

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2013-147**

**[REDACTED]**  
**[REDACTED]**

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**DECISION OF THE PRINCIPAL DEPUTY GENERAL COUNSEL  
AS THE OFFICIAL WITH DELEGATED AUTHORITY TO TAKE  
FINAL ACTION ON BEHALF OF THE SECRETARY OF  
THE U.S. DEPARTMENT OF HOMELAND SECURITY**

I approve the Recommended Final Decision of the Board for Correction of Military Records of the United States Coast Guard and grant the relief recommended therein.

Date:     [May 14, 2014]    

**[REDACTED]**

Principal Deputy General Counsel  
U.S. Department of Homeland Security

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**RECOMMENDED 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 receipt of the applicant's completed application on July 16, 2013, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated March 13, 2014, 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 lieutenant (LT) in the Reserve serving on active duty, asked the Board to remove from his record his non-selection for promotion by the active duty lieutenant commander (LCDR) selection board that convened on August 20, 2012, and grant other relief as described below. If he is selected for promotion in the future,<sup>1</sup> he asked the Board to backdate his date of rank to what it would have been had he been selected for promotion to LCDR in 2012, award him the corresponding back pay and benefits, and integrate him onto active duty in the regular Coast Guard, as he would have been had he been selected for promotion in 2012.<sup>2</sup>

The applicant alleged that his military record was incomplete when it was reviewed by the selection board because it did not include a CG-4082, Record of Professional Development, listing his military training and education. This prejudicial error, he alleged, caused him to be passed over for promotion. He alleged that if he had been selected for promotion, he would have

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<sup>1</sup> The applicant requested that his record be reviewed by a special selection board pursuant to 10 U.S.C. § 628. However, that statute authorizes only the Secretary of a "military department" to convene special selection boards, and the Department of Homeland Security is not a "military department" for the purposes of Title 10. 10 U.S.C. § 101(a)(6) (definitions). In December 2012, after the LCDR selection board convened in August 2012, Congress authorized the Secretary of Homeland Security to issue regulations for special selection boards, but to date, no regulations have been issued. 14 U.S.C. § 263.

<sup>2</sup> The applicant also requested a change to Coast Guard policy about digital signatures on supporting documentation for performance evaluations that is not within the jurisdiction of the BCMR to grant and so is not discussed herein.

been promoted and integrated into the regular Coast Guard, active duty officer, instead of remaining a Reserve officer serving on a temporary extended active duty (EAD) contract. Because his EAD contract was scheduled to end on September 30, 2013, the applicant also asked the Board to extend his contract through June 30, 2015, so that he will have two fair opportunities to be selected for promotion and to be integrated into the regular Coast Guard. He argued that at a minimum his EAD contract should be extended through June 30, 2014, so that if he is selected for promotion in August 2013, he will remain on EAD duty until he can be promoted and integrated into the regular Coast Guard.

Regarding the missing CG-4082, the applicant explained that in 2012, he was serving on EAD and “in the zone” for promotion to LCDR. As instructed, he ordered a complete copy of his military record to review in February 2012 since he knew he would be a candidate for promotion in August 2012. He immediately noticed the lack of an updated CG-4082, and so provided an updated CG-4082 with supporting documentation to his chain of command when he submitted his input for his officer evaluation report (OER) in May 2012. He discussed the CG-4082 in detail with his supervisor, and it was included in the routing folder with the OER and forwarded to the OER reviewer, who was his commanding officer (CO), so that it could be signed and entered in his record before the selection board convened. Although the OER was timely signed and entered in his record on July 10, 2012, the updated CG-4082 showing his military training and education was not. The applicant did not see this CG-4082 again until August 6, 2013, when he discovered that it had been entered in his record on June 6, 2013, even though he had signed in on May 14, 2012, and his CO had signed it on June 29, 2012.

The applicant claimed that he took reasonable steps to ensure the completeness of his military record. He noted that his unit did not have written instructions for routing CG-4082s, but at his prior two commands, updated CG-4082s were supposed to be included in the OER routing folder for the CO’s review and signature. In addition, training provided by the Officer Personnel Management (OPM) Branch of the Personnel Service Center (PSC) states that a CG-4082 should be submitted with an officer’s OER input, and he received an email from OPM on May 30, 2012, recommending that officers submit updated CG-4082s.

