

**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. 2014-007**



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**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 November 11, 2013, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated July 18, 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) serving on active duty, asked the Board to remove from his record his non-selection for promotion by the lieutenant commander (LCDR) selection board that convened on August 5, 2013. He alleged that his record was substantially incomplete when it was reviewed by that board because his most recent officer evaluation report (OER), dated May 31, 2013, was not included. The applicant stated that the OER was received by the Officer Personnel Management (OPM) Division of the Personnel Service Center before the selection board convened, but OPM failed to enter it in his record.

The applicant also asked the Board to promote him to LCDR directly or to order the Coast Guard to promote him immediately if he is selected for promotion by the next LCDR selection board and to pay him back pay and allowances retroactive to August 5, 2013.

In support of his allegations, the applicant submitted a copy of an email from the applicant's command dated July 31, 2013, by which his command forwarded the OER to OPM and pointed out that the applicant's record was being reviewed by the selection board on August 5, 2013.

## SUMMARY OF THE RECORD

The applicant began his military career as an enlisted member in [REDACTED]. He received excellent performance marks, was selected to attend Officer Candidate School, and received a commission as an ensign [REDACTED].

From [REDACTED], the applicant served as an Intelligence Officer assigned to the Maritime Intelligence Center. He received good OERs with primarily marks of 5 (out of 7)<sup>1</sup> in the various performance categories and marks in the fifth spot on the Comparison Scale. He was promoted to lieutenant junior grade on [REDACTED] and received increasingly good OERs with primarily marks of 6 and marks in the sixth spot on the Comparison Scale, denoting an “exceptional officer.” He received an Achievement Medal upon completing this tour of duty.

From [REDACTED] the applicant served as the Officer in Charge of a Law Enforcement Detachment. His OER marks in this position increased from primarily marks of 5 to primarily marks of 6 with marks in the fifth spot on the Comparison Scale, denoting an “excellent performer.” He was promoted to lieutenant on [REDACTED], and strongly recommended for promotion to LCDR on his OERs. He received another Achievement Medal upon completing this tour of duty.

From [REDACTED], the applicant served as the Intelligence Officer for a Coast Guard Sector. On the four annual OERs he received for this service, he received mostly marks of 6 and 7 in the performance categories, and his Comparison Scale mark rose from the fifth spot (“excellent performer”) to the sixth spot (“strongly recommended for accelerated promotion”). The applicant received a Commendation Medal upon completing this tour.

[REDACTED], the applicant began serving as the [REDACTED]. On his OER dated January 20, 2012, he received primarily marks of 7 in the performance categories, another mark in the sixth spot on the Comparison Scale, and an extra page of highly laudatory comments from his OER reviewer with another Comparison Scale mark in the sixth spot.

On August 2, 2012, the applicant was removed from his duties and recalled from overseas after being punished at a Flag Mast under Article 15 of the Uniform Code of Military Justice (UCMJ) for “multiple instances of false official statements.” He received a derogatory OER documenting his departure from the command with some high marks but also the following low numerical marks and supporting comments:

- 3 for “Adaptability”—“Circumvented USCG process for maintaining small arms qual; falsified paperwork and used it to obtain DoS permission to carry USG issued weapon.”

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<sup>1</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.

