

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-158



FINAL DECISION

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case upon receipt of the applicant's completed application on June 29, 2016,¹ and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 29, 2017, 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, [REDACTED] who was discharged from the Coast Guard Reserve on June 30, 2017, while his application was pending, asked the Board to—

- (a) remove from his record a CG-3307 ("Page 7") counseling form that was at issue in BCMR Docket No. 2010-081 (attached);
- (b) remove a memorandum from the Personnel Service Center (PSC) dated June 18, 2009, which states that after a careful review of his record, he would be discharged from the Reserve on June 30, 2009;
- (c) remove his non-selections for promotion by the Reserve lieutenant commander (LCDR) selection boards that convened in August 2015 and 2016;
- (d) void his June 30, 2017, discharge from the Reserve, which resulted from his non-selections for promotion in 2015 and 2016, to reinstate him in the Reserve;² and
- (e) back-date his LCDR date of rank if he is selected for promotion by the next selection board to consider his record after these corrections and award him corresponding back pay and allowances.

¹ The decision in this case was delayed in accordance with 33 C.F.R. § 52.26 because the applicant was granted extensions of the time to respond to the advisory opinion and then submitted significant new evidence with the response, which resulted in a new supplemental advisory opinion from the Coast Guard and another response from the applicant.

² The applicant added this as an additional request for relief in August 2017.

The applicant argued that his non-selections in 2015 and 2016 should be removed and his discharge voided because of the erroneous, disputed documents that were in his electronically imaged personnel data record (EIPDR) when it was reviewed by the selection boards and because in August 2015, his EIPDR was incomplete when it was reviewed by the LCDR selection board because two pages of form CG-4082, documenting his training and education, were missing.

Allegations About the Page 7 (CG-3307)

The applicant alleged that an erroneous Page 7 was in his record when it was reviewed by the LCDR selection boards in 2015 and 2016 and so the Page 7 and the non-selections should be removed. His claim regarding the Page 7 constitutes a request for reconsideration because the Board denied relief for the same request in BCMR Docket No. 2010-081 (attached). The Page 7 is signed by the Deputy Sector Commander and dated May 26, 2006, when the applicant was serving on active duty as the Assistant Response Officer at the Sector. It states the following:

[Applicant], your performance in recent weeks has shown that you are not progressing in your development as an officer. Three specific incidents in the past week have made it apparent to me that you are not progressing adequately in your professional development.

1. At the recent Sector [name redacted] Officer in Charge [OIC] conference, which was attended by all Sector Officers and Officer's in Charge, you were noticeably over an hour late. Additionally, you were the first to depart. As a commissioned officer all of your actions will be scrutinized by others. Your late arrival and early departure were noticed by all.
2. At the conference, two OIC's voiced their displeasure in not having the Command distribute the three hundred hour club awards. You had been previously tasked with ensuring the CO got to all the units to distribute their awards. You reported to your department head that the CO had made trips to all the units that were receiving the awards and that he had presented them. This was clearly untrue. At this point, I do not believe you intentionally lied; rather I think you failed to stay on top of this project. Either way, your mismanagement of this project embarrassed both your department head and the CO.
3. Upon your return from the OIC conference, you found that the Sector had been directed to conduct a boarding on an HIV [high interest vessel]. Although you did a fine job in ensuring the vessel was boarded, you failed to inform any of the command that an armed HIV boarding was being conducted until after completion of the boarding.

In short, [applicant], occurrences such as these are all too common in your performance and have come to be an expectation, rather than an exception. A key element in leadership is to "learn from the experience" of both your actions and those around you. Thus far you have not demonstrated that you are learning from your own experiences.

Another aspect of a good leader is introspection, so as you depart this weekend for Boarding Officer School, I am directing you to take a hard look at who you are as an officer, and more importantly at who you want to be as an officer. You will have five weeks to explore this question and upon your return, the significant change out in Command Cadre will offer you the perfect opportunity to turn over a new leaf and begin to excel as an officer in the Coast Guard. I am certain that you are capable of accomplishing this.

To support his claims regarding this disputed Page 7, the applicant submitted the following statements, which were not in the record for the Board's decision in BCMR Docket No. 2010-081:

- In a letter dated April 20, 2016, the Sector Commander stated that while he would not comment on the contents of the Page 7 because he cannot recall the events, he believes that “[o]fficer counseling should typically be done verbally, and then if necessary, through the OER process. I do not know why a Page 7 was used. Nor do I suspect that the command staff at the [Sector] recognized that the longevity (and career implications) of a negative Page 7 could extend beyond an OER given at the same time. Had the policy matter been known and understood, I firmly believe the documentation from the Sector Deputy would have been recorded in an OER vice a CG-3307.” Therefore, he recommended that the Page 7 be removed.
- In an email to the applicant dated April 20, 2016, a chief warrant officer (CWO) stated that he attended the 2006 OIC Conference and recalls scheduling changes throughout, especially on the first day because of inclement weather that would interrupt the golf outing. The CWO disputed the statements on the Page 7. He stated that the applicant arrived early enough to present his assigned segment and departed the conference that day when everyone else did.
- In a memorandum dated May 27, 2016, a lieutenant stated that shortly after he reported for duty at the Sector as an ensign in 2006, he was instructed to attend the OIC Conference. The location was more than fifty miles from his unit, but they were not issued travel orders to stay overnight. On the morning of the conference, the applicant gave him the agenda and they agreed that they “could leave at a certain time to eat lunch, prior to his afternoon presentation. We rode together in my personal vehicle. We arrived at approximately 1100. We were not late. [The applicant] was asked if he could give his presentation prior to lunch, which he did without question. The Command and the OICs then went to play golf, [the applicant] and I departed. There was no guidance given, nor was there an expectation for either [the applicant] or myself to remain at the event. At no time were we told, or was it inferred, we should stay. The afternoon event was golf, and neither of us could afford the cost of the event.” In addition, they had work to do at the Sector office. Regarding the boarding of the HIV, the lieutenant (then an ensign) stated that the applicant conducted a brief in the command center, which was supposed to but failed to notify the chain of command before the boarding team departed. The lieutenant stated that to his knowledge, no one was counseled about the failure to notify until the applicant received the Page 7.