The applicant stated that the original OER was later returned to him in the routing folder, and the CG-4082 was no longer inside, but he did not realize that the CG-4082 had not been entered into his record. Had he known, he would have followed up. He noted that he was on “work-related travel and associated leave” before the selection board convened on August 20, 2012. After the selection board convened, in October 2012, his supervisor advised him that he had not been selected for promotion. He sought counseling from OPM about how to be more competitive for promotion in the future and was told that the missing CG-4082 was a contributing factor to his non-selection. He finally got the CG-4082 entered in his record in October 2012, but it was too late for the selection board. The CG-4082 documented his recent, significant professional development activities, and so its absence from his record was very prejudicial when his record was reviewed by the LCDR selection board, as he was advised by OPM. He noted that education is one of the four criteria selection boards use to evaluate candidates and that the board’s instructions state that “Junior Officers should be rated and promoted based on professional knowledge, skills, and experience in the chosen specialty” and that selection boards should “recognize officers who commit to continual learning and self-improvement through

qualifications, certifications, or other professional milestones, and the pursuit of advanced education.” The CG-4082 is the form officers are supposed to use to report their training and education to the selection boards and so it “can greatly improve the competitiveness of the candidate for promotion.” The applicant stated that because the CG-4082 was not in his record, the selection board had no way of knowing about his logistics and joint senior leadership classes.

The applicant pointed out that the remainder of his record is highly competitive for promotion and that the opportunity of selection for in-zone candidates in 2012 was 76%. He noted that for Reserve officers who, like him, attended and entered active duty from Officer Candidate School instead of the Coast Guard Academy, the opportunity of selection was 77%.<sup>3</sup>

Therefore, the applicant asked the Board to expunge his non-selection for promotion from his record and, if selected for promotion in the future, to backdate his date of rank to what it would have been had he been selected for promotion to LCDR in 2012, award him the corresponding back pay and allowances, and integrate him onto active duty in the regular Coast Guard as he would have been had he been selected for promotion in 2012. In addition, he asked the Board to extend his EAD contract so that he will have two fair opportunities to compete on the active duty promotion list (ADPL) for promotion and integration into the regular Coast Guard. In support of these requests and allegations, the applicant submitted the following documents:

- The applicant’s original EAD contract committed him to serve on active duty from July 1, 2011, through September 30, 2013.
- On February 8, 2012, PSC emailed the applicant a copy of his military record in response to his request. The applicant replied the same day and noted that certain pages were out of order.
- An OPM PowerPoint slide deck states that an officer should update his CG-4082 before a selection board meets and that an officer’s education as documented on a CG-4082 is one of the primary things a selection board is supposed to consider in selecting officers for promotion
- An email dated May 30, 2012, from OPM to the candidates for promotion highly recommended that the candidates review their military records to ensure their completeness and to update their CG-4082s.
- The applicant’s immediate supervisor, LCDR M, wrote a statement on the applicant’s behalf, stating that in mid May 2012, the applicant submitted a CG-4082 and supporting documentation with his OER input. The CG-4082 was part of the OER package that the supervisor forwarded through the chain of command for signature.
- A senior chief yeoman emailed the final, signed copy of the applicant’s OER to him on July 10, 2012.

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<sup>3</sup> ALCGPSC 131/12 shows that 76% of all candidates who were, like the applicant, “in zone” for promotion were selected for promotion, and 77% of candidates who were Reserve officers were selected for promotion to LCDR in 2012.



- The applicant’s May 31, 2012, OER was signed by his official supervisor, CDR T, on June 25, 2012; by the reporting officer, CAPT N, on June 29, 2012; and by the OER reviewer and unit CO, CAPT G, on July 3, 2012.
- A printout of a unit calendar shows that the applicant was either on leave or deployed from August 10 through September 10, 2012.
- An email string shows that a human resources assistant entered the applicant’s updated CG-4082 in his record on October 22, 2012. This CG-4082 had been signed electronically by the applicant on October 17, 2012, and by his CO on October 19, 2012.
- Another email string shows that in January 2013, the applicant applied for an extension of his EAD contract prior to the convening of a Reserve Officer Extension Board.
- The originally updated CG-4082 (see attached) was signed by the applicant on May 14, 2012, and by the CO on June 29, 2012, but was not entered in the applicant’s record until June 6, 2013.

**SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard Reserve under the Delayed Entry Program on October 19, 1989, at age 22. He enlisted in the regular, active duty Coast Guard on XXXXX, 1990. XXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX He became an XXXXXXXXXXXXXXX, advanced to pay grade E-5, and served on active duty for almost seven years until June 26, 1997, when he was released into the Reserve, although he did not drill.

On [REDACTED] the applicant reenlisted in the Reserve and was ordered to active duty to attend Officer Candidate School. On [REDACTED] he accepted a commission as an ensign in the Reserve and began serving on inactive duty.

On [REDACTED], the applicant began serving on active duty orders as a shore security officer at a Port Security Unit (PSU). On his first OER dated [REDACTED] he received three marks of 4, ten marks of 5, and five marks of 6 in the various performance categories;<sup>4</sup> a mark in the fifth spot on the comparison scale;<sup>5</sup> and his CO’s recommendation for promotion.

