

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2013-136

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 June 21, 2013, and had the decision for the Board prepared as required by 33 C.F.R. § 52.61(c).

This final decision, dated March 13, 2014, 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 several inaccuracies in his Officer Evaluation Reports (OERs) for the periods June 1, 2009, to June 30, 2010, and July 1, 2010, to May 31, 2011, time periods. He stated that as the result of the Board's Order in BCMR Docket No. 2010-038, his lieutenant commander (LCDR) date of rank was backdated to [REDACTED], and so the OERs that he received as a lieutenant (LT) in 2010 and 2011 should be corrected to reflect his corrected rank. The applicant also asked the Board to correct his record to show that he was a LCDR when he received his May 30, 2011, Coast Guard Achievement Medal.

The applicant argued that Article 5.A.1.b.1. of the Coast Guard Officer Accessions, Evaluations, and Promotions Manual (COMDTINST M1000.3) states that OERs must contain accurate information, but that two of his OERs contain errors because they still show that he was a LT during the rating period, even though his promotion to LCDR has been backdated to [REDACTED]. He alleged that his OER for the period June 1, 2009, to June 30, 2010, contains the following errors:

- Block 1.c. Date of Rank - should read [REDACTED]
- Block 1.g. Grade - should read O4 instead of O3
- Block 7. Reporting Officer Comments – rank should be changed from LT to LCDR.
- Block 10. Potential – rank should be changed from LT to LCDR and grade should be changed from O4 to O5.

The applicant also alleged that the following errors need to be corrected on his OER for the period July 1, 2010, to May 31, 2011:

- Block 1.c. Date of Rank - should read [REDACTED]
- Block 1.g. Grade - should read O4 instead of O3
- Block 10, Potential - highest recommendation to LCDR should be changed to read CDR, and “sense of diplomacy at O4 level” should be changed to “O5 level.”

SUMMARY OF THE RECORD

In the Board’s decision for BCMR Docket No. 2010-038, issued on August 12, 2010, the Board found that the applicant’s 2003 and 2004 OERs were erroneous when the LCDR selection board reviewed his record for selection for promotion in 2008 and 2009. Therefore, the Board expunged the OERs and ordered the Coast Guard to remove the applicant’s two non-selections to LCDR so that he would have two more opportunities to compete for promotion to LCDR. The Board further directed that if he was selected for promotion to LCDR by the first Board that considered him for promotion with a corrected record, then his date of rank would be backdated to what it would have been had he been selected for promotion in 2008, at his discretion, and that he would receive back pay and allowances. The Board also ordered that if he was selected for promotion to LCDR by the second board, then he would receive a date of rank commensurate with selection by the 2009 board. Finally, the Board ordered the Coast Guard to reinstate the applicant to active duty, with back pay and allowances.

The Sector Commander awarded the applicant a Coast Guard Achievement Medal on May 30, 2011, and the applicant was still a LT at the time.

The PY12 Lieutenant Commander Selection Board convened on August 16, 2011, and selected the applicant for promotion with a corrected record. In accordance with the Board’s order, his LCDR date of rank was adjusted to [REDACTED]

VIEWS OF THE COAST GUARD

On August 14, 2013, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in accordance with a memorandum submitted by the Commander, Personnel Service Center (PSC).

PSC argued that of paramount importance in this case is the fact the rating chains “evaluated the applicant as a ‘lieutenant’ when they completed their evaluations – not as a ‘lieutenant commander.’” PSC alleged that there is a tremendous difference between recommending an officer in Block 10 of the OER for promotion to LCDR and recommending them for promotion to CDR, and that the rank of CDR is a senior officer in the Coast Guard and correcting the applicant’s record as requested would “create a far greater error since it would not reflect the two different and independent reporting officers’ (ROs) opinions at the time.” PSC also argued that the two ROs completed block 10 of the OERs per policy and made recommendations for promo-

tion to LCDR, and that performing a “find and replace” to substitute CDR for LCDR in the two OERs would be far too presumptuous.

PSC also argued that approving the applicant’s requests to correct the OERs would violate Coast Guard policies since the corrections would place documents which are misrepresentations of facts into the applicant’s record. PSC then argued that the applicant’s request for corrections is “binary with respect to the OERs – either all corrections must be made; or none at all.” PSC noted that correcting some, but not all, would create confusion for the reader of the applicant’s record and could potentially harm him. For example, PSC argued, if the applicant’s OERs are corrected in Block 1 to reflect his adjusted date of rank as a LCDR yet Block 10 (and Block 7 for one OER) comments continue to state recommendations for promotion to LCDR, then “future readers are left puzzled.”

With respect to the applicant’s request that his Achievement Medal be corrected to show that he was a LCDR, PSC argued that the Sector Commander approved the medal and awarded it to the applicant as a LT. PSC added that the determination of the appropriateness and accuracy of the award rested with the Sector Commander, who may not have approved the same level of award for a LCDR.

Finally, PSC argued that the requested corrections are not necessary per 10 U.S.C. 1552,¹ and stated that there are several other documents within the applicant’s record prepared between 2009 and 2011 which show the applicant as a LT. PSC then asked, hypothetically, if these documents should be corrected as well to reflect an adjusted date of rank. PSC added that “until the applicant shows an injustice created by the record, the corrections are not necessary, nor should they be authorized, as parts would violate policy.”