The applicant also submitted the following statements, which were already considered by the Board in BCMR Docket No. 2010-081:

- In a letter dated July 27, 2010, a retired lieutenant commander, who was head of the Logistics Department in 2006, wrote that if she had been consulted, she would have recommended preparation of an OER, instead of a Page 7. She remembers hearing CDR X and the Deputy Sector Commander discussing whether to give the applicant a Page 7 but alleged that they concluded that a Page 7 “was not the appropriate action.” She alleged that they should have given the applicant an optional OER instead and that the rating chain’s departure from the unit deprived the applicant of the opportunity to appeal the Page 7. She stated that at the OIC Conference, the applicant was scheduled to give a presentation at 11:00 and although he was not present when the conference began, he “arrived well ahead of his originally scheduled presentation time.” She also stated that the applicant did not leave early but stayed for the communal lunch and left with the other non-golfing conference participants when the CO opted to end the conference early to allow golfing. She further stated that there was a poor command

climate and she “witnessed some spiteful behavior.” She stated that the applicant “is an exemplary officer who was not treated fairly by a command generally known for its unfairness.”

- The applicant’s supervisor in 2006 wrote the following in a memorandum dated February 22, 2009:
 1. I am writing the DHS Board for Correction of Military Records (BCMR) on behalf of [the applicant’s] request for relief in removing from his record a CG-3307, dated May 26, 2006, which he received while I was his supervisor at Sector XXXXXXXX.
 2. The CG-3307 was initiated by me as his direct supervisor, and while I stand by the remarks therein, I feel that at this point the CG-3307 is wrongly prejudicial to [the applicant’s] career. [He] received the CG-3307 as an Ensign; by capturing performance via a CG-3307, it will be seen by LCDR and above promotion boards while as per [COMDTINST 1410.2, Documents Viewed by Coast Guard Officer Promotion and Special Boards], Ensign OERs are masked. In effect, this Ensign CG-3307 will be seen by future promotion boards, while Ensign OERs for performance from the same review period will not be. I feel that this is unfair.
 3. Although at the time, I believe the CG-3307 was appropriate, I did not intend for the CG-3307 to remain in his record longer than the OERs that cover the same period. Therefore, I recommend that the BCMR grant [the applicant’s] request and remove the CG-3307 from his record.
 4. Thank you for consideration of this information.
- In an email dated July 15, 2010, which was considered in 2010-081, a CWO stated that during the OIC Conference, a golf outing that had been planned for the second day of the conference was rescheduled to the first day because of the weather forecast. The CWO stated that his own presentation was therefore moved forward from 1300 to 1100, which was just a half hour after he arrived at 1030.
- In an email dated July 16, 2010, a senior chief boatswain’s mate wrote that the first day of the OIC Conference was ended early to allow people to play golf.

The applicant argued that these statements prove that he was not required to attend the conference except to make his own presentation and that he arrived in ample time to do so and was not noticeably over an hour late as the Page 7 claims. He also argued that the statements show that he left when everyone else did and was not the first to leave. The applicant argued that these statements call the entire Page 7 into question but that at a minimum the paragraph of the Page 7 alleging that he was late to the OIC Conference and was the first to leave has been proven false beyond a reasonable doubt and should be blacked out.

Regarding the HIV boarding, the applicant alleged that the command center was notified and given the lawful order to brief the command “given the short timeline to conduct the boarding. For some reason the command center never made the notifications.” Therefore, the command cadre was briefed after the boarding. The applicant argued that “[a]ny mistakes that took place were the fault of the command center” and that the failure should not be reflected in his own record.

The applicant noted that the Sector Commander, as well as the retired head of the Logistics Department, has agreed with him that the counseling recorded on the Page 7 should have been done verbally or recorded in an OER, instead of a Page 7, in which case it would not have had such long-term repercussions. The applicant stated that any special OER the command prepared for him in for him in May 2006 would have been an ensign OER because he was an ensign until June 15, 2006, and so it would have been masked and not seen by any LCDR selection board in

accordance with ALCOAST 214/03. He argued that the Page 7 contradicts the spirit of the policy in ALCOAST 214/03, which states that “active duty and Reserve promotion boards will no longer view any ensign OER at LCDR and above promotion boards beginning with promotion year 2004. The LTJG and LT selection boards will continue to view entire records including ensign OERs.” The applicant also argued that the statements show that the Sector Commander, who was the commanding officer, would never have authorized the Page 7 and that the Logistics Department was not properly consulted. He noted that even his supervisor regrets preparing the Page 7 for him.

Allegations About the PSC Memorandum

The applicant explained that after receiving a commission as a Reserve officer, he served on extended active duty contracts and would have been allowed to integrate into the regular Coast Guard if he had been selected for promotion to lieutenant by an active duty selection board. After he was twice non-selected in 2007 and 2008, he was advised that he would be released from active duty on June 30, 2009. At the time he was serving in Alaska and the economy was so bad that he could not find a civilian job. Therefore, he requested an assignment in Virginia, and his command approved the transfer because he would have a better chance of finding civilian employment in Virginia. Then on June 18, 2009, PSC issued the memorandum stating that he would be discharged from the Reserve, as well as being released from active duty, on June 30, 2009. However, he asked to be retained so that he could be considered for promotion by the next Reserve LT selection board, and instead of being discharged, he was issued active duty for operations support (ADOS) orders and continued to serve on active duty as a Reserve officer. Later he was told that he had been ineligible for the ADOS orders because he was supposed to have been discharged on June 30, 2009. Nevertheless, because he had been selected and promoted to lieutenant in the Reserve in August 2009, he remained on active duty until September 30, 2011, when he was released and assigned to a Reserve billet.

The applicant stated that after he asked about the presence of the June 18, 2009, memorandum in his record, he was informed by the Branch Chief for Reserve Personnel Services that they had reviewed the copy of the applicant’s EIPDR that was reviewed by the selection boards, and the memorandum was not there. The Branch Chief noted that if the applicant still thought that the memorandum should be removed, he should apply to the BCMR. The applicant stated that the memorandum should be removed because he was not actually discharged from the Reserve on June 30, 2009. He alleged that although it was not seen by the selection boards, the memorandum could have affected the assignments he received as a Reserve officer.

