

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 2000-109

FINAL DECISION

[REDACTED]

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on April 4, 2000, upon the Board's receipt of the applicant's complete application for correction of his military record.

This final decision, dated February 8, 2001, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a Commander (CDR) on active duty in the Coast Guard, requested that the Board remove his failure of selection for promotion to captain before the 1999 captain selection board and give him two additional opportunities before the captain promotion board. He further requested that if he is selected by the first selection board to consider him based on a corrected record, his date of rank, once promoted, be adjusted to the date he would have received if he had been selected for promotion by the 1999 captain selection board, with back pay and allowances.

EXCERPTS FROM RECORD AND SUBMISSIONS

The applicant alleged that his record was not complete when it was considered by the 1999 captain selection board. He asserted that the Coast Guard Achievement Medal and accompanying citation awarded to him on April 25, 1997 were not in his record at that time. He stated that "[t]he USCG Medals and Awards Manual (COMDTINST M1650.25B) requires the award issuing authority to forward a copy of each approved award to [Commandant] (G-WPM-3)." He further stated that the Medals and Awards Manual requires G-WPM-3 to forward the award to the Coast Guard Personnel Command for inclusion in the service member's record. (After applying to the Board, the applicant failed to be selected, a second time, for promotion to captain by the 2000 captain selection board, which met in July 2000. The Coast Guard Achievement Award was in his record at the time the 2000 selection board met.)

The applicant stated that he discovered that the award was not included in his record after his failure to be selected for promotion by the 1999 captain selection board, by contacting the Coast Guard Personnel Command. The award has since been placed in the applicant's record.

The applicant acknowledged "that one award does not, of itself, guarantee selection, given the highly competitive nature of promotion boards. However, this award did highlight [his] more significant accomplishments during his tour at MSO [REDACTED], including the development of several programs that were adopted throughout the [REDACTED], and may have swayed a border line decision in [his] favor . . ."

The Coast Guard Achievement Medal covers the period from August 1994 through April 1997. It was given to the applicant on April 25, 1997. It cited the applicant for the following:

[S]uperior performance of duty while serving as Chief, Vessel Compliance Department . . . from August 1994 to April 1997. During this period [the applicant] demonstrated outstanding leadership and marine safety expertise as he supervised over 2300 flag state inspections, 700 uninspected vessel examinations, 500 port state control boardings and 35 port state control inventions. Under his stewardship the Vessel Compliance Department successfully completed many extensive and high profile inspection projects including the [REDACTED], the [REDACTED] and the first inspection for certification and new vessel certification under the [REDACTED]

[The applicant] supervised the development of an uninspected passenger vessel examination program, a commercial tug boarding program, and a ballast water discharge standard operating procedure to prevent nonindigenous species in the environmentally sensitive [REDACTED]; these marine safety program improvements were adopted throughout the [REDACTED]. His efforts also resulted in Marine Safety Office [REDACTED] becoming the leader in the District's uninspected vessel safety program. [The applicant's] diligence, perseverance, and devotion to duty are most heartily commended and are in keeping with the highest traditions of the United States Coast Guard.

Applicant's CDR Record

The applicant's CDR performance marks consist mostly of 6s (on a scale of 1 to 7, with 7 being the highest) with some 5s and an occasional 4. In the last two CDR OERs he received several marks of 7. His comparison scale (block 12)¹ marks for the CDR OERs are 5, 5, 5, 6, 6, and 6. The applicant held the following assignments: Chief, Inspection Department of a Marine Safety Office; Chief, Vessel Compliance Department; and Executive Officer/Alternate; Officer in Charge, Marine Inspection at an Activities/Marine Inspection Office.

¹ This is the block where the reporting officer compares the reported-on officer with other officers of the same grade whom he has known in his career.

Three of the applicant's CDR OERs coincide with the period covered by the Coast Guard Achievement Medal. These OERs are very complimentary. Some of the pertinent comments from these OERs are discussed below.

The OER for the period June 25, 1994 to March 31, 1995 contains the following pertinent comment: "[a] nationally recognized expert in marine inspection policy & commercial vessel technical issues, i.e., [REDACTED]. Managed high visibility [REDACTED] one of two US [REDACTED] major [REDACTED] rehab project thru to completion despite significant obstacles; . . . most successful fishing vessel safety program in [REDACTED]. . . ."