On his OER dated [REDACTED] the applicant received fourteen marks of 5 and four marks of 6 in the performance categories; a mark in the fifth spot on the comparison scale; and his CO’s recommendation for promotion. The applicant was promoted to lieutenant junior grade (LTJG) on [REDACTED], and released from active duty to inactive duty in the Reserve on [REDACTED] where he began drilling regularly at the PSU.

<sup>4</sup> In OERs, officers are evaluated in a variety of performance categories, such as “Professional Competence,” “Teamwork,” and “Judgment,” on a scale of 1 to 7, with 7 being best.

<sup>5</sup> On the comparison scale on an OER, the reporting officer compares the reported-on officer to all other officers of the same grade whom the reporting officer has known throughout his career. The 7 possible marks on the comparison scale range from a low of “[p]erformance unsatisfactory for grade or billet” to a high of “distinguished officer.” On an OER form for an ensign and lieutenant junior grade, a mark in the third, fourth, or fifth spot on the comparison scale denotes the officer as “one of the many competent professionals who from the majority of this grade.”



On his OER dated [REDACTED], the applicant received one mark of 4, eight marks of 5, and nine marks of 6 in the performance categories; a mark in the fifth spot on the comparison scale; and his CO's recommendation for promotion. During this marking period, the applicant had received an Army Commendation Medal for his active duty service as the PSU's communications officer in 2004.

On his OER dated [REDACTED] the applicant received eight marks of 5, nine marks of 6, and one mark of 7 in the performance categories; a mark in the sixth spot on the comparison scale, denoting an "exceptional officer"; and his CO's recommendation for promotion "ahead of peers." The applicant also received an Achievement Medal during this period for his service as communications officer during the response to Hurricane Katrina.

On his OER dated [REDACTED], the applicant received six marks of 5, eleven marks of 6, and one mark of 7 in the performance categories; another mark in the sixth spot on the comparison scale; and his CO's recommendation that he be promoted "ahead of his peers" as he was "[c]apable of distinguished performance at a higher level position." He had performed several weeks of short-term active duty during this report period.

On January 3, 2007, the applicant began serving on continuous active duty on short-term orders as a XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX for a Sector command. He qualified to wear the Boat Force Operations Insignia, received another Achievement Medal in June 2007, and was promoted to lieutenant (LT) on XXXXXXXXXX, 2007.

On his OER dated May 31, 2008, as a Reserve lieutenant serving on continuous active duty as a XXXXXXXXXXXXXXX, the applicant received four marks of 4, nine marks of 5, and five marks of 6 in the performance categories; a mark in the fourth spot on the comparison scale, denoting a "good performer" ready for "tough, challenging assignments"; a comment that his promotion to lieutenant had been deserved; and a recommendation for integration onto active duty. He received a third Achievement Medal upon departing this unit in August 2008.

On July 23, 2008, the applicant signed a contract to serve on EAD through June 30, 2011. In August 2008, he began serving as a XX. On the applicant's OER dated May 31, 2009, he received two marks of 4, ten marks of 5, six marks of 6 in the performance categories; another mark in the fourth spot on the comparison scale; and a recommendation for promotion "with peers" and for continuation and integration on active duty.

On the applicant's OER dated May 31, 2010, he received one mark of 4, thirteen marks of 5, and four marks of 6 in the performance categories; a mark in the fifth spot on the comparison scale, denoting an "excellent performer" ready for the "toughest, most challenging, leadership assignments"; and a recommendation for extension and integration on active duty and for promotion "with peers." A CG-4082 dated June 8, 2010, lists 33 education and training courses that the applicant had completed since earning his bachelor's degree in 1997.

On the applicant's OER dated May 22, 2011, he received six marks of 5, eleven marks of 6, and one mark of 7 in the performance categories, another mark in the fifth spot on the com-



PSC admitted that the applicant's CG-4082, which he signed on May 14, 2012, and was approved by his CO on June 29, 2012, was not entered in his record until June 6, 2013, and so was not seen by the LCDR selection board that convened on August 20, 2012. PSC noted, however, that the proceedings of selection boards are by statute kept confidential and so it is not possible to know whether the lack of an updated CG-4082 caused the applicant not to be selected for promotion. Because PSC's staff is not privy to the deliberations of selection boards, no one at PSC could have or would have advised the applicant that the lack of the updated CG-4082 in his record caused his non-selection, and the officer who counseled him denies having done so.