Allegations About the CG-4082, Record of Professional Development

The applicant alleged that before the 2015 LCDR selection board convened, he properly submitted two pages of CG-4082 showing that he had completed two Coast Guard training courses and twenty graduate-level academic courses in Public Administration and Political Science from December 2011 through December 2014. The applicant stated that he provided the CG-4082 pages to his Sector’s Servicing Personnel Office (SPO) for entry in his EIPDR. The applicant submitted copies of these pages and the Routing and Transmittal Slip he submitted to have the CG-4082s

approved by his commanding officer (CO). The slip was initialed by the Senior Reserve Officer at the Sector on April 13, 2014, and by his CO on April 23, 2014.

The applicant stated that in December 2015, after he was non-selected for promotion the first time, he requested a copy of his record and discovered that the two CG-4082 pages were missing. Upon discovering the error, he “submitted the forms and did have them properly entered” in his EIPDR. The applicant submitted emails showing that after being non-selected in August 2015, he requested a copy of his EIPDR on December 5, 2015; received it on December 11, 2015; submitted the CG-4082s for entry in his EIPDR to the Sector SPO on January 9, 2016; and received confirmation from the SPO that the pages had been entered on January 20, 2016. The applicant also submitted the following two statements and argued that they support his claims:

- In an email dated April 20, 2016, a chief yeoman at the Sector SPO responded to a claim from the applicant that in 2012 he had submitted a document for entry in his EIPDR to the SPO. The chief yeoman did not indicate whether the SPO had received the document from the applicant but was able to confirm that no such document had been entered in the applicant’s EIPDR record in 2012. He noted that if the applicant did not expressly request that the document be entered in his EIPDR, the yeoman might not have done so. The chief yeoman further stated, “For the document signed on 4/23/14, you stated that you submitted it to the [SPO] and requested that this be input into your EIPDR for a LCDR board. You stated that it was given to an active duty Yeoman (you cannot specify who) for entry at the time. I can confirm that this document was not submitted by the SPO for EIPDR entry at that time. I cannot explain the specifics as to why it was not submitted to the EIPDR because I don’t know to whom it was given for action.”
- In an email dated April 11, 2016, the Senior Reserve Officer at the Sector replied to a request from the applicant for “a statement from you that you recall [the CG-4082 forms] and getting them signed for me. If you recall, I would like to state how I specifically intended to have them included in my record so that [they] would be seen before the next promotion board.” The Senior Reserve Officer replied that he remembered receiving the CG-4082s with the routing slip for signature; reviewing them for completeness and accuracy by comparing the documentation provided with the entries; and forwarding them to the Sector Commander for signature. The Senior Reserve Officer stated that he spoke to the Sector Commander about it and the pages and routing slip were signed by the Sector Commander, “but it is unfortunate to hear that it was never forwarded to RPM [the Reserve Policy Management branch of the Personnel Service Center] to get into your PDR.”

The applicant argued that these two statements prove that he timely submitted the CG-4082s for entry in his record to the SPO for entry in his record before the Reserve LCDR selection boards convened in 2015 and 2016 but were not in his record when it was reviewed by those boards.

Non-Selections for Promotion

The applicant argued that because his EIPDR contained the disputed, adverse Page 7 when it was reviewed by the Reserve LCDR selection boards in 2015 and 2016, his non-selections should

be removed, his discharge should be voided, and he should be reinstated in the Reserve. The applicant argued that under *Engels v. United States*, 678 F.2d 173 (Ct. Cl. 1982), his non-selections should be removed because he has shown that his record contained a prejudicial error when it was reviewed by the selection boards and it is not unlikely that he would have been selection for promotion if his record had not contained the disputed Page 7.³

The applicant argued that even if the Board does not remove both non-selections because of the erroneous Page 7, his non-selection for promotion in August 2015 is warranted because his record was incomplete at the time because two pages of CG-4082 were not in his record. The applicant noted that the Board granted relief in BCMR Docket Nos. 2010-252 and 2011-215 after finding that CG-4082s were missing from those applicants' records when they were reviewed by selection boards. He argued stated that the incompleteness of his EIPDR also meets the requirements of the *Engels* test because the lack of the CG-4082s was a prejudicial error and it is not unlikely that he would have been promoted if his record had contained the CG-4082s. The applicant stated that even if the Board removes just the 2015 non-selection, then his discharge should be voided and he should be reinstated in the Reserve because then he will have failed of selection only once, in 2016.

SUMMARY OF THE RECORD

On August 19, 2003, the applicant enlisted in the Coast Guard. On December 15, 2004, after attending Officer Candidate School, he was commissioned an ensign in the Reserve and began serving on an extended active duty (EAD) contract. He was assigned to a Sector as an Assistant Response Officer and on his first OER, dated September 30, 2005, he received fifteen marks of 4 and three marks of 5 in the various performance categories,⁴ a mark in the third spot on the comparison scale,⁵ and a recommendation for promotion "with peers."

On his second OER, dated March 31, 2006, the applicant received eleven marks of 4 and seven marks of 5 in the various performance categories, a mark in the third spot on the comparison scale, and his reporting officer's comment that he had been selected for promotion to LTJG and was "[s]teadily progressing towards [a] strong recommendation for LT." This OER is signed by the Assistant Chief of Response as supervisor; CDR X, the Chief of Response, as reporting officer; and the Sector Commander as the reviewer.

³ *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982) (finding that to determine whether an applicant's failure of selection should be removed the Board should answer 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?").

⁴ 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. An average mark of 4 is the expected level of performance. The supervisor assigns the marks for the first 13 performance categories, and the reporting officer assigns the last 5 marks.

⁵ The reporting officer usually makes a written recommendation about promotion and 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 are "unsatisfactory" for the first spot; "a qualified officer" for the second spot; "one of the many competent professionals who form the majority of this grade" for the third, fourth, and fifth spots; "an exceptional officer" for the sixth spot; and "a distinguished officer" for the highest, seventh spot.

On May 26, 2006, the applicant received the disputed Page 7, the text of which appears on page 2, above. On June 15, 2006, he was promoted to LTJG. On July 7, 2006, he completed a five-week Boarding Officer Course.

On his third OER, dated July 31, 2006, the applicant received six marks of 4 and twelve marks of 5, a mark in the fourth spot on the comparison scale, and a recommendation for promotion “with his peers.” This OER was signed by the new Assistant Chief of Response, the new Chief of Response, and the new Deputy Sector Commander.

On his fourth OER, dated January 31, 2007, the applicant received three marks of 4 and fifteen marks of 5 in the various performance categories, a mark in the fourth spot on the comparison scale, and a recommendation for promotion “with peers.”