The OER for the period April 1, 1995 to March 31, 1996 contains the following pertinent comments: "[Kept abreast of significant projects, resolved all issues up front, inspections completed smoothly & on time; notable on unique sealift reflag/conversion & 1st dry-dock/cert. . . . [C]reated synergistic marine inspector utilization, increased expertise, exceeded COMDT stds for marine inspectors on foreign vsl exams. . . . Resp'd positively to unit needs, offered marine inspectors for projects; notably [REDACTED] oil spill clean up. . . . Truly one of CG's experts, extremely knowledgeable of all policies & inspected vessel technical safety issues."

The OER for the period April 1, 1996 to March 31, 1997 comments that the applicant is "well in front on CG's uninspected vsl exam program, unit best in [REDACTED], crafted [REDACTED] uninspected passenger vsl guidance, developed additional resource through aggressive training Ingeniously managed resources Processing of inspection casework in Marine Safety Information System . . . best in [REDACTED]. . . ."

The applicant's block 12 marks on his LCDR OERs are 5, 5, 6, 5, 5.5, 6, 6, and 5. His performance marks consist mostly of 5s and 6s with an occasional 4 and the tone of these OERs was complimentary.

Views of the Coast Guard.

On November 22, 2000, the Board received an advisory opinion from the Chief Counsel of the Coast Guard. He recommended that the Board deny relief to the applicant.

The Chief Counsel stated that Article 1-A-19 the Coast Guard Medals and Awards Manual, COMDTINST M1650.25B, places the ultimate responsibility on the applicant for ensuring that an award has been entered into the PMIS/JUMPS (Personnel Management Information System/Joint Uniform Military Pay System). The Chief Counsel further stated that

While it appear[ed] Applicant's Achievement Medal citation was not forwarded by his unit to CG Headquarters for inclusion in his PDR [personal data record] during the summer of 1997, the burden ultimately shifted to Applicant to ensure the completeness of his PDR during the two year period between the date his award was presented and the July 1999 convening date of the PY00 [1999] Captain Promotion Board. A phone call or e-mail from Applicant to CPGPC-adm requesting a electronic copy

of his PDR prior to the convening date of the promotion board would have revealed the absence of the award citation. Applicant failed to exercise even this limited due diligence and cannot now point to the Coast Guard as the party entirely responsible for [the] absence [of the achievement medal].

The Chief Counsel stated that even if the award had been included in the applicant's record when it was considered by the 1999 captain selection board, it is unlikely that the applicant would have been selected for promotion. In this regard, the Chief Counsel stated the following:

Applicant has not met his burden to establish a nexus between the alleged error and his non-selection to O-6. Applicant was not selected by the recently completed PY'01 [2000] Captain Selection Board that reviewed a 'complete' PDR containing his Achievement Medal citation. . . . [T]he decision by the PY'01 [captain selection board] to pass Applicant over for promotion with the citation in his PDR is strong evidence that no nexus existed between the missing award citation and his non-selection before the PY'00 Promotion Board.

Moreover, even if Applicant were to prove that the Achievement Medal citation was absent from his record due to an error or injustice, he is not entitled to relief from a non-selection if it is unlikely that he would have been selected in any event. The initial burden of producing prima facie proof of such a nexus is upon Applicant. Engels v. United States, 230 Ct. Cl. 464, 470 (1982). There is no such proof in the record.

The Chief Counsel stated that the applicant's military record shows good performance, and in his opinion the Achievement Medal would not have made it any stronger. The Chief Counsel further stated as follows:

[T]he performance discussed in the achievement medal citation is also discussed in Applicant's OERs, and thus is largely cumulative with the information that was before the promotion boards. Because of the numerous controls in the Officer Evaluation System regarding preparation of OER's that has no counterpart in the awards system OERs, are far more reliable than award citations as documentation of performance and as a basis for comparing the promotion potential of eligible officers. The performance in question was correctly reflected in Applicant's OERs. Therefore, in view of Applicant's non-selection before the PY'01 Captain Promotion Board with a 'complete record, it is highly unlikely that inclusion of the award citation in Applicant's record prior to July 1999 would have changed the result of the PY'00 promotion board.

The Chief Counsel submitted a memorandum from the Commander of the Coast Guard Personnel Command (CGPC) along with his comments. He stated that the award was not in the applicant's record when it was considered by the captain selection board in 1999. According to the Personnel Manual, the award could have been

attached to the appropriate OERs, if it had been submitted by the applicant for attachment to the OER.