- 3 for “Developing Others”—“Exploited rank to improperly enlist aid of CG E-7 [chief petty officer] in the commission of multiple UCMJ violations without any regard for the negative ramifications to the enlisted member for complicity.”
- Block 7—“[The applicant] has performed most of his duties in a professional and honorable manner. However, I cannot condone the error in judgment that led him to not only commit multiple instances of false official statements, but also, and more gravely, coop the assistance of an enlisted member in the commission of his offenses. This lack of integrity is troubling on many levels and has caused me to lose faith in [his] ability to maintain a high visibility position under minimal direct supervision. Accordingly, he has been relieved of all duties at [the unit].”
- 1 for “Judgment”—“Coopted subordinate enlisted member to create false official documents [in order to] fraudulently carry a USG issued weapon.”
- 3 for “Professional Presence”—“Disregarded Core Values by misrepresenting weapons qual status to US Embassy ... staff.”
- Comparison Scale mark in the first spot—“Performance unsatisfactory for grade or billet.”
- Block 10—“The classification & nature of [the applicant’s] work precludes specific description in the OER, making it difficult to capture the full impact of his work. He is a proficient Intelligence Officer & Operator who has been a critical part of [the task force’s] most prolific reporting source. However, having been found guilty of multiple UCMJ violations, his value to the organization writ large is extremely limited. His actions have resulted in his removal for cause from a highly critical billet and have rendered him unfit for future promotion or assignment to a position of greater responsibility. Not recommended for promotion, future graduate education programs or any command cadre positions.”

Because the OER was derogatory, the applicant was entitled to submit an addendum, in which he stated the following:

I understand and appreciate the Reporting Officer’s appraisal of my duty performance and potential. There are no words to fully convey the remorse I feel for my actions. It is my intent to utilize the invaluable lessons learned from the recent proceedings by devoting 100% effort in honorably serving my country, the Coast Guard and my shipmates.

The applicant’s rating chain forwarded this addendum without comment.

The applicant also received a special derogatory OER dated August 3, 2012, documenting his punishment at Flag Mast. The OER states that he had violated Articles 107 (false official statement), 133 (conduct unbecoming an officer and gentleman), and 134 (general article)<sup>2</sup> of the

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<sup>2</sup> Article 134 of the UCMJ encompasses “all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, ...,” and specifically includes “soliciting another to commit an offense.”

UCMJ. His punishment included forfeiture of one-half month's pay and a punitive letter of reprimand. This OER contains mostly marks of "not observed" but also the lowest possible mark of 1 for "Judgment," "Responsibility," and "Professional Presence" and a mark in the first spot on the Comparison Scale supported by the following comments:

- "[The applicant] has failed to uphold the Coast Guard's core values of Honor, Respect, and Devotion to Duty. His demonstrated lack of integrity in falsifying small arms training documents & inducing an enlisted subordinate to collude to commit the violations that he has been found guilty of make [the applicant] unacceptable for a position that carries as much responsibility as a deputy TAT chief. [He] shows limited potential for promotion or assignment to any position of responsibility at this time."
- "Exercised poor judgment & disregard for USCG core values by falsifying official Coast Guard training documents & persuading a subordinate to collaborate in the commission of this violation. Suspect integrity & ethics as the result of multiple UCMJ violations related to false official statements & the application of coercion upon an enlisted subordinate in the commission of multiple [UCMJ] violations. Brought discredit upon the United States Coast Guard by fraudulently obtaining US Embassy ... authorization to carry a fire arm by falsifying official USCG records. Found in violation of Article 107, False Official Statements; Article 133, Conduct Unbecoming an Officer & Gentleman; & Article 134, Soliciting Another to Commit an Offense under the Code at Flag Mast; resulted in punitive letter of reprimand & forfeiture of one-half month's pay for one month."
- "Officer not recommended for promotion. Displays limited potential for future positions of increase responsibility."

Because the OER is derogatory, the applicant was entitled to submit an addendum (see attached). In forwarding this addendum, his reporting officer commented that he did not agree with the applicant's characterization of his misdeeds as "the path of least resistance"; that the fact that the applicant is an expert marksman "does nothing to ameliorate" his UCMJ violations; and that the addendum "underscores to me that he either does not understand the gravity of his actions, or he is lacking in contrition for his actions."

The Punitive Letter of Reprimand attached to this OER is dated August 3, 2012, and signed by a Rear Admiral. It states that the applicant "solicited an enlisted subordinate to falsify qualification records for you. You then submitted those fraudulent documents to the American Embassy ... as proof of your qualification to carry a weapon, which you were subsequently issued. Additionally, you tried to erroneously enter those fraudulent documents into your personal data record. Your lack of integrity has caused me to seriously question your ability to hold any position of trust within the Coast Guard."

