

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2013-005

████████████████████
████████████████████

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application upon receipt of the applicant's completed application on October 11, 2012, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated April 25, 2013, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his record by removing his non-selection for promotion to captain before the promotion year (PY) 2012 selection board. The applicant alleged that his record before the PY 2012 captain selection board improperly contained a draft officer evaluation report (OER) for the period May 22, 2009 to July 1, 2010 instead of the final OER for this period. The applicant argued that the erroneous draft OER was prejudicial because it contained a lower mark in "initiative" and less positive comments than the final OER. Also, the erroneous draft OER did not contain reviewer comments, as required by the Personnel Manual.

The applicant stated that he contacted his chain of command about the erroneous draft OER when he received a copy of it in 2010. He stated that he received an email from OPM stating that the draft OER had been removed and replaced with the final OER. However, the email was not from OPM but was from his unit informing him that OPM-3 was in receipt of the final OER, with the reviewer's comments. The applicant stated that when reviewing his record for the PY 2013 captain selection board, he discovered that the erroneous draft OER was still in his record and that it had not been replaced with the final OER.

The applicant stated that he was advised to file an application with the Personnel Records Review Board (PRRB) to have the error corrected. He stated that in 2012 the PRRB determined that the error was administrative and directed that his record be corrected by placing the final

OER in his record. Although the error was corrected prior to the convening of the PY 2013 captain selection board, the applicant was not selected for captain. The applicant stated that the failure before the PY 2012 selection board should be removed so that he has one additional opportunity to compete for promotion with a corrected record. He stated that unless the PY 2012 failure of selection is removed, he will be mandatorily retired on June 30, 2013.¹

VIEWS OF THE COAST GUARD

On January 3, 2013, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant the relief, as recommended by the Commander, Personnel Service Center (PSC).

In recommending relief, PSC stated that the applicant mistakenly believed he had requested and received his official record prior to the convening of the PY 2012 selection board. PSC stated that what the applicant probably received was a copy of his unit record from his servicing personnel office. PSC stated that it is reasonable for the applicant to have believed that his record was complete and contained the correct OER prior to the PY 2012 captain selection board. PSC stated that because the corrected OER contained more laudable comments than the draft OER, the applicant suffered an injustice before the PY 2012 captain selection board.

PSC concluded that the PY 2012 captain selection board viewed an incorrect version of the subject OER and that the correct version was more favorable to the applicant. PSC recommended that the applicant's PY 2012 non-selection for promotion to captain be removed from his record.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 9, 2013, the Board received the applicant's response to the views of the Coast Guard. He agreed with them.

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 section 1552 of title 10 of the United States Code. The application was timely.

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;"

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. 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. 33 C.F.R. § 52.24(b).

4. The Coast Guard admitted in the advisory opinion that the applicant's record before the PY 2012 captain selection board was in error because it contained a draft OER for the period from May 22, 2009 to July 1, 2010 instead of the final OER. The draft OER contained less favorable comments and a lower mark in one performance category than the final OER. Also there was no reviewer comment page attached to the draft OER, as required by regulation. The inclusion of the draft OER in the applicant's record, instead of the final OER, was error. In June 2012, the PRRB ordered the applicant's record corrected by removing the draft OER and replacing it with the final OER. Because the PRRB does not have jurisdiction to remove failures of selection for promotion, the applicant filed that issue with the BCMR.

5. The JAG recommended, and the Board agrees, that the applicant's PY 2012 failure of selection before the captain selection board should be removed from his record. By recommending that the applicant's failure of selection be removed, the Coast Guard is admitting that the applicant's record before that board was prejudiced by the error because the error made his record appear worse and that with a corrected record, it is not unlikely that he would have been selected for promotion. *See Engels v. United States*, 230 Ct. Cl. 465, 470 (1982) (setting forth the standard for prejudice: "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?") While the applicant was not selected for promotion before the subsequent PY 2013 selection board even after the error was corrected, this fact does not prove that his non-selection before the PY 2012 board was inevitable because the pool of candidates was different and the selection board members were different.² Therefore, because it is not unlikely that the applicant would have been selected in PY 2012 had his record been correct at the time, the Board finds that his non-selection for promotion in PY 2012 should be removed from his record.

6. There is no basis on which to consider removing the PY 2013 failure of selection and the applicant does not argue for its removal. Therefore, his non-selection before the PY 2013 selection board should count as his first, and he should be retained on active duty and be considered for promotion again this summer.

6. The applicant's failure of selection for promotion to captain before the PY 2012 selection board should be removed from his record. Accordingly, he is entitled to relief.

² In addition the applicant was entitled to a record that was complete and accurate. *See Hary v. United States*, 618 F.2d 704, 709 (1980) (stating that an officer is entitled to a record before a selection board that is "substantially complete and fair").

ORDER

The application of [REDACTED] for correction of his military record is granted. The Coast Guard shall correct his record by removing his PY 2012 failure of selection for promotion to captain. At a minimum, he shall be retained on active duty until he is considered by the next selection board for promotion to the grade of captain.

No other relief is granted.