The CGPC stated that the Coast Guard Achievement Medal ranks last among personal awards. Listed in the order of precedence, the personal awards are: the Legion of Merit; the Meritorious Service Medal; the Commendation Medal; and the Achievement Medal. CGPC stated that the applicant had two years from receipt of the award in 1997 until the convening of the selection board in 1999 to review and correct his record. He stated that officers are routinely reminded to check their records for completeness prior to appearing before a board. CGPC compared this case with that in BCMR No. 1999-183, wherein the Board removed that applicant's failure of selection because he had recently received the Meritorious Service Medal (a higher award than the Achievement Award) that had not been included in his military record. CGPC stated that unlike the applicant in BCMR 1999-183, the applicant in this case had two years between the time he received the award and the convening of the 1999 selection board to determine whether the Achievement Award had been included in his record.

With respect to a nexus between the applicant's incomplete record (absence of award) and his failures of selection, CGPC stated the following:

Captain selection boards are required to review at least the seven most recent years of a member's record. Applicant's record of performance during his tour of duty at Marine Safety Office [REDACTED] falls within that seven year period. His performance over the course of his career is good, and he would classify as a solid performer. There is no obvious reason for his non-selection other than the extremely high level of competition for promotion with a stated opportunity of selection of only 66 percent. The Coast Guard Achievement Medal that applicant earned was not in his record, and the [selection] board may have wondered why the member did not receive an end-of-tour award. However, it is not Coast Guard policy or unilateral practice that each departing officer should receive an award. In the case presented, considering Applicant's position and the level of award he received, it is unlikely that the presence of that award in his record would have materially aided his opportunity for selection. Although any award serves as positive recognition, the issue is whether this particular award would have materially enhanced applicant's record. It is the Coast Guard's position that the award in question would not have made the difference between selection and non selection.

Applicant's Response to the Views of the Coast Guard

On November 27, 2000, a copy of the views of the Coast Guard was mailed to the applicant inviting him to submit a response. He did not respond to the advisory opinion.

APPLICABLE REGULATIONS AND PRECEDENT

Medals and Awards Manual

Article 1-A-19 of the Medals and Awards Manual states, in pertinent, as follows:

a. Headquarters. Commandant . . . is responsible for publishing this manual and establishing procedures relative to issuance of medals and awards. Awarding authorities at each level of the organization shall forward one copy of each award citation, with the service member's SSN typed or neatly written in the upper right corner of the citation, to G-PMP-4/ The award will subsequently be forwarded to Commander (MPC-s-3) for active duty members . . . or Commandant (G-RSM-3) for reserve members.

c. Servicing PERSRU. PERSRU's must submit PMIS/JUMPS transactions to record any award earned by Coast Guard and Coast Guard Reserve members (officer and enlisted). These transactions will only be submitted on personnel which the PERSRU is responsible for PDR maintenance. Copies of citations received for other service members will be forwarded to the appropriate servicing PERSRU for action.

Member. Ultimately, the service member is responsible for ensuring the accuracy of PMIS/JUMPS award data. All service members should be encouraged to retain copies of all award citations and/or appropriate documentation in their personal files, to substantiate any future contentions.

Board Precedent

In Docket No. 116-97, a similar case, the Deputy General Counsel approved the minority opinion granting the applicant's request for the removal of his two failures of selection for promotion to LCDR.

In that case, a Coast Guard Achievement Medal was not included in the applicant's record when it was considered by the selections boards. Prior to the convening of those selection boards, the applicant, in BCMR 116-97, had inquired about his record and was told that the Medal was in his record, when in fact it was not.

The Deputy General Counsel found that the applicant had made a prima facie showing of a causal connection between the error and his failures of selection for promotion to LCDR. The Deputy found that the Coast Guard failed to carry its "end burden of persuasion . . . to show harmlessness."

In reaching the above conclusions, the Deputy General Counsel found that the applicant's OERs failed to mention the Coast Guard Achievement Medal, did not

mention certain of his accomplishments that were noted in the award citation, and fell short of the laudatory tone that appeared in the award citation. She further determined that the applicant had been prejudiced by the absence of the Medal from his record, since the inclusion of the award would have "[stood] in stark contrast to [a negative] comment appearing in one of the applicant's early OERs. Last, the Deputy General Counsel found that while the Coast Guard asserted that the error was harmless, it failed to supply the Board with any facts, statistics, or other hard evidence to support this contention.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's record and submissions, the Coast Guard's submission, and applicable law:

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10, United States Code. The application was timely.