On his fifth OER, dated June 15, 2007, the applicant received ten marks of 4 and eight marks of 5 in the performance categories; a mark in the third spot on the comparison scale; and a recommendation for promotion “with peers.” The Chief of Response noted that he “remains on course with his development as a dependable junior officer. [He] aggressively pursued and eventually completed his Boat Forces PQS, thus earning the temporary insignia. With additional concentration on communication and professionalism skills, [he] will soon evolve into a more capable junior officer that can work independently and free of command cadre intervention.” The applicant was not selected for promotion to lieutenant in 2007.

On July 8, 2007, the applicant reported for law enforcement duty in Alaska. On his OER dated January 31, 2008, he received one mark of 4, ten marks of 5, and seven marks of 6 in the various performance categories, a mark in the fifth spot on the comparison scale, and a strong recommendation for promotion. On his OER dated June 30, 2008, he received one mark of 4, five marks of 5, and twelve marks of 6 in the performance categories; a mark in the fifth spot on the comparison scale; and a recommendation for promotion “with best of peers.” However, he was not selected for promotion in 2008 and was therefore unable to integrate into the regular Coast Guard and slated for release from active duty on June 30, 2009.

On February 1, 2009, the applicant was transferred to Virginia. On his transfer OER, he received ten marks of 5 and eight marks of 6 in the performance categories, a mark in the fourth spot on the comparison scale, and a strong recommendation for promotion.

On June 18, 2009, the Reserve informed the applicant that he would be discharged from the Reserve as of June 30, 2009. On June 29, 2009, the applicant submitted a request to be retained in the Reserve so that he could be considered for promotion by the next Reserve LT selection board. On June 30, 2009, the applicant’s request for retention was approved so that he could compete once more for promotion to LT in the Reserve. The memorandum states that if he was not selected for promotion to LT in 2009, he would be discharged from the Reserve as of June 30, 2010. However, the applicant was selected for promotion to LT as a Reserve officer, and he continued serving in Virginia on ADOS orders until he was released from active duty on September 30, 2011, and transferred to the Selected Reserve.

While serving in Virginia on ADOS orders, the applicant received an OER dated June 30, 2009, on which he was assigned twelve marks of 5, six marks of 6, a mark in the fifth spot on the comparison scale, and a strong recommendation for promotion. On an OER dated January 31, 2010, he received eleven marks of 5, six marks of 6, one mark of 7, another mark in the fifth spot on the comparison scale, and a recommendation for “promotion w/ best of peers.”

The applicant was promoted to lieutenant on January 16, 2010. On his first lieutenant OER, dated May 31, 2011, the applicant received seven marks of 5, eleven marks of 6, a mark in the fourth spot on the comparison scale, denoting a “good performer,” and a recommendation for promotion “with peers.”

After being released from active duty on September 30, 2011, the applicant was transferred to the SELRES and assigned to a billet in the Sector where he had received the disputed Page 7. On his OER dated May 31, 2012, the applicant received one mark of 4, eight marks of 5, nine marks of 6, another mark in the fourth spot on the comparison scale, and a recommendation for promotion. The applicant’s EIPDR On his OER dated May 31, 2014, he received nine marks of 5, nine marks of 6, a mark in the fifth spot on the comparison scale, denoting an “excellent performer,” and a strong recommendation for promotion.

On his OER dated May 31, 2015, the applicant received one mark of 5, fourteen marks of 6, three marks of 7, another mark in the fifth spot on the comparison scale, and a strong recommendation “for promotion with top peers.” However, he was not one of the 68 out of 124 candidates (55%) selected for promotion by the Reserve LCDR selection board that convened in August 2015. On his OER dated May 31, 2016, the applicant received one mark of 5, eleven marks of 6, five marks of 7, another mark in the fifth spot on the comparison scale, and his reporting officer’s “highest recommendation for promotion w/ best of peers.” However, he was not one of the 62 out of 113 candidates (55%) selected for promotion in 2016. Therefore, he was discharged from the Reserve on June 30, 2017. However, before he was separated, he transferred to a new Reserve unit in another District.

The applicant’s EIPDR currently contains four CG-4082s, which were signed by the applicant’s commanding officers in September 2008, August 2009, June 2012, and April 2014. According to the applicant in the Coast Guard, the last two, which document eighteen different courses in political science and public administration and two Coast Guard courses, were not in his record before the 2015 selection board convened but were entered in 2016 before the 2016 selection board convened.

VIEWS OF THE COAST GUARD

On December 6, 2016, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial relief in this case.

Regarding the CG-4082s that were not in the applicant’s record in August 2015, the JAG noted that the applicant was not selected for promotion in August 2016 even after the CG-4082s were added. Therefore, the JAG argued, the fact that the CG-4082s were not in the applicant’s record in 2015 should not be considered to have caused his non-selection for promotion in 2015.

Moreover, the JAG pointed out, in the prior BCMR cases cited by the applicant, 2010-252 and 2011-215, the applicants had proven that they took the steps required by their commands to have the CG-4082s entered in their records. The JAG stated that CG-4082s are considered non-mandatory documents and so the responsibility for submitting them for entry in their records rests on the individual officers. The JAG argued that the applicant has shown that he submitted the CG-4082s for signature by his CO, but he has not shown that he submitted them to the SPO after they were signed. The JAG stated that the emails submitted by the applicant only show that the SPO confirmed that they did not enter the CG-4082s in the applicant's record and do not confirm that they actually received the forms before the 2015 selection board met. The JAG argued that because the applicant has not shown that he actually gave the CG-4082s to the SPO for entry in his record, which was his responsibility to do, his record should not be considered incomplete or erroneous based on the lack of the CG-4082s when his EIPDR was reviewed by the 2015 selection board.

Regarding the Page 7, the JAG attached the Board's prior decision in BCMR Docket No. 2010-081 and stated that the applicant has not proven that it is erroneous or unjust. Therefore, the JAG argued, neither of the applicant's non-selections for promotion should be removed from his record. Moreover, the JAG noted, instead of applying the *Engels* test to decide whether to remove non-selections, the Board is now supposed to direct the Coast Guard to convene a special selection board (SSB) if it finds that an applicant's record contained a material error when it was reviewed by a selection board.

