first failure of selection. PSC recommended that the applicant’s record be reviewed by the PY 2013 CDR selection board, and if selected by the PY 2013 selection board that his date of rank be corrected to the date he would have received if he had been selected by the PY 2012 selection board.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 24 2012, the Board received the applicant’s response to the views of the Coast Guard. He agreed with them, except that he disagreed that his PY 2012 failure of selection should not be removed.

The applicant argued that the Coast Guard’s contention that he did not suffer an injustice before the PY 2012 selection board is incorrect and that the remedy recommended by the Coast Guard is inadequate. The applicant argued that the appropriate remedy in this case would be a

special selection board, as authorized by 10 U.S.C. § 628(b), where an officer's record is compared with a sampling of other officer's records who were selected and the special board renders a determination as to whether that non-selected officer would have been selected with a corrected record.³

In the alternative, the applicant argued that the Coast Guard should remove both of his non-selections for promotion from his record. The applicant argued that in determining whether a failure of selection should be removed, the Board must consider (1) whether the error was prejudicial to the applicant's record in the sense that it made the applicant's record appear worse than it would have without the errors, and (2) whether it is unlikely that the applicant would have been promoted in any event. BCMR No. 2007-022, citing *Engels v. United States*, 678 F.2d 173, 177 (Ct. Cl. 1982). The applicant argued that he is not required to prove that the error changed the result of the selection board, just that the error prejudiced his record. The applicant stated that in assessing whether an error prejudiced his record, "the fundamental principal is whether [the applicant's] record before the selection boards still portrayed his service career on a fair and equitable basis." *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980). The end burden of demonstrating the harmlessness of the error falls on the government. *Engels*, 678 F.2d at 176.

The applicant argued that his non-selection by the PY 2011 selection board had lasting negative impacts that prejudiced his record before the PY 2012 selection board. He argued that his record before the PY 2012 selection board was prejudiced by indicators that he had been previously passed over for promotion. He stated that the Federal Court of Claims has recognized "the inherently detrimental nature of the presence of passovers in a serviceman's record . . ." See *Riley v. United States*, 608 F.2d 441, 444 (Ct. Cl. 1979). With regard to the *Riley* case, the applicant offered the following:

[T]he court invalidated a second nonselection for promotion on the basis that an earlier nonselection was prejudicial to the serviceman's record. In *Riley*, a serviceman was passed over for promotion for the first time after the selection board viewed a record that contained two erroneous OERs. *Id.* at 442. The erroneous OERs were removed from [the applicant's] record and [the applicant] applied to have the passover removed from his record. *Id.* While the application was pending, the applicant was passed over a second time. *Id.* The record before the second selection board did not contain the erroneous OERs, but did indicate that [the applicant] was previously passed over for promotion. *Id.* The court held that inclusion of the first nonselection in the serviceman's record before the second selection board was prejudicial error. *Id.* at 444. "[T]he parties and even the Correction Board acknowledged that previous passovers may detrimentally affect promotion opportunities." *Id.* As the first nonselection was based on material error that prejudiced the serviceman's record and the nonselection itself was prejudicial, both the first and second nonselections were equally invalid even though the erroneous OERs had been removed from the serviceman's record by the time the second selection board considered him for promotion. *Id.* The court

³ The Coast Guard does not have the authority to convene special selection boards. See Memorandum from the Office of the Judge Advocate General, General Law Division (January 26, 2001).

ordered a nonprejudicial explanation be put in the serviceman's record addressing the gaps caused by the nonselections. *Id* at 445.

