

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-163

██████████
██████████ LT (former)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on July 9, 2018, and prepared the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated August 23, 2019, 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, a former lieutenant in the Coast Guard Reserve who was honorably discharged on June 30, 2017, asked the Board to correct his record by removing a Page 7 (CG-3307) and giving him a “second look at promotion,” which the Board interprets as a request to convene a Special Selection Board to determine whether he would have been promoted had it been correct when it was reviewed by the selection board. The applicant alleged that “[d]ata was improperly submitted into [his] record giving [him] a disadvantage before the board. Also, [he] received a page seven (7) for not submitting an e-resume – others did the same and did not receive.” The applicant submitted no other information or evidence with his application form. The applicant alleged that he discovered the errors in his record on May 1, 2017.

SUMMARY OF THE RECORD

The applicant graduated from Officer Candidate School and was appointed an ensign in the Reserve on September 2, 2005. He was assigned to the Selected Reserve and drilled regularly at a support unit and received an OER dated March 31, 2006, with primarily good marks of 4 and 5 (out of 7) in the performance dimensions. He was promoted to lieutenant junior grade on February 19, 2007.¹ On his second OER, dated July 31, 2007, the applicant received primarily high marks of 5 and 6.

¹ Article 10.A.3. of the Personnel Manual then in effect, COMDTINST M1000.6A, states that Reserve ensigns normally receive annual OERs on March 31st each year; lieutenants junior grade normally receive annual OERs on

On October 1, 2007, the applicant was transferred to a major command, where he served on active duty for a year as an activities coordinator supporting foreign militaries and economies. On his first OER at this assignment, dated January 31, 2008, the applicant received primarily marks of 5 in the performance dimensions, a mark in the fourth (middle) spot on the officer comparison scale, and a strong recommendation for promotion “with peers.” His next OER, dated June 30, 2008, was very similar. The applicant was selected for promotion to lieutenant in September 2008.

In November 2008, the applicant was released from active duty and on his third OER as the activities coordinator, dated November 30, 2008, he received primarily marks of 4 and two lower marks of 3 in the performance dimensions and a low mark in the third spot on the comparison scale. The comments are sparse, and his supervisor noted that the applicant had not provided any input for the OER. The applicant had recently been selected for promotion to lieutenant, and his reporting officer wrote that he “continue[d] to show potential,” had “strong analytical skills,” and was a “good candidate for think tank.”

After his release from active duty, the applicant was reassigned to the unit’s command center to serve as an operations/watch officer. He drilled regularly and was promoted to lieutenant on August 19, 2009. He was called up for active duty for six months from January 23 to July 25, 2010, to assist in disaster relief, and he received a Joint Service Commendation Medal on March 13, 2010.

The applicant’s first OER from the command center shows in Block 1, which was completed by the applicant, that it covers his service from December 1, 2008, to May 31, 2010, and that he did not initiate and submit his input for this OER until April 11, 2011. The applicant received very high marks of 6 and 7 for his performance of operational duties on this OER, but marks of 4 and 5 in most of the other dimensions concerning communications, leadership, and personal and professional qualities. He also received a low mark of 3 for “Evaluations,” which is supported by a comment stating that his OER input “was not timely and did not reflect his significant contributions” to a joint task force in 2009. The OER contains comments about his service in several high-visibility positions assisting flag officers, as well as his work in response to the earthquake in Haiti and other natural disasters. His reporting officer assigned him a mark in the fourth spot on the comparison scale and commented that the applicant was “[p]rogressing to recommendation for promotion with peers.” The OER includes the citation and certificate for the Joint Service Commendation Medal as an attachment.

On June 10, 2011, the disputed, “General” Page 7 was entered in the applicant’s record. It references ALCGRSV 046/10 and states the following:

Every mid-level Officer should know that tracking one’s expected transfer date, following guidance for transfer outlined in the Reference, submitting an e-Resume, and communicating with the assignment officer is their responsibility.

July 31st each year, and lieutenants normally receive biennial OERs on May 31st every other year. However, other events, such as the officer’s transfer or release from extended active duty, a change in the officer’s reporting officer, or being a candidate for promotion, may also trigger OERs if one has not recently been completed.

[The applicant] should have rotated from [his Reserve unit] on 30 September 2010 but did not submit an e-Resume for that assignment year, thereby not participating in assignment year 2010, and he remained at [the unit].

