

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-174

██████████
██████████

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receiving the applicant's completed application on June 20, 2012, and assigned it to staff member ██████████ to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 11, 2013, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

BACKGROUND

In February 2012, the applicant asked the Personnel Records Review Board (PRRB) of the Coast Guard to expunge his officer evaluation report (OER) for the year ending March 30, 2011; to remove his non-selection for promotion to captain in 2011; and, if selected for promotion to captain thereafter, to back date his date of rank to what it would have been had he been selected for promotion in 2011 and to award him corresponding back pay and allowances. The applicant also asked that his record be reviewed by a Consolidated Major Command Screening Panel if he were selected for promotion.

The applicant alleged several errors and injustices in the disputed OER. Most significantly, he alleged that the supervisor who prepared the OER, who was junior to him by four years, "took reprisal for what he perceived as disloyal conduct while [the applicant] was temporarily detailed to another unit which reported on his Office's substandard performance." The applicant noted that in comparison with his prior OER from the same office, the supervisor had lowered many of his marks from high marks of 7 and 6 to marks of 5 and that because he had been assigned to the other office and to training during the reporting period, the supervisor had observed his performance for only 72 days in the period. The applicant noted that on the concurrent OER for most of the same period, which he received for his performance in a temporary assignment to the xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, eleven of his eighteen numerical marks had been 7s—the highest possible marks; the other seven had been marks of 6; and he had been described as an "exceptional performer" who was "already performing at the O-6 level." In

addition, his rating chain had temporarily “lost” the Commendation Medal he received for his work at the xxxxxxxx and omitted it from the disputed OER.

In its decision the PRRB found that the applicant’s rating chain had failed to fully perform their duties in preparing the disputed OER even though they had strongly supported the accuracy of the OER in sworn declarations. Specifically, the PRRB found that the supervisor had failed to properly document the applicant’s long-term temporary duty assignment to the XXXX in the list of duties in block 2 of the OER and that a couple of the numerical marks—for the performance dimensions Workplace Climate and Health & Well-Being—appeared to have been arbitrarily lowered (from those assigned in the previous OER) from 6s to 5s even though the supporting comments for those performance dimensions were the same as in his previous OER. The PRRB recommended that the OER be corrected to reflect his assignment to the XXXX from May 5 to September 30, 2010, in block 2 and by raising the numerical marks for Workplace Climate and Health & Well-Being from 5s to 6s. The PRRB noted that much of the relief the applicant requested is beyond its jurisdiction and can only be granted by the BCMR: removing the applicant’s non-selection in 2011; backdating of his date of rank and awarding him back pay if he is selected; and ordering consideration by the Consolidated Major Command Screening Panel if he is selected for promotion.

The PRRB’s recommendation was approved by Commander, PSC, and forwarded to the applicant on June 4, 2012. Although the disputed OER was corrected on June 21, 2012, before the applicant’s record was reviewed by the captain selection board in July 2012, he was not selected for promotion. Therefore, he is subject to mandatory retirement on July 1, 2013.¹

APPLICANT’S REQUEST AND ALLEGATIONS

The applicant asked the Board to grant the relief that was not within the jurisdiction of the PRRB to grant: remove the applicant’s non-selection for promotion in 2011; backdate his date of rank and award him back pay if he is selected; and order consideration by the Consolidated Major Command Screening Panel if he is selected for promotion. The applicant argued that the errors in the disputed OER caused his non-selection for promotion in 2011 and so delayed his promotion and prevented his consideration by the screening panel.

VIEWS OF THE COAST GUARD

On January 3, 2013, 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 as recommended in a memorandum on the case prepared by the Personnel Service Center (PSC). He noted that because the applicant has been twice non-selected for promotion to captain, he will

¹ 14 U.S.C. § 285(a) states that “[e]ach officer of the Regular Coast Guard serving in the grade of lieutenant commander or commander, who has failed of selection for promotion to the grade of commander or captain, respectively, for the second time shall: (1) if he has completed at least 20 years of active service or is eligible for retirement under any law on June 30 of the promotion year in which his second failure of selection occurs, be retired on that date;”

be mandatorily retired on July 1, 2013, unless the Board grants relief by removing one of his non-selections before that date.