The JAG agreed that the memorandum dated June 18, 2009, stating that the applicant would be discharged from the Reserve, is erroneous and should be removed because he was not actually discharged from the Reserve on June 30, 2009. However, the JAG noted, such memoranda are masked from view and not seen by selection boards, so this correction does not warrant removal of the applicant's non-selections.

The JAG also adopted the findings and analysis provided in a memorandum on the case prepared by the PSC, which recommended the same partial relief. Regarding the CG-4082s, PSC stated that the applicant has not overcome the presumption that the SPO personnel acted properly and would have entered the CG-4082s in his record if he had timely submitted them to the SPO. PSC also stated that by policy, Article 4.a. of COMDTINST 1410.2, it is an officer's responsibility to ensure that his EIPDR contains his CG-4082s. Moreover, officers are reminded of this fact and advised to check their records before each selection board convenes. PSC stated that ALCGRSV 048-15, issued in July 2015, stated that "all officers being considered [for promotion] are highly encouraged to take steps to review their official record." PSC stated that the applicant did not check his record until December 2015, after the selection board convened. PSC stated that the CG-4082s were uploaded to the applicant's EIPDR on May 16, 2016, before the 2016 selection board convened.

Regarding the disputed Page 7, PSC stated that the Board has already found that it is neither erroneous nor unjust, and the applicant has not proven otherwise. PSC stated that the fact that the applicant arrived in time to make his presentation does not prove that he was not expected to be present earlier that day, and that the Sector Commander recommended removing the Page 7 not because the contents were inaccurate but because of the possible effect of the Page 7 on the applicant's career. PSC stated that the Page 7 is neither unjust nor contrary to policy.

Regarding the memorandum dated June 18, 2009, PSC recommended that it be removed from the applicant's record because he was not actually discharged on June 30, 2009. PSC stated that the presence of the memorandum in his record does not warrant removing his non-selections because selection boards do not see such memoranda.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 16, 2017, the applicant responded to the views of the Coast Guard. The applicant repeated many of his allegations.

The applicant also argued that the law concerning SSBs, 14 U.S.C. § 263, does not remove the Board's authority to remove non-selections pursuant to the *Engels* test. Because the case law on this issue that was cited by the JAG applies to the Department of Defense and not the Coast Guard. The applicant stated, however, that he has shown both that his record was adversely affected by a material error of fact and that the selection board did not have before it material information—his CG-4082s—and so he meets the statutory requirements for an SSB.

Regarding the CG-4082s, the applicant alleged that the preponderance of the evidence in the record before the Board supports his claim, and so he has met his burden of proof. The applicant stated that, like the applicant in BCMR Docket No. 2011-215, he took the necessary steps to ensure that the CG-4082s were entered in his record by submitting them to his CO for approval. The applicant argued that for both CG-4082s, his "evidence makes it clear I walked into the [SPO], gave an Active Duty yeoman the signed form, and stated that I needed it in my EIPDR so that it could be seen before the LCDR promotion board." The applicant argued that if the Board gives Coast Guard officials the presumption of regularity, then the Board should presume that he timely gave his CG-4082s to the SPO in 2012 and 2014. He noted that officers are repeatedly advised to check their records before selection boards convene and, given the important education documented on his CG-4082s, it "is utter lunacy" and "defies logic" to think that he would go to the trouble of having his CG-4082s approved by his CO but then not give them to the SPO. The applicant noted that in a new memorandum dated January 11, 2017, his supervisor has stated that he was "remarkably organized" and submitted paperwork and correspondence "well in advance of deadlines."

Regarding the Coast Guard's claim that the CG-4082s are non-mandatory documents in an officer's record, the applicant disagreed and quoted the following advice about the forms from the Coast Guard's website to prove his point:

This optional form is an important and often overlooked component of an officer's record. At a minimum it is recommended that all officers submit an updated CG-408s prior to a selection panel or promotion board. Each form that you submit becomes a part of your record and is not replaced by previous submissions, so there is no need to repeat information on subsequent forms.

It is strongly recommended that officers document all significant education, training, and qualifications on a CG-4082s, with an emphases on times not captured on the member's Employee Summary Sheet in CGBI.

The applicant claimed that the Coast Guard's argument that it was his responsibility to ensure the CG-4082s were in his record before the selection boards convened is weak because an officer cannot personally enter documents in his own record, and an officer cannot reasonably stand over yeomen in the SPO to ensure they do their work. The applicant noted that in BCMR Docket No. 2002-040, the Board granted relief when a member proved that he had relied on the bad advice of a yeoman to his detriment.

The applicant argued that the fact that he was non-selected in 2016 after the CG-4082s were entered in his record does not prove that their absence in 2015 did not cause his non-selection as each selection board is composed of different members who may weight matters differently.

Regarding the Page 7, the applicant argued that he has produced multiple witnesses showing that it is erroneous. He stated that while there are errors throughout, he has specifically proven that the paragraph about being late to the OIC Conference is erroneous. The applicant stated that he did not arrive at the start of the conference but there "never was any expectation that I should be, merely that I arrive in time to given my scheduled presentation," and he arrived in time to present it even though they moved it earlier in the day.

Regarding the HIV board, the applicant argued that his new statement from the officer who witnessed the applicant conducting the briefing in the command center proves that the command center was ordered to notify the command and failed to do so. The applicant stated that the HIV boarding was time-sensitive and he reasonably trusted the command center to notify the command. The applicant repeated his allegation that he was not in charge of the boarding because he had not yet attended Boarding Officer school, and an first class petty officer who was a certified Boarding Officer was in charge. He alleged that the petty officer did not receive any negative feedback about the failure to notify the command. He argued that this shows that the Page 7 was retaliatory.

The applicant also repeated his arguments about the masking of ensign OERs but lack of masking of ensign Page 7s and stated that the BCMR should tell the Coast Guard it should mask ensign Page 7s too and grant relief in his case.

SUBSEQUENT PROCEEDINGS

The applicant was granted an extension and submitted additional information on March 16, 2017. He submitted an email from a yeoman dated March 15, 2017, who stated that the disputed CG-4082s were in the applicant's paper military file at the SPO. The applicant stated that the presence of these CG-4082s in his paper file supports his claim that he submitted them to the SPO before the 2015 selection board convened, but they were improperly entered in only his paper file and not his EIPDR, because the paper file was mailed from the Sector SPO to his new District SPO when he transferred in 2016.

