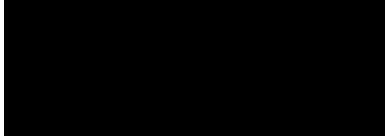


**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:



BCMR Docket No. 2013-063

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 February 1, 2013, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated November 22, 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 for a "review of her O-5 [promotion] package due to the fact that [her] employee summary sheet (ESS) did not accurately reflect [her] Marine Safety Insignia and SAR [search and rescue] qualification." Essentially, the applicant is asking the Board to remove her PY 2013 failure of selection for promotion to CDR from her record and to backdate her date of rank if she is subsequently selected for promotion with a corrected record.

The applicant alleged that she had an incomplete record before the PY 2013 CDR selection board. In this regard, she alleged that her ESS did not show that she had earned the Marine Safety Insignia (the "M" pin) and a SAR qualification. The applicant stated that she reviewed her record in May 2012 and discovered that the "M" pin and the SAR qualification were not in Direct Access. She stated that she gave documents of her entitlement to the "M" pin and SAR qualification to her District 11 chief yeoman and she watched him upload them into her Direct Access profile. She stated that in August 2012 her record was being screened by the Senior Command Screening Panel and that an officer assigned to that panel contacted her inquiring whether she had earned the "M" pin. The applicant stated that she scanned a copy of the qualification and emailed it to the officer. She stated that she later learned that the copy of the award that she had provided to the screening panel was not supplied to the other boards and panels, including the PY 2013 CDR selection board.

The applicant stated she understands that the personal data record (PDR) is the primary means of evaluation, but the ESS, which is pulled from direct access, serves as a snap shot of a member's career, showing in an easy-to-view format an officer's education, awards, and competencies, etc. She stated that when the PY 2013 promotion board pulled her ESS it did not show that she had earned the "M" pin or that she was SAR qualified.

The applicant asserted that the Commandant's guidance to the selection board stated that O-5s should be demonstrating evidence of mastery in their specialty. She asserted that her "M" pin and SAR qualification speak directly to her specialty in the Marine Environmental Response Field.

VIEWS OF THE COAST GUARD

On August 2, 2013, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief. With respect to removing her failure of selection for promotion to CDR, the JAG stated the following:

In cases alleging error in the record resulting in a failure to promote, the framework involves a two-step analysis under *Engels v. United States*, 678 F.2d 173 (Ct. Cl. 1982). The applicant has the burden of production to "first show that the service committed a legal error." *Id.* at 175. Once the legal error has been established, "the next question . . . is whether the error is causally linked with the passover—in summary terms, was it prejudicial or harmless?" *Id.* Regarding this second prong, the applicant "must make at least a prima facie showing of a substantial connection between the error and the non-select. But the end-burden of persuasion falls to the Government to show harmlessness—that, despite the [applicant's] prima facie case, there was no substantial nexus or connection." *Id.*

The JAG stated that the applicant has not provided any evidence to support her allegation that the Coast Guard committed an error or injustice. The applicant stated that in preparation for the PY 2013 promotion board, which meets each July, she reviewed her records in May 2012. At that time the applicant noticed that the two missing qualifications were not in her electronic record, as well as the duplication of other documents. The JAG stated that although the applicant had her servicing personnel officer (SPO) make corrections to her record, she failed to verify that the corrections appeared in her record.

The JAG argued that according to ALCOAST 154/09 (Additions of the Employee Career Summary Sheet with Individual Board and Panel View through Coast Guard Business Intelligence (CGBI)), it is the applicant's responsibility to ensure her electronic record, including the ESS is up-to-date and accurate. The JAG argued that although the applicant witnessed a yeoman make changes to the electronic system, that act alone is not sufficient to meet a member's burden of responsibility. The JAG asserted that the applicant should have followed up and verified that the correct data was showing in her electronic record and ESS. The JAG stated that the applicant had two months between May when she asked for the corrections and July

when the promotion board met. According to the JAG, a prudent officer would have used that time to verify and ensure that their record was accurate.

The JAG argued that the applicant failed to show that the Coast Guard committed a legal error, which makes it logically impossible for her to make a prima facie showing of a substantial connection, or nexus, between the alleged errors and the Coast Guard's decision not to promote her in PY 2013.

The JAG stated assuming *arguendo* that the Coast Guard committed an error or injustice, there is no evidence to link that error or injustice to the applicant's failure to promote. In this regard, the JAG argued the following:

The applicant alleges that she was not selected for promotion to O-5 because of the inaccurate ESS in her record. While an ESS does provide a consolidated view of a member's record, it is not the only source of information used by a promotion board. Promotion board review a variety of documents, including officer evaluation reports (OERs) which often contain the same information as an ESS.

The applicant's ESS in question did not list her SAR Watchstander qualification. However, the applicant's 2012 OER specifically stated in the "Performance of Duties" block that she earned the SAR watchstander qualifications. . . . And while the applicant's ESS did not specifically list her "M" pin qualification, the ESS did contain the requisite competencies and assignment history to demonstrate that she qualified for the insignia The Coast Guard promotion board had all the necessary information to make an informed decision as to whether to promote the applicant, or not, and chose not to promote her. There is nothing in the record and nothing submitted by the applicant to support her allegation that the inaccurate ESS was the cause of her non-selection. There is, therefore, no demonstrable harm or prejudice to the applicant.