PSC stated that the corrections made to the disputed OER in June 2012 were to the applicant's benefit and were not seen by the captain selection board that convened in July 2011. However, the corrections were made before the selection board convened in July 2012. The applicant was not selected for promotion by either board.

PSC stated that because there are no notable failures in performance or conduct in the applicant's record which would have made the applicant's selection in July 2011 unlikely even if the corrections to the disputed OER had been made before that selection board convened, his non-selection in July 2011 by the promotion year (PY) 2012 captain selection board should be removed from his record. However, the corrections were made before the PY 2013 captain selection board convened in July 2012, so that non-selection should count as his first, instead of his second non-selection. PSC recommended granting no relief other than removing the applicant's non-selection for promotion in July 2011 so that only the non-selection in July 2012 would remain in his record.

PSC submitted copies of the messages announcing the results of the PY 2012 and PY 2013 captain selection boards. ALCGPSC 104/11 states that the opportunity for selection by the PY 2012 board, which convened in July 2011, was 56% (70 of 124) for first-time ("in-zone") candidates and 22% (8 of 36) for second-time ("above-zone") candidates. ALCGPSC 107/12 states that the opportunity for selection by the PY 2013 board, which convened in July 2012, was 57% (71 of 124) for in-zone candidates and 10% (3 of 29) for above-zone candidates.

Neither the JAG nor PSC addressed the applicant's other requests for relief other than to state that only the partial relief recommended above should be granted.

RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 30, 2013, the applicant responded to the views of the Coast Guard. He stated that the partial relief recommended by the Coast Guard fails to address the full adverse consequences of the errors in the disputed OER that the PRRB corrected. The applicant alleged that the errors in his record "interrupted [his] promotion timeline" and prevented his "consideration for various Commands, Senior Service Schools and fellowships, advanced education, and related opportunities. It placed me behind my peers; compromised my standing among colleagues in the Armed Services and private sector; and caused considerable anguish for my family." In addition, because he is slated for retirement on July 1, 2013, even though he may not be retired on that date if the Board removes one of his non-selections, he will likely be assigned only to a "placeholder fill at CG Headquarters" instead of being assigned to a tour of duty commensurate with his experience, achievements, and demonstrated abilities. The applicant noted that he has been recommended for accelerated promotion more than a dozen times, including on his latest OER. He submitted a copy of his 2012 OER, which has seven highest possible marks of 7 and eleven marks of 6 for the various performance dimensions; a mark in the fifth spot of seven, denoting an

“exceptional performer,” on the comparison scale; and a mark for “accelerated promotion/in-zone reordering” on the promotion scale.

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 submissions, and applicable law:

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a). The application was timely.

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.²

3. The applicant alleged that the errors in his 2011 OER, which were later corrected by the PRRB, caused his failure of selection in July 2011 and have caused further far-reaching negative consequences for his career. In considering allegations of error and injustice, the Board begins its analysis in every case by presuming that the disputed information in the applicant’s military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.³ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”⁴

4. The record shows that in June 2012, PSC corrected errors that the PRRB had found in the applicant’s 2011 OER by raising two numerical marks and adding information about his duty assignments. In light of these corrections, this Board finds that the applicant has proved by a preponderance of the evidence that his record contained prejudicial errors when it was reviewed by the PY 2012 captain selection board in July 2011. When an applicant proves that his military record contained an error when it was reviewed by a selection board, this Board must determine whether the applicant’s non-selection for promotion should be removed by answering 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?”⁵

² 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).