Following his recall and removal, the applicant was assigned to serve as a deputy project and operations officer assisting the relocation of Coast Guard Headquarters to its new location. On his OER dated May 31, 2013, the applicant received primarily high marks of 6 and 7, a mark in the fifth spot ("excellent performer") on the Comparison Scale, and his new reporting officer's "highest recommendation" for promotion and assignment as an operational division department

head or the intelligence or response programs. This was the OER that his command submitted to OPM five days before the LCDR selection board convened in 2013 but that was not entered in his record in time.

### **VIEWS OF THE COAST GUARD**

On January 29, 2014, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

PSC admitted that the applicant's OER dated May 31, 2013, was not in his record when it was reviewed by the LCDR selection board on August 5, 2013. PSC stated that OPM "had a reasonable amount of time to validate the OER and forward it ... to ensure entry in the applicant's [record]." PSC further claimed that the applicant "was disadvantaged" before the selection board due to the absence of the OER. Therefore, PSC recommended that the Board remove the applicant's non-selection for promotion and, if the applicant is selected for promotion in 2014, back date his date of rank and award him back pay and allowances.

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

On January 30, 2014, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited him to submit a response within thirty days. No response was received.

### **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>3</sup>

2. The applicant alleged that his non-selection for promotion to LCDR in 2013 was erroneous and unjust because his most recent OER, dated May 31, 2013, which contained high marks and a strong recommendation for promotion, was not in his record. 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>4</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>5</sup>

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

<sup>4</sup> 33 C.F.R. § 52.24(b).

<sup>5</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992).

3. The Coast Guard has admitted that the applicant's military record did not include his most recent OER when it was reviewed by the LCDR selection board in August 2013. Because there is no evidence contradicting this claim, the Board finds that the applicant has proven that the OER was missing from his record when the selection board reviewed it.

4. When an officer proves that his personnel file contained an error when it was reviewed by a selection board, the Board must determine whether the applicant's non-selection 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>6</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>7</sup>

5. Because the missing OER contains high marks and a strong recommendation for promotion and was the only OER the applicant had received since being punished at mast and removed from his duties in 2012, the Board finds that the absence of the disputed OER made his record appear somewhat worse than it would have appeared if PSC had entered it in his record before the selection board convened. Therefore, the Board finds that his record was prejudiced by error before the selection board and the first prong of the *Engels* test has been met.<sup>8</sup>

6. Regarding the second question of the *Engels* test, the Board finds that it is very unlikely that the applicant would have been selected for promotion even if his 2013 OER had not been missing from his record. His record included two very derogatory 2012 OERs and a Punitive Letter of Reprimand documenting his removal from his primary duties and punishment at Flag Mast for very serious violations of the UCMJ. Those offenses and the consequent OERs reflect extremely poorly on the applicant's integrity and care for, loyalty to, and leadership of his subordinate. Because it is definitely unlikely that the applicant would have been selected for promotion in 2013 even if his most recent OER had been timely entered in his record, the second prong of the *Engels* test has not been met, and the Board will not remove his non-selection for promotion.

7. Accordingly, the applicant's requests should be denied because he has not proven by a preponderance of the evidence that his non-selection for promotion to LT in 2013 constitutes an error or injustice warranting correction under the authority of the Secretary.<sup>9</sup>

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<sup>6</sup> *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

<sup>7</sup> *Engels*, 678 F.2d at 175.

<sup>8</sup> *Id.*

<sup>9</sup> 10 U.S.C. § 1552 ("The Secretary of a military department may correct any military record of the Secretary's department *when the Secretary considers it necessary to correct an error or remove an injustice.*" (Emphasis added)).

**ORDER**

The application of [REDACTED] USCGR, for correction of his military record is denied.

July 18, 2014