PSC stated that a CG-4082 is an optional form in an officer's record and that the applicant "owns the burden for ensuring his record is complete, especially for an optional form such as the Record of Professional Development, Form CG-4082." PSC did not cite any authority in effect in 2012 to support these claims, however.<sup>7</sup>

PSC stated that before selection boards meet, PSC checks officers' records only for required documents, not for optional documents. PSC stated that the applicant's claim that he would have followed up had he realized the updated CG-4082 was not in his record is an admission that he bore the responsibility for checking his military record. In addition, PSC noted, there is no regulation stating that OERs and CG-4082s should be routed together for entry in officers' records. PSC stated that it

strongly opposes any precedence being set that allows an officer who was non-selected to argue that the non-selection was the result of an *optional* document not being present for the selection board to view. Each selection board announcement message [published at least 30 days prior to each selection board] published by CG PSC specifically advises "*all officers being considered* [by a selection board] *are highly encouraged to take steps to review their official records.*" While the applicant did obtain his [military record] in Feb of 2012, he did not take steps just prior to the PY13 Lieutenant Commander Selection Board to ensure his ... CG-4082 signed in June of 2012 was present. If in the applicant's view this document contained such vital information for the selection board, then he should have been more diligent and persistent in checking his record. It is not uncommon for a candidate to have a document such as a personal award, an Administrative Remarks [Page 7], or ... CG-4082 missing from their record. However, it would be monumental to be missing a required document. While the service ensures *required* documents are present, the service member owns the burden for *optional* documents.

PSC concluded that the applicant had ample time to confirm the completeness of his record during the weeks before the selection board convened on August 20, 2012, but did not do so; that he was not selected for promotion in August 2013 even with a complete record; and that because selection boards are confidential, the reasons for his non-selection cannot be known. Therefore, PSC and the JAG recommended that the Board deny the applicant's request.

#### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On February 7, 2014, the applicant responded to the views of the Coast Guard and strongly disagreed with them. He noted that the Coast Guard has admitted that the CG-4082 that

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<sup>7</sup> PSC cited ALCGPSC 037/13, issued on March 7, 2013, which reminds officers to check their records to ensure their accuracy and completeness, but this bulletin was issued long after the LCDR selection board met in 2012.



he submitted through his c [REDACTED] and in May 2012 was not entered in his record until June 6, 2013, long after the LCDR selection board convened in August 2012. Therefore, he argued, the Coast Guard's recommendation to deny relief is completely inconsistent with the advisory opinion the Coast Guard submitted for BCMR Docket No. 2011-215 and with the Board's final decision in that case, which is summarized below. Moreover, he argued, the Coast Guard's advisory opinion for 2011-215 refutes the Coast Guard's current argument that relief should be denied because a CG-408 [REDACTED] is an "optional document." He noted that his missing CG-4082, like the one at issue in 2011-215, documented his recent, significant military training and education, and its absence made his record appear significantly worse before the selection board. In this regard, he noted that the form itself states that the information on the form is gathered primarily as a "[f]actor of selection for promotion" and that "[n]on-disclosure may result in the possibility of diminished chances for selection for promotion."

[REDACTED]

The applicant also stated that contrary to the Coast Guard's claim that the CG-4082 is merely optional, Article 1.E.10.k. of COMDTINST M1500.10, the Performance, Training and Educational Manual, states, "Military members, active and reserve, *shall* inform [PSC] ... by 1 August of each year of recently acquired training or education on the ... CG-4082, for inclusion into Direct Access." (Emphasis added.) Therefore, he argued, the CG-4082 is a required document, not an optional document in an officer's record. In this regard, he noted that the Commandant's guidance to selection boards concludes its discussion of progressive training and education toward certifications, qualifications, and advanced degrees by stating, "Documenting this requirement is by submitting the CG-4082," and the precept for the selection board stated that in developing criteria for selecting candidates for promotion, the four factors to consider were performance, professionalism, leadership, and education. Therefore, the applicant argued, the selection boards look at candidates' CG-4082s and expect to find recent entries to show that they are progressing in training and education, and the lack of a CG-4082 documenting his most recent courses was very prejudicial especially given the 60% selection rate.

The applicant noted that PSC admitted that the CG-4082 that he prepared in May 2012 and that was signed by his CO on June 29, 2012, was not entered into his record until June 6, 2013, but failed to provide any explanation for the long delay. He stated that he and unit yeomen had made numerous queries trying to trace the form in October 2012 to no avail.

Regarding his own timing, the applicant stated that he began early, requesting a copy of his record in February 2012, because he had previously experienced delays in receiving copies of his records and making corrections through PSC. He submitted his CG-4082 in plenty of time to be entered in his record, and he should not be blamed for not waiting until the last minute to try to get his record correct, as PSC seemed to claim.

Finally, the applicant argued that, if the CG-4082 had been in his record, reflecting his continuing pursuit of training and education, it is likely that he would have been selected for promotion in 2012 given the quality of his OERs, his achievements, including a Coast Guard XXXXXXXXXXXX and the lack of negative information.