The applicant stated that the Coast Guard lists the in-zone and above-zone⁴ candidates for promotion in a combined list to avoid disclosing candidates who are above-zone to the selection board. According to ALCGOFF 093/11, the Coast Guard listed members to be considered by the PY 2012 selection board alphabetically. The only other information about the members on that list was their employee identification numbers. Out of 261 candidates, the applicant's name was listed as number 149. The applicant stated that this procedure of listing members failed to remove all indicators from the record of a candidate who has been previously passed over for promotion. The applicant argued that his date of rank and the fact that he had one more OER than other candidates indicated to the CDR selection board that he had a previous non-selection. The applicant stated that based on promotion statistics in the announcement of the selection board results for PY 2012 there was a 74% (125/170) opportunity of selection for in-zone officers and a 20% (18/90) opportunity of selection for above-zone officers. The applicant argued that by virtue of his date of rank he would have been associated with the above-zone officers at the PY 2012 CDR board.

The applicant argued that his record was further prejudiced before the PY 2012 selection board because due to his non-selection before the PY 2011 selection board, he was unable to pursue career enhancing assignments that would have made him a stronger candidate before the PY 2012 board. In addition, the applicant stated that the employee summary sheet that showed his rank as lieutenant was not corrected until November 9, 2011 after the PY 2012 CDR selection board met on July 26, 2011. The applicant argued that the selection board would have had no way of knowing that the rank error on his employee summary sheet was an administrative error, and that it would have been logical for the selection board to conclude that the error was simply an indication of the applicant's carelessness in checking his record for accuracy prior to the CDR board. The applicant also stated the following:

The PY11 non-select basically foreclosed all opportunity for applicant to comply with the Commandant's guidance to the PY 12 board that "[o]fficers should aspire . . . to assignments that provide them with successively greater levels of responsibility, authority and accountability." . . . The lack of an end of tour award, applicant's inability to seek career enhancing assignments, the continued presence of errors in the record, and the indicators to the board that applicant had a previous non-select on his record made applicant's record at the PY12 [CDR] board weaker than it would have been had it not been for the Coast Guard's failure to correct substantial errors in applicant's record for the PY11 board. It is impossible to know whether these errors in fact caused the PY [CDR] board to non-select applicant. However, applicant must only show the record appeared worse than it would have without the errors. Other than the non-selects in PY11 and PY 12, applicant had had a stellar career in the Coast Guard. There is nothing in his record to indicate that applicant would not have been selected for promotion even if his record had not been correct.

⁴ Above-zone refers to an officer who has been passed over for promotion.

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 was not selected by the PY 2011 selection board for promotion to CDR. After learning of his non-selection, he reviewed his record and discovered two pages were missing from his Professional Development Record. He filed an application with the Board seeking a direct promotion because of the error and failure. In the alternative, he requested the removal of his failure of selection before the PY 2011 selection board, and that if selected by the PY 2012 board, that his date of rank be backdated to what it would have been if selected by the PY 2011 board.

3. While his application was pending before the BCMR, the Coast Guard administratively corrected the applicant's record by including a complete copy of his Professional Development Record. His corrected record was then placed before the PY 2012 CDR selection board. However, even with the corrected record, the applicant was not selected for promotion by the PY 2012 CDR selection board. After the applicant's failure before the PY 2012 board, the Coast Guard issued an advisory opinion in this case recommending removal of the PY 2011 failure of selection, but not the PY 2012 failure. In his reply to the advisory opinion, the applicant renewed his request for a special board. In the alternative, he requested removal of his PY 2011 and PY 2012 failures of selection, and that if he is selected by the PY 2013 selection board that his date of rank be adjusted to the date he would have had if he had been selected by the PY 2011 selection board.

4. With respect to the applicant's request for a special selection board, the Board has no such authority. The General Law Division of the office of the JAG stated in a January 26, 2001 memorandum that 10 U.S.C. § 628 does not authorize the Coast Guard to convene special selection boards. . Nor is it the Board's policy to promote an officer who has not been selected by a duly convened selection board. In similar cases, the Board has denied requests for direct promotions, including BCMR Nos. 1998-065, 2008-024, and 2010-038. As the Board explained in BCMR 2008-024 (finding 14) for not directly promoting an officer:

The applicant requested that upon a finding of error or injustice that the Board order his promotion to the grade of LCDR, as well as direct the removal of his two failures of selection of promotion to LCDR. The Board does not normally promote but instead removes failures of selection for promotion that allows the applicant another opportunity(s) to be considered for promotion by a duly constituted selection board with a corrected record. . . . Moreover, decisions on promotions are better left to the Service which has a selection board process in place to determine who is best qualified for service in the next higher grade.