The JAG attached a memorandum from the Commander, Personnel Service Center (PSC) and asked that PSC's comments be accepted as a part of the advisory opinion. PSC stated that a review of the applicant's ESS as it appeared before the PY 2013 CDR selection board did not include the applicant's Marine Safety Insignia and SAR qualification. PSC further stated that while the applicant ESS did not contain her SAR qualification, her April 30, 2012 OER captured this information and was reviewable by the selection board. PSC stated that the OER included the specific comment: "Expanded professional competence earned FOSCR qual, attended SAR planning school and earning SAR qual on own time."

PSC stated that while the applicant's ESS did not explicitly cite her "M" insignia, it did contain the competencies and assignment history that would generally be acknowledged as requirements to receive the insignia. These data elements were visible to the PY 2013 CDR selection board.

PSC stated that all duplicate information contained within applicant's record was authorized for entry into the EI-PDR and permitted to be viewed by the selection board. The inclusion of the duplicates was neither error of omission or commission.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 9, 2013, a copy of the views of the Coast Guard was mailed to the applicant for a response. On October 28, 2013, the Board received correspondence from the applicant.

The applicant stated that she was not selected by the PY 2014 CDR selection board. The applicant argued that she had a better chance of being selected for promotion by the PY 2013 selection board because it was her first look and the stated opportunity of selection in-zone was 78% with actual in-zone selection was 69%. As an above-zone officer, her stated opportunity of being selected was 12%. She argued that if her record had been corrected at the time of her first selection board, she would have had a 78% opportunity of being promoted. She argued that even with an exemplary record it is hard for anyone to overcome a 66% drop in the opportunity for selection. She stated that this is an injustice and asked that it be rectified.

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.
2. The Board begins its analysis in every case presuming administrative regularity on the part of the Coast Guard and the applicant bears the burden of proving the existence of the error or injustice by a preponderance of the evidence. 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. *See* 33 C.F.R. § 52.24(b).
3. The applicant was not selected by the PY 2013 selection board for promotion to CDR. Subsequently, she reviewed her record and found that her ESS did not notate that she had earned the Marine Safety Insignia ("M" pin) or that she was a qualified search and rescue (SAR) watchstander. Her record was corrected prior to consideration by the PY 2014 selection board, but she was still not selected for promotion. The applicant asked the Board to review her commander promotion package because of the alleged error. The Board interpreted her request as one for the removal of her failures of selection for promotion to CDR, as did the advisory opinion.
4. The Board agrees with the advisory opinion that although the applicant's ESS before the PY 2013 did not list her SAR Watchstander qualification, her 2012 OER, which was available to the selection board, expressly stated in the "Performance of Duties" block that she earned the SAR watchstander qualification. Further, the Board also agrees with the advisory opinion that while the applicant's ESS did not specifically notate that she had earned the "M"

pin, the ESS listed her competencies and assignment history, which according to the advisory opinion demonstrated that she qualified for the “M” insignia. The applicant did not submit evidence that the listing of her competencies and assignment history on the ESS failed to put the selection board on notice that she qualified for the “M” pin.

5. In addition, the applicant’s suggestion that the absence of noting the two qualifications on her ESS, which were reflected elsewhere in her record before the selection board, would have influenced the selection board or outweighed an otherwise strong record of performance is not persuasive to the Board. The Board is not persuaded that this administrative error constituted a legal error that was prejudicial to the applicant before the PY 2013 selection board. In this regard, the Board notes that even with a correct record before the PY 2014 selection board, she was not selected for promotion. In addition, the applicant did not state whether she was selected for command by the command screening panel in August 2013 even though she had a complete record during that process. The Board believes that if the applicant had successfully screened for command she would have so stated in her application.

6. The failure to be selected by the 2014 CDR selection board with a corrected record and the absence of an affirmative statement from the applicant that she successfully screened for command with a corrected record, leads to the Board to find that the absence of a notation on her ESS that she earned the “M” pin and was SAR qualified were not prejudicial to her record before the PY 2013 selection board in the sense that the absence of the notations on the ESS made her overall record appear worse. *See Engels v. United States*, 678 F. 2d 173, 176.¹ As the advisory opinion stated, the PY 2013 promotion board had all the necessary information in her service record to make an informed decision as to whether to promote the applicant and did not do so.

7. The applicant suggested that her opportunity for selection was much less before the PY 2014 selection board than it was before the PY 2013 board. She argued that it was an injustice that her ESS was missing notations that she had earned the “M” pin and SAR qualification before the PY 2013 selection board. However, the selection board would not have known that the applicant was above the zone (had failed the first time) because the Coast Guard lists officers alphabetically who are being considered for promotion rather than by date of rank, which essentially provides level playing field for all candidates being considered for promotion. It goes without saying that fewer officers are selected on their second look because there are fewer of them before the selection board. However, the fact that the percentage of officers selected on their second look is less than the percentage of officers selected on their first look, does not prove that the applicant’s record was prejudiced before the PY 2013 selection board. As stated above the applicant has not made a persuasive case that the administrative error related to her ESS was causally connected to her non-selection.

8. In light of the above finding, the Board agrees with the advisory opinion that the applicant’s failures should not be removed from her record.

¹ In *Engels*, the United States Court of Claims established 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?"

ORDER

The application of [REDACTED] for correction of her military record is denied.

November 22, 2013
Date

[REDACTED]

[REDACTED]

*

* The third member of the Board was unavailable. However, pursuant to 33 C.F.R. § 52.11(b), two designated members constitute a quorum of the Board.