³ 33 C.F.R. § 52.24(b); see Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the “clear and convincing” evidence standard recommended by the Coast Guard and adopting the “preponderance of the evidence” standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

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

⁵ *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

When an officer shows that his record was prejudiced before a selection board by error, “the end-burden of persuasion falls to the Government to show harmlessness—that, despite the plaintiff’s *prima facie* case,[⁶] there was no substantial nexus or connection” between the prejudicial error and the non-selection for promotion.⁷ To void a non-selection, the Board “need not find that the officer would in fact have actually been promoted in the absence of the error, but merely that promotion was not definitely unlikely or excluded.”⁸

5. The Board agrees with PSC that the errors in the applicant’s 2011 OER were prejudicial and that, given the lack of any notable failure in performance or conduct in the applicant’s record, it is not unlikely that the applicant would have been selected for promotion if those prejudicial errors had not been in his record. While the applicant was not selected for promotion in 2012 even after the errors were corrected, this fact does not prove that his non-selection in 2011 was inevitable because the pool of candidates was different and the selection board members were different. Therefore, because it is not unlikely that the applicant would have been selected in 2011 had his record been correct at the time, the Board finds that his non-selection for promotion in 2011 should be removed from his record pursuant to the *Engels* test.⁹

5. Because the applicant’s record was correct when it was reviewed by the captain selection board in July 2012, there is no basis for removing his non-selection by that board. Therefore, his non-selection in July 2012 should count as his first, and he should be retained on active duty and be considered for selection for promotion again this summer. If selected for promotion this summer, he should be considered for a command assignment by the next duly convened Consolidated Major Command Screening Panel if otherwise eligible, as he requested.

6. Assuming that he will be selected for promotion to captain, the applicant asked the Board to backdate his date of rank¹⁰ to what it would have been had he been selected for promotion in July 2011 and to award him back pay and allowances. He alleged that he would have been selected for promotion in 2011 and promoted but for the errors that the PRRB corrected. If an applicant is selected for promotion by the first selection board to review his record after it has been corrected, the Board normally presumes that he would have been selected for promotion previously but for the error in his record and so backdates the date of rank to what it would have been had the applicant been timely selected.¹¹ In this case, however, even after the errors in his record were corrected, the applicant was not selected for promotion in July 2012 despite the addition of an excellent new OER. Therefore, the Board finds no grounds for

⁶ A “*prima facie* case” is one in which there is sufficient proof to support a finding in the plaintiff’s favor if the evidence to the contrary is disregarded. BLACK’S LAW DICTIONARY, Rev’d 4th ed. (1968), p. 1353.

⁷ *Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003), citing *Engels*, 678 F.2d at 175; *Quinton*, 64 Fed. Cl. at 125.

⁸ *Engels*, 678 F.2d at 175.

⁹ *Id.* at 175-76.

¹⁰ An officer’s date of rank is determined first by his year of selection and then by his seniority on the active duty promotion list. Officers are promoted off the list resulting from a selection board only as vacancies in the higher rank arise, and the list is exhausted before promotions are made from the list resulting from the next year’s selection board. 14 U.S.C. § 271.

¹¹ See, e.g., BCMR Docket Nos. 2011-082, 2011-035, 2010-097, 2007-138, 2007-022, 2005-147, 2005-046, 2004-095, 2002-110, 2000-128, 1998-018.

backdating his date of rank or awarding him back pay and allowances if he is selected for promotion this summer.

7. Accordingly, partial relief should be granted by removing the applicant's non-selection for promotion in July 2011 so that his non-selection in July 2012 shall count as his first and he will not be subject to retirement pursuant to 14 U.S.C. § 285 this summer.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of [REDACTED] USCG, for correction of his military record is granted in part as follows:

The Coast Guard shall expunge from his record his non-selection for promotion by the PY 2012 captain selection board in July 2011 so that his non-selection in July 2012 by the PY 2013 captain selection board shall count as his first failure of selection, and he shall not be subject to mandatory retirement on July 1, 2013, for twice failing of selection pursuant to 14 U.S.C. § 285.