PSC noted that the applicant may communicate to future selection boards per 14 U.S.C. § 253(b)² to explain that the two OERs and award were prepared prior to his adjusted date of rank to LCDR.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 5, 2013, the Chair of the BCMR sent the applicant a copy of the Coast Guard’s views and invited him to respond within 30 days. The Chair did not receive a response.

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 Under 10 U.S.C. 1552, the Secretary may correct any military record of the Coast Guard when the Secretary “considers it necessary to correct an error or remove an injustice.”

² 14 U.S.C. § 253(b) states that each officer eligible for consideration by a selection board convened under section 251 of this title may send a communication through official channels to the board, to arrive not later than the date the board convenes, inviting attention to any matter of record in the armed forces concerning himself. A communication sent under this section may not criticize any officer or reflect upon the character, conduct, or motive of any officer.

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The applicant alleged that two OERs in his record and his Achievement Medal contain errors because they indicate that he was a LT in 2010 and 2011 even though his date of rank as a LCDR has been backdated to July 1, 2009. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.³ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."⁴

3. The applicant had not yet been promoted to LCDR when he received the disputed OERs and so all of the evaluation marks, the comparison scale mark,⁵ and the recommendations for promotion (to LCDR) and future assignments on the disputed OERs were assigned to him as a LT, not as a LCDR. As an officer's rank is taken into account when marks are assigned on an OER—for example, an ensign's mark of 5 for professional competence is unlikely to reflect the same amount of expertise as that of a lieutenant or captain who receives a mark of 6—it is very unlikely that the applicant would have received identical marks and recommendations had he actually been a LCDR in 2010 and 2011. Because his rating chain prepared the disputed OERs with his LT rank in mind and recommended him for promotion to LCDR, not to CDR, changing the applicant's rank on the disputed OERs to reflect his backdated rank of LCDR would introduce substantial error and inaccuracy into the applicant's record even though it would fix an inconsistency. While the Board has many times caused officers' dates of rank to be backdated in past cases, the Board is unaware of any occasion on which it has therefore also changed the officers' past OERs to reflect the higher rank. Therefore, although the applicant's date of rank was backdated to [REDACTED], pursuant to the Board's decision in 2010-038, the Board finds that the OERs he received as a lieutenant in 2010 and 2011 should not be changed to show that he received those performance and comments as a LCDR.

4. Similarly, the applicant was a LT when his command awarded him the Achievement Medal in May 2011, and it cannot be known whether he would have received the same level of medal had he been a LCDR at the time because a member's rank is taken into consideration when the medal is awarded.⁶ Therefore, the citation for this award should not be changed to show that he received it as a LCDR even though the applicant's date of rank has been backdated to [REDACTED].

³ 33 C.F.R. § 52.24(b).

⁴ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁵ As explained on the OER form, the reporting officer picks a mark on the comparison scale on an OER by comparing an officer's overall performance and potential with that of all other officers of the same rank whom the reporting officer has known throughout his career.

⁶ U.S. Coast Guard, COMDTINST M1650.25D, Medals and Awards Manual, para. 2.A.16.a.(1) (May 2008) ("To merit the award, professional achievement must clearly exceed what is normally required or expected, considering the individual's rank ...").

5. The applicant has not proved by a preponderance of the evidence that the disputed information is erroneous or unjust, even though it remains inconsistent with his date of rank. Therefore, his request for relief should be denied.

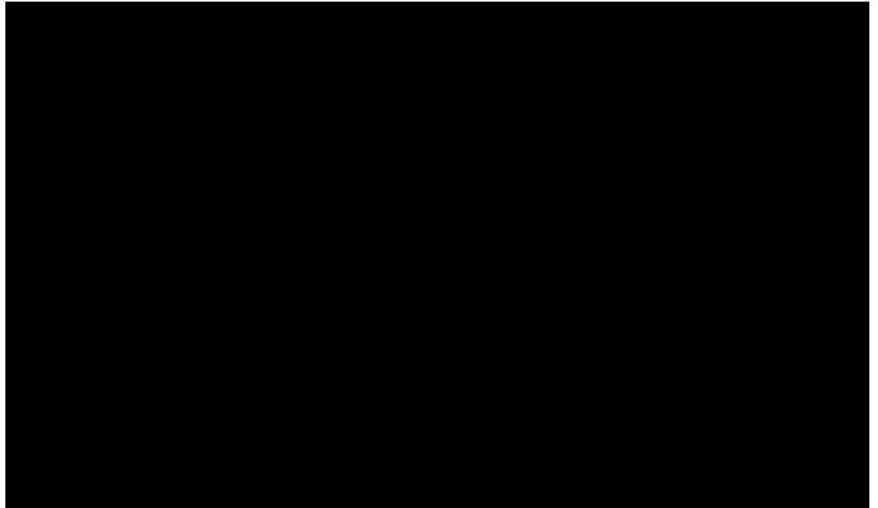

(ORDER AND SIGNATURES ON NEXT PAGE)



ORDER

The application of [REDACTED] for correction of his military record is denied.

March 13, 2014



[RECUSED]