2. The Coast Guard concedes that the Coast Guard Achievement Medal was not in the applicant's record when it was considered by the 1999 captain selection board. The Achievement Medal was added to the applicant's record prior to its consideration by the 2000 captain selection board. The applicant was not selected for promotion by that board.

3. Both the applicant and the Coast Guard had a responsibility for ensuring that the Achievement Medal was placed in the applicant's record. Unlike, the applicant in Docket No. 116-97, the applicant in this case has not indicated that he made any effort to ensure that his record was complete before it was considered by the 1999 captain selection board. The Board finds that any error that exists here can be partially attributed to the applicant. While the Board believes that the applicant's failure in not checking his record prior to the convening of the 1999 captain selection board is sufficient to defeat his application, it will not rest its decision on this basis alone, but on the additional finding that it is unlikely that the applicant would have been chosen for selection for promotion, even if the achievement medal had been included in his record.

4. Establishing an error is not enough to cause the applicant's failures of selection to be removed. The applicant must establish a nexus between the error and his failures of selection for promotion to captain. In resolving the nexus issue, the Board applies the test in Engels v. United States, 230 Ct. Cl. 465 (1982). This test consists of two "separate but interrelated standards" to determine the issue of nexus. The standards are as follows: "First, was the claimant's record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that he would have been promoted in any event?" Engels at 470.

5. The Board finds that the applicant's record appears only marginally better with the achievement medal in the record. While the award itself is missing from the record, the accomplishments described in the citation are discussed in the OERs that cover the period for which the award was given. The applicant has not asserted any other error in his record and the Board is not aware of any. Even with the marginal

increase in the appearance of his record by the addition of the Coast Guard Achievement Medal, the Board finds that it is unlikely that the applicant would have been promoted in any event.

First as discussed below, the selection board was aware of the accomplishments described in the Award citation because they were described in the applicant's OERs. For instance:

a. Both the Achievement Medal citation and the three pertinent OERs comment on the applicant's marine safety expertise. One OER calls his fishing vessel safety program the best in District [redacted]. One states that the applicant is "[t]ruly one of the CG's experts, extremely knowledgeable of all policies & inspected vessel technical safety issues." A third OER states that the "applicant's "Marine Safety Information System . . . best in D [redacted]"

b. The citation mentions the applicant's successful completion of the [redacted], as does the OER for the period June 25, 1994 to March 31, 1995.

c. The citation states that the applicant "supervised the development of an uninspected passenger vessel examination program, a commercial tug boarding program, and a ballast water discharge standard operating procedure to preventing nonindigenous species in the environmentally sensitive [redacted]. The OER for the period April 1, 1996 to March 31, 1997 states that the applicant is "well in front of CG's uninspected vsl exam program, unit best in D [redacted], crafted D [redacted] uninspected passenger vsl guidance, developed additional resource through aggressive training. . . ." The "sealift conversion and the first inspection for certification and new vessel certification" is also mentioned in the OER for the period April 1, 1995 to March 31, 1996.

d. The citation states that the applicant's office was the leader in the District's uninspected vessel safety program. The fact that the applicant's program is the best in District [redacted] is specifically mentioned in two of the three pertinent OERs.

Second, except for the Coast Guard Achievement Award, the applicant had a complete record before the 1999 captain selection board and his OERs were very complimentary in tone. CGPC stated that it could find no reason for the applicant's failure of selection for promotion to captain except for the "extremely high level of competition for promotion with a stated opportunity of selection of only 66 percent." CPGC further noted the applicant's good record and solid performance. The applicant offered no evidence to rebut this conclusion.

7. Therefore, the Board finds it unlikely that the applicant would have been promoted even if the Achievement Medal had been included in his record. The Board's finding is reinforced by the applicant's failure to be selected for captain by the 2000 captain selection board with the Achievement Medal in his record.

8. The applicant has failed to show the required nexus between the absence of the Coast Guard Achievement Medal from his record in 1999 and his failure of selection for promotion to captain by that selection board. For this reason, as well as the

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applicant's failure to review his record prior to the convening of the 1999 selection board, the Board finds that relief should be denied.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of CDR .
his military record is denied.

i, for correction of