The following year, he did not complete and submit an e-Resume on 30 Nov 2010 as directed in the Reference for assignment year 2011. In Jan 2011, the Commanding Officer advised [the applicant] of the need to submit an e-Resume or face the potential of being placed in the IRR [Individual Ready Reserve (unpaid)]. He reiterated this direction on 6 Apr 2011, with a follow up e-mail on 7 Apr 2011. Subsequently, the Executive Officer, his Department Head, and the Administration Officer all articulated the need to complete an e-Resume for assignment. His Department Head and the Administration Officer spent approximately 2 hours discussing career options and the process for completing an e-Resume during the [regional] all hands held the weekend of 16 April.

[The applicant] has been repeatedly counseled to submit an e-Resume for transfer, finally completing one month late on 2 June 2011, and has been advised that a late e-Resume and improper career management has adverse career consequences.

A signed note below this text states that the applicant refused to acknowledge receipt of the Page 7 with his signature.

On his next OER as an Operations Officer, dated October 16, 2011, the applicant received high marks of 6 and 7 for his performance of duties; marks of 5 and 6 for his communications skills; mostly marks of 4 for his leadership skills, as well as “Judgment” and “Responsibility”; and the highest possible mark of 7 for “Professional Presence.” His reporting officer recommended that the applicant “diversify his skill set” and recommended him for promotion “with peers.”

On October 17, 2011, the applicant was transferred to another unit, where he supervised two petty officers and chief petty officer, was “[r]esponsible for the performance of the watch,” and coordinated responses to incidents and events. On his first OER at this assignment, dated May 31, 2012, the applicant received primarily marks of 5 and 6 in the performance dimensions; a mark in the fifth spot on the comparison scale, denoting an “excellent performer”; and a recommendation that he be promoted “with best of peers.” But on his next OER, dated May 31, 2014, the applicant received primarily marks of 4 in the performance dimensions and another mark in the fourth spot on the comparison scale. Nevertheless, he was “[h]ighly recommended for promotion with peers.”

On October 31, 2014, the applicant reported for duty to another unit. His OER dated May 31, 2015, contains primarily marks of 4 in the performance dimensions and another mark in the fourth spot on the comparison scale, as well as a recommendation for promotion “with peers.” The applicant was not selected for promotion in 2015, however.

From October 1, 2015, to May 31, 2016, the applicant served on active duty for another six months. On his OER dated May 31, 2016, he received primarily marks of 5 in the performance dimensions, a mark in the fifth spot on the comparison scale, and a comment that he was “[h]ighly recommended for promotion.” But the applicant was not selected for promotion in 2016.

On November 3, 2016, the applicant received a memorandum informing him that because he had not been selected for promotion to lieutenant commander by two selection boards, he would be discharged from the Coast Guard Reserve on June 30, 2017.

VIEWS OF THE COAST GUARD

On November 13, 2018, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC stated that the applicant provided no evidence to support his allegation that the Page 7 was unjust or that improperly entered data in his record disadvantaged him before the selection boards. Therefore, PSC recommended that no relief be granted.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 5, 2019, the applicant responded to the views of the Coast Guard. He claimed that when his record was reviewed by the selection board in 2015, an OER covering the period October 30, 2008, to June 30, 2009, was missing from his record and it contained a birth certificate for someone who is not related to him. The applicant claimed that even though he reported the missing OER to PSC, it was still missing when the selection board convened in 2016.

The applicant alleged that the OER in his record dated November 30, 2008, erroneously overlaps with the missing OER, as does the OER dated May 31, 2010. He also complained that his "marks fluctuated widely" even though his duties did not change. He noted that he received a medal in March 2010 and claimed that his "CG chain-of-command at the time was reprimanded, investigated, and forced to retire. I assumed those marks were in retaliation."

Regarding the disputed Page 7, the applicant alleged that he had actually been directed to remain in his billet at the same command in a telephone call, and "[t]his was passed to my current supervisor. The incoming supervisor did not agree. I was given a [Page 7]." He alleged that his most recent detailer (Assignment Officer) told him that a Page 7 is "unbecoming as it is a well known issue among CG members that no e-resume will result in a non-transfer of choice, but not a reprimand." He noted that the ALCGRSV that required submission of e-Resumes did not state that a consequence of not submitting one could be receipt of a Page 7.