The applicant also alleged that his record was erroneous and prejudiced before the selection board that convened in 2013 because it contained both the substitute CG-4082 with seven

entries and the original CG-4082 with six entries, which was signed before the substitute but entered in his record after it. The applicant alleged that CG-4082 with six entries entered in his record in June 2013 “appears to delete that additional [seventh] certification [on the October 2012 CG-4082] and raises the question of why both were submitted with nearly identical entries.” He alleged that this made his record appear worse than it otherwise would have. His record was further prejudiced, he alleged, because the selection board could likely tell that he had already been non-selected once given his date of rank, his EAD extensions, and the fact that there was one more OER in his record than in those of the other candidates.

Therefore, the applicant asked the Board to remove his non-selection in 2013 from his record as well as his non-selection in 2012 so that he will have two more opportunities to be selected for promotion; to extend his EAD contract through June 2016; and, if selected for promotion, to back date his date of rank to what it would have been had he been selected for promotion in 2012, to award him back pay and allowances, and to integrate his into the regular Coast Guard as would have occurred had he been selected for promotion in 2012.

#### **PRIOR SIMILAR CASE: BCMR DOCKET NO. 2011-215**

The applicant in 2011-215 first noticed several errors in his record, including the lack of a CG-4082, in April 2010. Most of the errors were corrected and on July 19, 2010, he submitted five signed pages of CG-4082 to his Servicing Personnel Office (SPO). However, he later learned that two of the five pages, documenting 22 courses that he had taken from June 9, 2005, to August 14, 2009, were not entered in his record. Therefore, his record was incomplete when the selection board convened eight days later on July 27, 2010.

In the advisory opinion for the case, PSC stated that although the applicant “made every effort” to have his record corrected, his CG-4082 was incomplete when it was reviewed by the selection board. PSC stated that the missing pages “could have had an impact on the board’s determination not to promote the applicant, as these omitted documents spanned a five year period of professional development.” PSC noted that the applicant had not been selected for promotion in 2011 even after his record was corrected but recommended that his 2010 non-selection be removed from his record and that, if he was selected for promotion in 2012, his date of rank be backdated to what it would have been had he been selected for promotion in 2011.

The Board found in 2011-215 that the applicant’s record was prejudicially incomplete when it was reviewed by the selection board because it did not include a complete CG-4082. Therefore, the Board granted the relief recommended by the Coast Guard.

#### **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. The application to the Board was timely.<sup>8</sup>

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<sup>8</sup> 10 U.S.C. § 1552(b) (requiring application within 3 years of the applicant’s discovery of the alleged error).

2. The applicant requested an oral hearing before the Board. The Chair denied the request, acting pursuant to 33 C.F.R. § 52.51, and recommended disposition of the case without a hearing. The Board concurs in that recommendation.<sup>9</sup>

3. The applicant alleged that his non-selection for promotion in 2012 was erroneous and unjust because his record contained a prejudicial error—a missing CG-4082, Record of Professional Development, documenting his training and education in 2011 and 2012—when it was reviewed by the LCDR selection board. When considering allegations of error and injustice, the Board begins its analysis 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.<sup>10</sup> 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.”<sup>11</sup>

4. The Coast Guard has admitted that the applicant’s military record did not include his updated CG-4082 when it was reviewed by the LCDR selection board that convened on August 20, 2012. The Board finds, therefore, that the applicant has proved by a preponderance of the evidence that the CG-4082 that he signed and submitted through his chain of command on May 14, 2012, and that was signed by his CO on June 29, 2012, was not timely entered in his record and so was not in his record when it was reviewed by the selection board on August 20, 2012. Instead, it was entered in his record about a year later, on June 6, 2013. The Coast Guard has not explained this delay. Because officers are required to submit CG-4082s at least one month before their selection boards convene,<sup>12</sup> the Coast Guard clearly expects its personnel to enter such documents into officers’ records within a month so that they will be seen by the selection boards. Therefore, the Board concludes that the Coast Guard’s failure to enter the applicant’s CG-4082 in his record before the selection board convened on August 20, 2012, constituted an error.<sup>13</sup>

5. The applicant asked the Board to order the Coast Guard to convene a special selection board to reconsider his selection for promotion in 2012 in accordance with 10 U.S.C. § 628. That statute does not apply to the Coast Guard, which is not a “military department” for the purposes of Title 10,<sup>14</sup> but a new statute authorizing special selection boards, 14 U.S.C. § 263, does apply to the Coast Guard. The Secretary, however, has not yet issued regulations or procedures for special selection boards. Moreover, convening special selection boards will require the Coast Guard to preserve copies of the candidates’ records in the exact state they were in when reviewed by the regular selection boards to perform the comparisons required in

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<sup>9</sup> 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”).

<sup>10</sup> 33 C.F.R. § 52.24(b).

<sup>11</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992).