In light of the new evidence that the applicant had submitted after the Coast Guard had issued its advisory opinion, the Chair forwarded his submissions to the Coast Guard for a supplemental advisory opinion. On June 26, 2017, the JAG responded. The JAG stated that the presence of the CG-4082s in the applicant's paper file when it was mailed from one SPO to another after he transferred in 2016 does not prove that the applicant submitted them before the 2015 selection board. The JAG stated that the Sector SPO received the CG-4082s from him in 2016 and so they were entered in his records then, before his paper file would have been mailed to his new District SPO. Moreover, the JAG argued, there is no evidence that if the applicant did timely give the CG-4082s to the SPO that he specifically asked them to upload the forms to his EIPDR instead of just placing them in his PDR. The JAG repeated the claim that it was the applicant's responsibility to ensure the completeness of his record before the 2015 selection board convened, and he failed to do so.

In response to the supplemental advisory opinion, the applicant argued that it is indisputable that he timely submitted the CG-4082s before the 2015 selection board. He also argued that when he gave the forms to the SPO, he should not have had to argue that they should be entered in his EIPDR instead of just his paper file because the Coast Guard has long relied on electronic records and policy in COMDTINST M1080.10I requires SPOs to enter CG-4082s in a member's EIPDR. The applicant admitted that he should have checked his EIPDR before the 2015 selection board convened but argued that this should not prevent the Board from granting relief because the SPO should have entered the forms in his EIPDR when he gave them to the SPO. In this regard, the applicant entered an email from the Section Chief of the Military Records branch of PSC dated June 14, 2017, in which the Section Chief stated, "It is the Unit Admin/SPO's responsibility to send us authorized documents for the EIPDR. When you submitted your documents, you Admin/SPO should have cross referenced CIM 1080.10 to assess if the documents needed to be sent to us for inclusion in your EIPDR."

On August 22, 2017, the applicant amended his request for relief to include reinstatement on active duty.

APPLICABLE LAW AND POLICY

Directives Concerning Records and Selection Boards

Article 5.B.2.d.(1)(h) of COMDTINST M1000.3A (hereinafter "Officer Manual") states that each officer must "[r]eview the accuracy and completeness of the EI-PDR. Ensure that all days of commissioned service are covered by OERs."

Article 6.A.4.d. of the Officer Manual states that "Commander (CG PSC-OPM) furnishes personnel boards the names and personnel records of all officers to be considered. The personnel record consists of general administrative paperwork including such items as statements of service and sea service; the record of emergency data; Administrative Remarks, Form CG-3307, entries; documentation of alcohol incidents, and reports of civil arrests; performance evaluations; education information; and awards and discipline documentation."

COMDTINST 1410.2 concerns documents that are to be viewed by officer promotion boards. Enclosure (1) lists types of documents that *may* be viewed by selection boards, including

CG-4082s. It also lists types of records that must be “masked from view,” when the officer’s records are presented to a selection board. Paragraph 4.a. notes the following:

Coast Guard officers are responsible for their career development and maintenance of their records. Personnel boards are a significant aspect of an officer’s career and it is critical that every officer manages the contents of the record and the data in various human resources management systems such as Direct Access.

PSCNOTE 1401 “provide[s] guidance to officers eligible for consideration by a selection board.” Paragraph 9, titled “General Guidance for All Officers,” states that all “officers under consideration by upcoming boards and panels are encouraged to review their [EI-PDR] maintained by the CG Personnel Service Center (PSC) Military Records Branch (BOPS-MR). The complete EI-PDR can be obtained by sending a signed memo request as a PDF e-mail attachment to PSC-BOPS-MR. Members are responsible for ensuring the completeness and accuracy of their own records and therefore should take steps well in advance of their board or panel to verify their information. Please view <http://www.uscg.mil/psc/adm/adm3/default.asp> for additional instructions and contact information regarding officer records.”

Special Selection Boards

Under 14 U.S.C. § 263(b)(1), for an officer who was considered for selection for promotion but not selected—

[T]the Secretary may convene a special selection board to determine whether the officer or former officer should be recommended for promotion, if the Secretary determines that--

- (A) an action of the selection board that considered the officer or former officer--
 - (i) was contrary to law in a matter material to the decision of the board; or
 - (ii) involved material error of fact or material administrative error; or
- (B) the selection board that considered the officer or former officer did not have before it for consideration material information.

Article 6.B.13. of the Officer Manual contains the rules for SSBs. Article 6.B.13.c.(2) provides that an officer may submit a request for one to PSC. Article 6.B.13.e., titled “Basis for convening a SSB,” states the following:

SSBs may be convened pursuant to 14 U.S.C. § 263 to consider or reconsider commissioned officers or former commissioned officers for promotion when one or more of the following occur:

- (1) An officer was not considered from in or above the promotion zone by a regularly scheduled selection board because of administrative error.
- (2) The Secretary determines that a selection board that considered an officer from in or above the promotion zone acted contrary to law or made a material error.

(3) The selection board that considered an officer from in or above the promotion zone did not have before it some material information required to be presented to the board by Coast Guard policy.

(4) The Coast Guard Board for Correction of Military Records (CG BCMR) or a federal court directs a SSB be convened.

Article 6.B.13.f. states that SSBs shall *not* be convened for any of these reasons (among others):

(5) The convening authority determines that the error in the officer's record was immaterial or could have been discovered and corrected prior to board convening.

(a) It is the officer's responsibility to review his or her record before the board convenes and take reasonable steps to correct any errors or notify the board, in writing, of possible administrative deficiencies.

PRIOR CG-4082 CASES

BCMR Docket No. 2010-252

In BCMR Docket No. 2010-252, an applicant submitted emails proving that she had sent copies of two documents, a CG-9556 and a CG-4082, on August 6, 2009, and asked that they be entered in her record before the selection board convened on August 19, 2009. But they were not timely entered in her record, and she was non-selected for promotion. Therefore, the Coast Guard recommended that the Board remove her non-selection and the Board granted this relief.

BCMR Docket No. 2011-215

In BCMR Docket No. 2011-215, an applicant proved that beginning in April 2010 he repeatedly tried to get several errors in his record corrected and on July 19, 2010, he submitted five signed pages of training information on a CG-4082 to his Servicing Personnel Office for entry in his record. Although he was told they had been entered, two of the five pages were not entered in his record. The Coast Guard recommended removing his non-selection in 2010, noting that the applicant had "made every effort" to have his record corrected before the selection board convened. The Board concurred and granted relief.