The applicant stated that his OERs "show that I have succeeded at positions of great responsibility as a Junior Officer," as well as in arduous assignments. "Had it not been for the errors and inaction of others, my record would indicate the same. I would also request relief that effect be promotion to O4 with backpay."

In support of these allegations, the applicant submitted the following evidence:

1. The first piece of evidence is a printed copy of the applicant's personal data record, which he dated December 10, 2015. He alleged that this was the record that the selection board reviewed in 2015. This copy contains his OERs through 2015 but does not contain an OER dated June 30, 2009. It contains several birth certificates, and he alleged that one of them is for someone he is not related to.

2. The second is a printed copy of the applicant's personal data record, which he dated September 14, 2016. It contains his OERs through 2016 but does not contain an OER dated June 30, 2009. It does not contain one of the birth certificates that is in the 2015 record.
3. The applicant submitted a signed but un-validated copy of an OER that documents his service as a lieutenant junior grade and watch officer at the command center from October 30, 2008, to June 30, 2009. The occasion for the OER is noted to be "detachment/change of reporting officer." The OER is signed by a single officer—the XO of the applicant's Reserve unit—as both supervisor and reporting officer,² and this officer's signature does not appear on either the applicant's 2008 or 2010 OERs. The OER contains primarily marks of 5 in the performance dimensions (some higher and some lower than those on his OER dated May 31, 2010); comments about his performance as a watch officer at the command center and his assistance and reports to many flag officers; another a mark in the fourth (middle) spot on the comparison scale; and a comment that he was "[s]trongly recommended for promotion with peers."
4. The applicant submitted an email that he sent to himself on November 2, 2013, with no text but an attached message from the Reserve Junior Officer Detailer attached. The attached message contains only the detailer's signature block.
5. In an email November 12, 2009, the detailer invited the applicant and others to participate in "our first webinar, which is scheduled for Saturday, 21 November 2009, from 1300-1500 Eastern Standard Time," which would "provide an overview of the PSC-rpm [Reserve Personnel Management Branch] staffs and functions; introduce the staff of the Reserve Assignments Branch (PSC-rpm-2); explain the assignment process and how assignments are made; and discuss the AY10 assignment season." The detailer attached the agenda, ALCGRSV 046-09 (see below), ALCGRSV 052-09 (which concerns enlisted assignments), and instructions on joining the webinar.
6. ALCGRSV 046/09, a bulletin issued on September 24, 2009, announces the "kickoff" of the Reserve officer assignment season for 2010. It lists eight prior bulletins and instructions as references and states that "shopping lists" of Reserve billets that would become vacant in 2010 would be electronically available by October 19, 2009. It states that any Reserve officer desiring a billet in the Selected Reserve "shall compete for a position through the AY10 assignment process." Regarding e-Resumes, paragraph 4 of the bulletin states that an e-Resume is how a Reserve officer informs the detailer of his career intentions and desires; that failing to submit one might result in losing the chance to have their desires considered by the detailer; and that any officer who wants to extend his tour of duty must submit a command endorsement with their request. It notes the detailers would try to assign officers to billets within a reasonable commuting distance from home but that if none was available, a Reserve officer could voluntarily accept a billet outside of the area in order to remain in the Selected Reserve. It instructs members how to find the Assignment Guides online, which "demystify the assignment process, describe rules of engagement, provide information to manage expectations, and serve as a counselling tool for Reserve officers." Paragraph 9 of the bulletin states that Reserve

² According to Article 10.A.2.e. of the Personnel Manual then in effect, only the following officers may serve as both supervisor and reporting officer on an OER: (1) any Commanding Officer; (2) at Coast Guard Headquarters: Assistant Commandants, Deputy Directors, and Office and Division Chiefs; and (3) at the Pacific and Atlantic Area Commands, Pacific and Atlantic Maintenance and Logistics Commands, Coast Guard Districts, and all Headquarters units: Deputy Commanders, Executive Officers, Chiefs of Staff, Staff Chiefs, and Division and Branch Chiefs. No Reserve units are mentioned, and any exceptions to the rule for require the approval of Commander, CGPC-opm or -rpm.

junior officers seeking a Selected Reserve billet “shall submit e-Resumes IAW Para 4.” Paragraph 10 states that counseling would be available from November 17, 2009, to January 6, 2010, and that the deadline for Reserve junior officers to submit their e-Resumes is January 6, 2010.