<sup>12</sup> U.S. Coast Guard, COMDTINST M1500.10C, Performance, Training and Education Manual, Arts. 1.E.10 k. and 4.C.1. (2009).

<sup>13</sup> 5 U.S.C. § 552a(e)(5) (requiring agencies to maintain and base decisions on accurate personnel records).

<sup>14</sup> 10 U.S.C. § 628 (authorizing the Secretaries of “military departments” to convene special selection boards); 10 U.S.C. § 101(a)(6) (defining “military departments” as the Army, Navy, and Air Force); see *Quinton v. United States*, 64 Fed. Cl. 118, 125 n3 (2005).



§ 263(c), but the applicant waited almost a year to request a special selection board, and Congress did not authorize special selection boards until December 2012, several months after the selection board at issue convened. In light of these factors, the Board will not order the Coast Guard to convene a special selection board.

6. Without a special selection board, the Board must determine whether the applicant's non-selections for promotion should be removed by answering two questions: "First, was [his] 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?"<sup>15</sup> 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, there was no substantial nexus or connection" between the prejudicial error and the failure of selection.<sup>16</sup> 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."<sup>17</sup>

7. The CG-4082, Record of Professional Development, that was missing from the applicant's record in 2012 documented his most recent military training and education—six courses in two years—and so reflected not only his completion of this training and education but also his continuing commitment to professional growth. The CG-4082 is the only and expected place where such information would appear in an officer's record when it is reviewed by a selection board, and the form itself notes that failing to submit it is likely to diminish an officer's chance to be selected for promotion.<sup>18</sup> Therefore, regarding the first question of the *Engels* test,<sup>19</sup> the Board finds that the applicant's record was clearly prejudiced by the omission of the CG-4082 in that it appeared worse before the LCDR selection board in 2012 than it would have if the CG-4082 had been properly entered in his record.

8. Regarding the second question of the *Engels* test, the Board finds that the applicant's military record of OERs, medals, training, and education is of good quality with no negative entries that precluded his selection for promotion, and so it is not unlikely that he would have been selected for promotion had the CG-4082 been entered in his record. The fact that the applicant was not selected for promotion in 2013 after the CG-4082 was entered in his record does not alter this finding because while 77% of Reserve LTs on active duty were selected for promotion to LCDR in 2012, only 57% were selected for promotion in 2013, and the overall selection rate fell from 67% in 2012 to 57% in 2013.<sup>20</sup> In addition, the precepts for the selection boards show that each selection board was composed of different officers who were allowed to develop their own criteria for selecting officers for promotion. Therefore, the Coast Guard has not met its burden of proving that the applicant could not have been selected for promotion in 2012 even if the CG-4082 had been entered in his record.<sup>21</sup> Because it is not unlikely that he would have been selected in 2012 had the CG-4082 been in his record, in accordance with the *Engels* test, the

<sup>15</sup> *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

<sup>16</sup> *Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003); *Quinton*, 64 Fed. Cl. at 125.

<sup>17</sup> *Engels*, 678 F.2d at 175.

<sup>18</sup> U.S. Coast Guard, CG-4082, para. 4.

<sup>19</sup> *Id.*

<sup>20</sup> U.S. Coast Guard, ALCGPSC 131/12 (Oct. 9, 2012); U.S. Coast Guard, ALCGPSC 126/13 (Oct. 4, 2013).

<sup>21</sup> *Christian*, 337 F.3d at 1343; *Quinton*, 64 Fed. Cl. at 125.

applicant's non-selection for promotion in 2012 should be removed from his record and his active duty should be extended for a few months so that he will get two fair opportunities for selection for promotion.<sup>22</sup>

9. The Coast Guard argued, however, that the applicant is not entitled to the removal of his non-selection for promotion in 2012 because the CG-4082 is "optional" and so its absence from his record was not erroneous. The Coast Guard did not address the fact that the applicant properly submitted the form for entry in his record more than a month before the selection board met or the fact that its personnel took about a year to enter it in his record. The Coast Guard also cited no regulation supporting the claim that the form is optional, while the applicant cited regulation and other official documents related to selection boards showing that the form is required. The Coast Guard's Performance, Training and Education Manual, COMDTINST M1500.10C, contrarily supports both positions. Listing members' responsibilities with regard to training and education, Article 1.E.10.k. of the manual states the following:

Military members, active and reserve, *shall* inform Commander, Coast Guard Personnel Service Center (PSC) and Commandant (CG-1B1) by 1 August of each year of recently acquired training or education on the Record of Professional Development, form CG-4082, for inclusion into Direct Access. (Emphasis added.)