Therefore, the Board will consider the applicant's request for alternative relief, which is the removal of his PY 2011 and 2012 failures of selection and backdating of his CDR date of rank to the PY 2011 board if he is selected for CDR by the PY 2013 selection board.

5. With regard to the PY 2011 selection board, the Board finds that the applicant's record before that board contained a prejudicial error. The Coast Guard admitted, and the Board finds, that the applicant's record before the PY 2011 CDR selection board was inaccurate because it did not include the applicant's complete Professional Development Record. Therefore, the Coast Guard recommended, and the Board agrees, that as a result of this prejudicial error, the applicant's PY 2011 failure of selection for promotion to CDR should be removed from his record.

6. With regard to the PY 2012 selection board, the Coast Guard stated that the applicant had a correct record before that board and still was not selected for promotion. Therefore, the Coast Guard argued that his PY 2012 failure should not be removed. In contrast, the applicant argued that his PY 2012 failure of selection for promotion to CDR should be removed because, even though the error had been corrected and even though the Coast Guard does not distinguish between in-zone and above-zone officers before selection boards, he was prejudiced before the 2012 board by the fact that the selection board knew that he was above-zone based on his LCDR date of rank and due to his having one more OER than other in-zone officers. However ALCGOFF 093/11 issued on June 15, 2011 published the selection board list for the PY 2012 CDR board and listed officers alphabetically by last name with no other information on that list except for their employee identification numbers. By listing the officers alphabetically there was no indication on that list who was more senior or who was in or above-zone. Of the 261 officers on the selection board list, the applicant was listed as number 149. Therefore, with just the names listed alphabetically and no other information about the officer on that list, the selection board could not tell from that list which officers were above-zone. The applicant has not provided an explanation why the selection board would be curious about his date of rank such that it would review and compare dates of ranks for all 261 officers. The applicant has not presented sufficient evidence that it was apparent to the PY 2012 selection board that he was above-zone due to his date of rank. Nor has he presented sufficient evidence that the selection board was aware that he was above-zone because he had one more OER than other members on the list. Except for his statement, he presented no concrete evidence in this regard. The applicant has failed to establish an error in his record before the PY 2012 board and without the establishment of an error there is no basis on which to discuss removing a failure of selection due to prejudice or any other reason. *See Engels v. United States*, 678 F.2d 173, 175 ("officers claiming . . . to have been improperly selected out, after passovers, must first show that the service committed a legal error.") The court further stated in *Engels* that as to the existence of the error, the burden of going forward and of persuasion lies squarely with the claimant. In this case, the applicant speculates as to errors but offers insufficient proof that any error occurred in his record before the PY 2012 selection board.

7. Even if the selection board was aware of the applicant's date of rank, it would not prove that the applicant was above-zone. In this regard, the officers may have different dates of rank for different reasons. For instance, officers on the list could have had date of rank

adjustments through BCMR action. Therefore, it cannot be automatically assumed, as the applicant has done, that what *appears* to be an earlier date of rank means that an officer is above-zone.