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.³
3. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.⁴ The applicant claimed that he discovered the errors in his record—the Page 7 and the missing OER—on May 1, 2017, but the record proves that this claim is not accurate. The record shows that the applicant received the Page 7 in 2011 but refused to sign it. The record also shows that the applicant was aware that the disputed June 30, 2019, OER was not in his record no later than April 2011, when he initiated his May 31, 2010, OER by completing Block 1, “Administrative Data,” including the period of the report from December 1, 2008, to May 31, 2010. Therefore, the Board finds that his requests to remove the Page 7 and to enter the June 30, 2009, OER in his record are untimely. The applicant should have submitted his application regarding these documents within three years of his discovery of the errors in 2011, not including time spent on active duty.⁵
4. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.⁶ 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”⁷ to determine whether the interest of justice supports a waiver of the statute of limitations. The court 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.”⁸
5. The applicant did not justify his long delay in filing an application to seek removal of the Page 7 and entry of the 2009 OER in his record.

³ *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).

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

⁵ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers’ and Sailors’ Civil Relief Act of 1940, the BCMR’s three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member’s active duty).

⁶ 10 U.S.C. § 1552(b).

⁷ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁸ *Id.* at 164, 165; see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

6. The Board's cursory review of the merits of this case indicates that the applicant's claims lack potential merit:

a. The Page 7 states that the applicant failed to submit an e-Resume to the detailer for many months to facilitate his transfer to another unit despite the requirement in ALCGRSV 046/09 and multiple explicit directions from his chain of command to do so. This Page 7 is presumptively correct⁹ and the applicant has not submitted anything to prove that he submitted an e-Resume more promptly in response to his command's directions. The fact that ALCGRSV 046/09 does not mention that a member may be counseled on a Page 7 for persistently disobeying directions from one's chain of command to submit an e-Resume does not make the Page 7 erroneous or unjust.

b. The disputed OER dated June 30, 2009, was signed by the Executive Officer of the applicant's Reserve unit as both supervisor and reporting officer, which was impermissible under Article 10.A.2.e. of the Personnel Manual then in effect. Moreover, the entire period covered by the disputed OER is covered by two other OERs in his record. The OERs in his record are presumptively correct,¹⁰ and the applicant has not submitted sufficient evidence to overcome that presumption.

7. Because the applicant's claims regarding the Page 7 and June 30, 2009, OER lack potential merit, the Board will not excuse the application's untimeliness or waive the statute of limitations to conduct a thorough review of the merits. The applicant's requests to remove the Page 7 from his record and enter the OER in his record should be denied.

8. The applicant also claimed that his non-selections for promotion were erroneous and unjust not only because of the Page 7 and OER but also because "[d]ata was improperly submitted into [his] record giving [him] a disadvantage before the board." Although the applicant did not explain that part of the disputed "data" was the birth certificate of someone who was not related to him until he responded to the Coast Guard's advisory opinion in January 2019, the Board considers this request timely because he apparently discovered the extraneous birth certificate when he reviewed his record in December 2015 and he filed his BCMR application within three years of that discovery. But while the applicant alleged that the 2015 selection board saw the extraneous birth certificate and was prejudiced by it, not all parts of an officer's record are shown to selection boards. COMDTINST 1410.2 states that selection boards may only view record entries "dealing with performance as an officer," including OERs. The only exceptions are for officers' personal communications to selection boards and Reserve officers' resumes. All other documents and information are masked from view, including demographic information, family data, and medical data. More specifically, birth certificates are not on the list of documents that selection boards are allowed to see in Enclosure (1) to COMDTINST 1410.2. Because the preponderance of the evidence shows that any and all birth certificates in the candidates' records were masked from view by the selection boards, the apparent presence of an extraneous birth certificate in the applicant's

⁹ 33 C.F.R. § 52.24(b); see *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

¹⁰ 33 C.F.R. § 52.24(b).

PDR in 2015 is not grounds for convening a Special Selection Board,¹¹ promoting the applicant, or reversing the separation that resulted from the selection boards' decisions.

9. The applicant has not proven by a preponderance of the evidence that his record, as reviewed by the selection boards in 2015 and 2016, contained any erroneous or unjust information. Therefore, his requests for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹¹ 14 U.S.C. § 2120 (requiring the Coast Guard to convene a Special Selection Board when an action of the selection board “involved a material error of fact” or the when the selection board “did not have before it for consideration material information”).

ORDER

The application of former LT [REDACTED], USCGR, for correction of his military record is denied.

August 23, 2019