The use of "shall" in this article shows that the form is not optional but required. Article 4.C.1., however, states the following about CG-4082s in a chapter on workforce development:

The Record of Professional Development (CG-4082) allows military members to include education, training, professional certifications and licenses, and other information in their permanent record. *This form is optional, but strongly recommended.* Regular submission of this form is particularly important for members (both officers and enlisted) whose records will be evaluated by promotion boards and special assignment panels. *In order to ensure its inclusion into an officer's record, this form must be submitted to Coast Guard Personnel Service Center (PSC-adm-3) at least 30 days prior to any applicable board, panel, or proceeding.* (Emphasis added.)

Therefore, pursuant to the Performance, Education, and Training Manual, although the form is only "strongly recommended," officers are in fact required to submit a CG-4082 at least once per year and must do so at least one month in advance of any selection board that will review their records, as the applicant actually did.

10. An officer's education is one of the four basic criteria for promotion that selection boards are required to consider,<sup>23</sup> and the Commandant expressly instructed the 2012 selection boards to "recognize officers who commit to continual learning and self-improvement through qualifications, certifications or other professional milestones, and the pursuit of advanced education" and who "progressively demonstrate technical competence and proficiency through on-the-job training, formally recognized training or education ..."<sup>24</sup> Articles 1.E.10.k. and 4.C.1. of COMDTINST M1500.10C require officers to submit CG-4082s to PSC annually and at least one

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<sup>22</sup> 14 U.S.C. § 283.

<sup>23</sup> COMDTINST M1000.3, Article 6.A.3.b.

<sup>24</sup> U.S. Coast Guard, Commandant's Guidance to PY13 [2012] Officer Selection Boards and Panels (July 2012).

month before a selection board convenes,<sup>25</sup> and PSC is supposed to furnish “education information” to the selection boards.<sup>26</sup> Although PSC calls the CG-4082 “optional,” it is the only form on which Coast Guard officers may report their own education and training.<sup>27</sup> The applicant properly submitted his CG-4082 in May 2012 through his chain of command for signature by his CO and entry in his record, but it was not timely entered in his record. Therefore, although the Coast Guard called his CG-4082 optional, the Board finds that the applicant’s record was in fact erroneous and substantially incomplete when it was reviewed by the LCDR selection board on August 20, 2012, because it did not include documentation of the applicant’s prior two years of education and military training even though he had timely submitted it as required by regulation.<sup>28</sup>

11. PSC argued that the applicant’s request should be denied because it was his responsibility to ensure that his record was correct when it was reviewed by the LCDR selection board in 2012. PSC provided no citation supporting this claim, however, and under the Privacy Act, each agency is required to “maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination.”<sup>29</sup> Article 6.A.4.d. of the Officer Accessions, Evaluations, and Promotions Manual states that PSC furnishes the selection boards with the officers’ personnel records, including “education information.” The applicant could not enter the CG-4082 in the Coast Guard’s Direct Access database himself, and so timely and properly submitted it through his chain of command for signature by his CO and entry in his record well in advance of the selection board. The fact that Coast Guard personnel failed to enter his CG-4082 in his record between the date his CO signed it, June 29, 2012, and August 20, 2012, when the selection board convened, is not attributable to any error on the part of the applicant.

12. The Coast Guard’s arguments [REDACTED] are inconsistent with the arguments and recommendation for relief it submitted for BCMR Docket No. 2011-215, in which the applicant, like the applicant in this case, was non-selected for promotion with an incomplete CG-4082 in his [REDACTED] was non-selected for promotion after his CG-4082 was corrected. The Board finds no grounds for refusing this applicant the same relief [REDACTED] applicant in 2011-215 received in accordance with the Coast Guard’s recommendation. Therefore, the Board finds that, like the applicant in 2011-215, this applicant is entitled to the removal of his non-selection for promotion in 2012 because his record was erroneous and substantially incomplete when it was reviewed by the 2012 [REDACTED] d, and it is not unlikely that he would have been promoted had his record contained the CG-4082.<sup>30</sup> He should also be extended on active duty at least until the results of the 2014 selection board are issued so that he will have the two fair chances for promotion [REDACTED] to the regular Coast Guard that he would have had if the CG-4082 had [REDACTED] er in his record.

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<sup>25</sup> COMDTINST M1500.10C, Articles 1.E.10.k. and 4.C.1. (annual submission requirement and requirement for submission at least one month before selection board convenes).

<sup>26</sup> COMDTINST M1000.3, Article 6.A.4.d.

<sup>27</sup> *Id.* at Art. 6.A.4 h.

<sup>28</sup> COMDTINST M1500.10C, Articles 1.E.10.k. and 4.C.1.

<sup>29</sup> 5 U.S.C. § 552a(e)(5).

<sup>30</sup> *Christian*, 337 F.3d at 1343, *citing Engels*, 678 F.2d at 175; *Quinton*, 64 Fed. Cl. at 125.