BCMR Docket No. 2013-147

In BCMR Docket No. 2013-147, an applicant reviewed his record before a 2012 selection board and noticed that the CG-4082 was missing. PSC instructed him to submit it with his OER to his CO for signature. The CO signed both the OER and CG-4082 and the command forwarded both for entry in the applicant's record, but only the OER was timely entered in his record on July 10, 2012. Although PSC argued that relief should be denied because the CG-4082 is only an optional document and because the applicant had not exercised due diligence to ensure that his record was complete, the Board found that the applicant had exercised due diligence and granted relief by removing his non-selection for promotion.

BCMR Docket No. 2014-016

In BCMR Docket No. 2014-016, an applicant proved that before his selection board convened, he had checked his record, attempted to correct it by telephone and email, and submitted his missing CG-4082 for entry in his record. PSC recommended that the Board deny relief because the CG-4082 is “optional” under COMDTINST 1410.2 and because the applicant bore the responsibility of ensuring the accuracy of his record. PSC stated that the Coast Guard—

strongly opposes any preceden[t] being set that allows an officer who was non-selected to argue that the non-selection was the result of an *optional* document not being present for the selection board to view. Each selection board announcement message [published at least 30 days prior to each selection board] published by CG PSC specifically advises “*all officers being considered* [by a selection board] *are highly encouraged to take steps to review their official records.*” While the applicant emailed his Record of Professional Development, Form CG-4082 to CG Military Records on 27 March 2013, he did not take steps to confirm its entry into his record prior to the PY14 Lieutenant Commander (O-4) Selection Board.

The Board found that the applicant had proven that he had exercised due diligence in trying to correct his records by sending emails regarding the missing CG-4082. The Board denied relief, however, because the only significant information missing from the applicant’s CG-4082—his enrollment in a Master’s program—was mentioned in his recent OERs.

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.
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.⁶
3. The applicant’s request regarding the removal of the disputed Page 7 dated May 26, 2006, is a request for reconsideration and is not timely because he submitted it more than three years after his separation from active duty.⁷ The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.⁸ In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without “analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review”⁹ to determine whether the interest of justice supports a waiver of the statute of limitations. The court

⁶ 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”); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) (“The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process.”); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

⁷ 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

⁸ 10 U.S.C. § 1552(b).

⁹ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

noted that “the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review.”¹⁰

4. The applicant did not provide a compelling excuse or justify his delay in requesting reconsideration of the Board’s decision in 2010-081, and a cursory review of the merits shows that his request cannot prevail for the reasons stated in 2010-081. The applicant’s evidence—both old and new—does not show that he did not arrive at the OIC Conference more than an hour later than he had been told to arrive, as his supervisor wrote in the Page 7, which was signed by the Deputy Sector Commander. While the evidence shows that the applicant left around the time others left the conference, it does not show that he was not the “first to depart,” as stated in the Page 7. Nor has the applicant shown that he did not “fail[] to inform any of the command that an armed HIV boarding was being conducted until after completion of the boarding,” as stated on the Page 7. The record shows that the applicant was not the official Boarding Officer, who was an E-6, but he was the Assistant Response Officer and the senior officer present, he briefed the boarding team in the command center beforehand, and he failed to notify the command or ensure that the command was notified before he allowed the E-6 to lead an armed boarding of an HIV. Nor does the applicant’s evidence refute the fact that the Page 7 was authorized and appropriate given that the applicant had just received an OER dated March 31, 2006, and would receive another on July 31, 2006. The fact that the Sector Commander and others now think that the Page 7 should be removed from his record so that the selection boards will not be able see it does not prove that the Page 7 is erroneous or unjust. It is not rare for ensigns to receive adverse Page 7s for performance or conduct issues, and the Page 7s remain in their records and are not masked even though ensign OERs are masked from LCDR selection boards. Therefore, the Board will not excuse the untimeliness of this request or waive the statute of limitations. The disputed Page 7 should not be removed.

5. The applicant’s requests regarding the CG-4082s and non-selections are timely because he submitted his application within three years of his discovery of the alleged errors. 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.¹¹ 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.”¹²

6. The applicant’s evidence shows that he submitted CG-4082s for approval by his CO in 2012 and 2014 and that they were approved. He has not submitted evidence showing that he actually emailed or gave them to the SPO for entry in his records. The statement of the chief yeoman at the Sector SPO clearly states that the SPO did not enter the two CG-4082s in the applicant’s record before the 2015 selection board, but it also clearly does not support the applicant’s claim that he had submitted the CG-4082s to the SPO. Nor does the fact that the CG-4082s were in the applicant’s paper record when it was transferred to his new unit’s SPO in June 2016 show that the applicant had submitted them before the 2015 selection board. The evidence shows that the CG-4082s were entered in the applicant’s record after he submitted them in January

¹⁰ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

¹¹ 33 C.F.R. § 52.24(b).

¹² *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992).

2016 and before his transfer to another unit in June. There is no evidence that the CG-4082s were in his paper file at the SPO before 2016.

7. Even if the applicant did submit the CG-4082s to the SPO in 2012 and 2014, he has admitted that he did not check his EIPDR before the selection board convened as officers are repeatedly advised to do and as he admitted he was advised to do. Article 5.B.2.d.(1)(h) of the Officer Manual, states that each officer must “[r]eview the accuracy and completeness of the EIPDR. Ensure that all days of commissioned service are covered by OERs.” PSCNOTE 1401, which contains the “guidance to officers eligible for consideration by a selection board,” states that all “officers under consideration by upcoming boards and panels are encouraged to review their [EIPDR] ... Members are responsible for ensuring the completeness and accuracy of their own records and therefore should take steps well in advance of their board or panel to verify their information.” In addition, in each message announcing an upcoming selection board, PSC strongly encourages officers to check their EIPDRs and provides instructions for doing so. Of course, under the Privacy Act, each agency is obliged by the Privacy Act to “maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination.”¹³ Pursuant to COMDTINST 1410.2 and Article 5.B.2.d.(1)(h) of the Officer Manual, however, the Coast Guard considers an officer’s record to be complete for the purposes of a selection board as long as there are no missing OERs. The Coast Guard allows other documents, such as CG-4082s, to be shown to selection boards but places the burden on the officers to ensure such documents are in their EIPDRs. As the Board has previously noted in similar cases, the Coast Guard’s policy of requiring only OERs and placing the burden on officers to ensure that CG-4082s and other documents are entered in their records before each selection board convenes is reasonable because no one but the officer himself can know all the educational courses he has completed or all the medals or commendations he has received that could be documented in his record. PSC personnel reviewing officers’ EIPDRs prior to selection boards can tell if there is a period of an officer’s service not covered by an OER, but they cannot know whether there is a CG-4082, medal, or other optional document missing from an officer’s record.