8. The applicant next alleged that the rank history entry on his employee summary sheet indicating that he held a LT's position immediately after his promotion to LCDR was not corrected until after the PY 2012 board dismissed. The Coast Guard indicated that the applicant had a correct record before the PY 2012 selection board. Except for his statement, the applicant did not present any evidence showing when this correction was actually made. He suggested that this error may have led the selection board to believe that he was not concerned enough about his record to review and correct it prior to the selection board meeting. However, even if the employee summary sheet indicated that he held a LT's position as a LCDR immediately after his promotion to LCDR, it was clearly obvious that the applicant was a LCDR, since the following entry on the employee summary sheet showed that he was a LCDR and since he was competing for promotion to CDR before the PY 2012 selection board. He would not have been competing for promotion to CDR as a LT. Moreover, all of his LCDR OERs showed his rank as LCDR, as did his Record of Professional Development. In addition, the applicant's suggestion that an incorrect rank on an employee summary sheet, which was an obvious administrative error and was refuted by accurate reflections of his rank and the other overwhelming evidence in the record, would have influenced the selection board or outweighed an otherwise strong record of performance is not persuasive to the Board. The Board is not persuaded that this administrative error constituted a legal error that was prejudicial to the applicant before the PY 2012 selection board because it did not make his overall record appear worse. See *Engels* at 176.⁵

9. In light of the above finding, the Board agrees with the advisory opinion that the applicant's PY 2011 failure should be removed from his record and treated as if it never occurred. The PY 2012 failure should not be removed because he had a substantially complete and fair record when he was considered for promotion by PY 2012 selection board. In *Hary v. United States*, 618 F.2d 704, 709 (1980), the court stated that an officer is entitled to a record before a selection board that is "substantially complete and fair," which the applicant had before the PY 2012 selection board. Therefore, his PY 2012 failure should be treated as first failure, as recommended in the advisory opinion. The applicant's record should be placed before the PY 2013 selection board and if selected by that board, his date of rank should be adjusted to that he would have received if selected by the PY 2012 board.

10. The Coast Guard recommended relief that is more generous than Board precedent supports. In such past situations, the Board has ordered the Coast Guard to correct the error and to remove the applicant's failure of selection for promotion. The Board's order would have further directed that if the applicant is selected for promotion by the first board to consider him with a corrected record, his date of rank should be backdated. (If the applicant is not selected by the first board to consider him with a corrected record, he is usually not backdated by the BCMR.) See ordering language in BCMR Nos. 2008-024 and 2010-038.

⁵ In *Engels*, the United States Court of Claims established two "separate but interrelated standards" to determine the issue of nexus. The standards are as follows: "First, was the claimant'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?" *Id.* at 176.

The Coast Guard recommended relief in the applicant's case similar to that that an officer would be entitled to whose record was not considered by a selection board due to an administrative error. Under 14 U.S.C. § 262(b) an officer shall not be considered to have failed of selection if he was not considered by a selection board because of administrative error. The law further states that "[i]f he is selected by the next succeeding selection board and promoted, he shall be given the date of rank and position on the active duty promotion list in the grade to which promoted that he would have held had he been recommended by the first selection board." In cases of administrative error, it is as if the administrative error never occurred. In this case, by treating the applicant's PY 2012 failure as his first, it is as if the FY 2011 failure never occurred. Even though under Board precedent, the applicant would not be entitled to backdating if selected by the PY 2013 board because he failed before the PY 2012 selection board with a corrected record, this Board will grant the relief recommended by the Coast Guard under this particular set of circumstances.

11. Accordingly, the applicant should have the partial relief recommended by the JAG, which includes the removal of his PY 2011 failure of selection for promotion to CDR as if it never occurred. His PY 2012 failure of selection for promotion should not be removed and it should be considered his first failure of selection for promotion to CDR. If he is selected for promotion by the PY 2013 selection board he should have the date of rank he would have had, if he had been selected by the PY 2012 selection board, with back pay and allowances.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXXXXXXXXXXXXXXX, for correction of his military record is granted, in part, as follows:

The Coast Guard shall correct his record by removing his PY 2011 failure of selection for promotion to CDR. His PY 2012 failure of selection for promotion to CDR shall not be removed from his record and shall be considered his first failure of selection for promotion to CDR. If he is selected for promotion to CDR by the PY 2013 selection board, his date of rank shall be backdated to what it would have been had he been selected for promotion by the PY 2012 selection board and he shall receive corresponding back pay and allowances.

No other relief is granted.