13. The applicant alleged that his non-selection from promotion in 2013 was also unjust because his record contained two somewhat duplicative CG-4082s by then: the substitute CG-4082 with seven entries that the applicant and his command submitted in October 2012 and the original CG-4082 with six entries that PSC finally entered in the applicant's record on June 6, 2013, about a year after the applicant's CO approved it. The Board, however, is not persuaded that a selection board would draw the negative inferences that the applicant claims just because forms with similar entries were entered in his record twice. Therefore, the Board finds that the applicant's record contained no substantive, prejudicial error that would warrant removal of his non-selection in 2013 pursuant to the *Engels* test.<sup>31</sup>

14. The applicant asked that, if promoted, his date of rank be backdated to what it would have been had he been selected for promotion in 2012. When a military officer's record has been prejudiced by an error when it was reviewed by a selection board, full relief—erasing the error—normally includes backdating the officer's date of rank if he is selected for promotion by the next selection board to review his record and paying him back pay and allowances.<sup>32</sup> Such relief has long been provided by this Board in similar cases, and the Coast Guard itself has typically recommended backdating an officer's date of rank and paying back pay and allowances when it found that the officer's record was prejudiced by error before a selection board.<sup>33</sup> Backdating the applicant's date of rank to what it would have been had he been selected for promotion in 2012, however, would ignore the fact that the applicant was non-selected for promotion in 2013 with a correct and complete military record. Therefore, the Board finds that the applicant is entitled to the same relief as that which the Coast Guard recommended and the Board granted in 2011-215. Like the applicant in this case, the applicant in 2011-215 was first non-selected with an incomplete CG-4082 in his record but was again non-selected even after his CG-4082 was corrected. In that case, the Coast Guard recommended expunging the officer's first non-selection so that his second non-selection would count as his first and, if he were selected for promotion by the third board (his second opportunity with a correct record), backdating his date of rank to what it would have been had he been selected for promotion by the second selection board. In addition, if selected for promotion, he should have the opportunity to integrate into the regular Coast Guard that he would have had if selected for promotion in 2013.<sup>34</sup>

15. Accordingly, relief should be granted by expunging the applicant's non-selection for promotion by the LCDR selection board that convened on August 20, 2012, and by extending his active duty contract at least until the results of the LCDR selection board convening in 2014

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<sup>31</sup> *Engels*, 678 F.2d at 175.

<sup>32</sup> See 10 U.S.C. § 628(d) (“Persons considered by promotion boards in unfair manner ... A person who is appointed to the next higher grade as the result of the recommendation of a special selection board convened under this section shall, upon that appointment, have the same date of rank, the same effective date for the pay and allowances of that grade, and the same position on the active-duty list as he would have had if he had been recommended for promotion to that grade by the board which should have considered, or which did consider, him”); *Richey v. United States*, 322 F.3d 1317 (Fed. Cir. 2003).

<sup>33</sup> See, e.g., the following BCMR cases in which the Coast Guard has recommended backdating an active duty or Reserve officer's date of rank and awarding back pay and allowances when the officer's record was prejudiced by error before a selection board: 2013-037, 2012-238, 2012-007, 2011-215, 2011-082, 2011-035, 2010-252, 2008-115, 2008-106, 2008-071, 2007-141, 2007-114, 2006-147, 2006-070, 2006-001, 2005-147, 2005-046, 2004-159, 2004-120, 2004-109, 2004-105, 2004-095, 2004-023, 2000-162, 2000-128, 2000-106, and 1999-183.

<sup>34</sup> U.S. Coast Guard, COMDTINST M1000.3, Officer Accessions, Evaluations, and Promotions, Article 1.A.8. (September 2011).

are announced. If he is no [REDACTED] promotion in 2014, he may be released from active duty into the Reserve, but if he is selected for promotion in 2014, he should receive the same opportunity to integrate into the regular Coast Guard that he would have had in 2013; his date of rank, once promoted, should be backdated to what it would have been had he been selected for promotion in 2013; and he should receive corresponding back pay and allowances.

[REDACTED]  
**(ORDER AND SIGNATURES ON NEXT PAGE)**

[REDACTED]

**ORDER**

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

The Coast Guard shall remove from his record his non-selection for promotion by the LCDR selection board that convened on August 20, 2012, and shall extend him on active duty at least until the results of the LCDR selection board convening in 2014 are announced.

If he is not selected for promotion by the ADPL LCDR selection board in 2014, he may be released from active duty into the Reserve, but if he is selected for promotion, he shall receive the same opportunity to integrate into the regular Coast Guard that he would have had if he had been selected for promotion in 2013; his date of rank, once promoted, shall be backdated to what it would have been had he been selected for promotion in 2013; and he shall receive corresponding back pay and allowances.

March 13, 2014