8. In prior similar cases, summarized above, the Board has typically granted relief in the interest of justice when applicants have proven that they followed policy by checking their records before the selection board convened and exercising due diligence by trying to have their records corrected in time, to no avail. In this case, the applicant has admitted that he did not check his EIPDR in 2015 despite the policies and reminders to do so. Therefore, even if the applicant had proven by a preponderance of the evidence that he had submitted his CG-4082s to the SPO in 2012 and 2014, the Board finds that he would not have proven by a preponderance of the evidence that he exercised due diligence to ensure that the CG-4082s were in his record because he did not check his record in 2015 and try to have the CG-4082s entered in his record.

9. In 14 U.S.C. § 263(e), Congress authorized the Secretary to convene SSBs in cases of material error and to “issue regulations regarding the process by which an officer or former officer may apply to have a matter considered by a special selection board convened under this section.” The Coast Guard has issued these regulations in Article 6.B.13. of the Officer Manual. Article 6.B.13.e. states that an SSB should be convened if the “selection board that considered an

¹³ 5 U.S.C. § 552a(e)(5).

officer from in or above the promotion zone did not have before it some material information required to be presented to the board by Coast Guard policy.” Enclosure (1) of COMDTINST 1410.2 states that CG-4082s “are permitted to be viewed” by selection boards, which indicates that they are not “required to be presented to the board by Coast Guard policy.” Coast Guard directives do not require CG-4082s to be presented to selection boards although they strongly recommend that officers submit them for entry in their EIPDRs and check to ensure they have been entered in the EIPDR so that selection boards will see them. Therefore, pursuant to COMDTINST 1410.2 and Article 6.B.13. of the Officer Manual, the Coast Guard has determined that an officer’s record is complete and does not lack the “material information” required for promotion decisions as long as it contains all of the officer’s OERs. The Board finds that the applicant has not shown that he is entitled to an SSB under Coast Guard policy.

10. The Coast Guard may also convene an SSB if the BCMR orders it to do so, but the applicant has not shown that his record was incomplete due to a missing OER in 2015 or 2016 or that he exercised the due diligence reasonably required by Coast Guard policy to ensure that the two optional CG-4082s were entered in his record before the 2015 selection board convened. Accordingly, the Board finds that the applicant has not shown that his non-selection for promotion in 2015 constitutes an error or injustice. Although the applicant argued that the Board may remove his non-selections and that the case law concerning the other Services’ BCMRs should not apply to the Coast Guard, the Board disagrees. The Coast Guard BCMR is convened under the same statute as the other BCMRs, 10 U.S.C. § 1552, and the Coast Guard’s SSB statute at 14 U.S.C. § 263 is very similar, though not identical, to the SSB statute at 10 U.S.C. § 628. Therefore, if any BCMR finds that “an action of the selection board that considered the officer ... did not have before it for consideration material information,” as defined by the Service, the Board should direct the Coast Guard to convene an SSB instead of applying the *Engels* test to decide whether to remove a non-selection and backdate an officer’s date of rank.¹⁴ In this case, however, because the applicant’s record was not incomplete under Coast Guard policy and because he did not exercise due diligence to ensure the CG-4082s were in his EIPDR before the selection board convened in 2015, there are no grounds for convening an SSB.

11. The applicant also asked the Board to remove PSC’s memorandum dated June 18, 2009, regarding his pending discharge on June 30, 2009. Like the applicant’s request regarding the Page 7, this request is also untimely because it was not submitted within three years of the applicant’s release from continuous active duty in 2011. However, the Coast Guard has recommended that the Board grant partial relief by removing this memorandum. Although the memorandum was not erroneous on the date it was issued, the applicant’s record shows that he was not actually discharged from the Reserve on June 30, 2009, and instead remained in the Reserve until 2017. Therefore, the Board will direct the Coast Guard to remove the memorandum.

¹⁴ See *Porter v. United States*, 163 F.3d 1304, 1324 (Fed. Cir. 1998) (finding that since the enactment of the Title 10 SSB statute, 10 U.S.C. § 628, the “harmless error test” espoused for the BCMRs in *Engels* no longer applied to the BCMRs for services authorized to convene SSBs); *Richey v. United States*, 322 F.3d 1317, 1324 (Fed. Cir. 2003) (finding that “In *Porter* we held that once it is determined that the initial selection board’s decision ‘involved material administrative error,’ nothing in this statute requires the Secretary, acting through the Corrections Board, to make a harmless error determination. Instead, under the statute, as interpreted in *Porter*, the Corrections Board should refer the matter to an SSB, which decides whether to promote the officer based on his corrected military record, and, therefore, ‘the harmless error rule has no application.’”

Because such memoranda are masked from view by selection boards, however, the memorandum is not grounds for directing the Coast Guard to convene an SSB.

12. Accordingly, the Board will grant partial relief by directing the Coast Guard to remove the June 18, 2009, memorandum from the applicant's record. His request for removal of the Page 7 is denied based on its untimeliness and lack of apparent merit. His request for removal of his non-selection in 2015 or an SSB should be denied because the absence of the CG-4082s in 2015 did not render his record incomplete for the purposes of the selection board under Coast Guard policy and because the applicant failed to check his EIPDR and exercise due diligence in 2015 to try to ensure that the CG-4082s were entered in his record. Because the Board finds no grounds for removing either his 2015 or 2016 non-selection, as he requested, or for directing the Coast Guard to convene an SSB, the applicant's request to be reinstated in the Reserve should also be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of former [REDACTED], USCGR, for correction of his military record is granted in part: The Coast Guard shall remove from his records the memorandum dated June 18, 2009, stating that he would be discharged from the Reserve on June 30, 2009. No other relief is granted.

September 29, 2017

